

HUMAN RIGHTS IN UKRAINE — 2009–2010

HUMAN RIGHTS ORGANISATIONS REPORT

UKRAINIAN HELSINKI HUMAN RIGHTS UNION

KHARKIV HUMAN RIGHTS PROTECTION GROUP

«PRAVA LUDYNY»

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This book considers the human rights situation in Ukraine during 2009–2010. It is based on studies by various non-governmental human rights organizations and specialists in this area. The first part gives a general assessment of state policy with regard to human rights in this period, while in the second part each unit concentrates on identifying and analysing violations of specific rights in , as well as discussing any positive moves which were made in protecting the given rights. Current legislation which encourages infringements of rights and freedoms is also analyzed, together with draft laws which could change the situation. The conclusions of the research contain recommendations for eliminating the violations of human rights and fundamental freedoms and improving the overall situation.

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FROM THE EDITORS

This report focuses on the human rights situation in Ukraine in 2009–2010. It contains a “Civic Assessment of government policy in the area of human rights” and an in-depth analysis of specific aspects of the human rights situation during the period in question. The scope of both of the above has been considerably expanded since the previous years’ reports.

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CIVIL ASSESSMENT OF GOVERNMENT POLICY IN THE AREA OF HUMAN RIGHTS

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN 2009–2010: OVERVIEW¹

The article 3 of the Constitution of Ukraine proclaims that “The human being, his or her life and health... and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State ... To affirm and ensure human rights and freedoms is the main duty of the State.” In fact, this article remains sheer declaration.

In 2005–2009, during continuous strife of political forces for power the opponents recalled human rights only for legitimating of their own actions and made nothing real to improve the situation. It is rather difficult to do something to this effect under political instability, when any step of government body, bill or assignment to the post were primarily estimated from the point of view of future advantages in political strife. The politization of any issue and decision in the light of interests of the political force, but not of the interests of society and state, caused that, following the short-lived improvement in 2005, the state with human rights either stagnated or deteriorated. The political expediency and departmental interests of government bodies prevail over interests of citizens; therefore these bodies study their own or momentary state interests instead of pursuing interests of human rights. The improvements, which did take place due to the NGOs efforts, occurred without support of the state, or even contrary to it.

The same about the local self-government bodies. For example, in Kharkiv, in 2009, under pretence of absence of city budgetary financing, they liquidated the TB hospital for 675 beds during epidemic. It should be noted that the article 3 of Constitution belongs to foundations of the constitutional system of Ukraine; its juridical sense entails that during realization of any social payments, the determination of budgetary financing of health care for the citizens of Ukraine must take priority. Strictly speaking, the health care for the population of Ukraine must be carried out at the expense of all material resources of the state. For any impartial person, in this case the Kharkiv authorities turn article 3 into sheer hypocrisy.

The key condition of observance of human rights and basic freedoms is a strong and independent judicial authority. The disrespect for justice, mechanisms of support of independence of courts, their authority convert protection of human rights into an illusion. When courts do not work, it remains only to raise a hue and cry hoping to wake up the conscience of powers that be and attract their attention to the gross violations of human rights.

Everybody tries to infringe upon the authority of justice! The top brass constantly affords not to execute court decisions, violate them, and offend the judiciary naming them a mafia, although they mean those, which have been caught red-handed or adopted an objectionable decision... All the time the judges are kept on a short leash due to underfunded judicial system. Whence will the respect to justice proceed? No wonder, for several years now the parliament has been failing to pass

¹ Prepared by Yevhen Zakharov, Co-Chair of KHPG and Member of UHHRU Board.

bills intended to implement progressive Concept intended to improve judicial practice and promote fair trial².

There remains a topical problem of implementation of court decisions: annually over 70% of civil judgments stay unpaid. Annually over 80% of rulings of the European court on human rights against Ukraine apply to violations of section 1, art. 6 of European Convention as a result of violation of reasonable duration of trial and non-fulfillment of court decisions, in particular about wages payable or other payments by public and other enterprises and establishments. And for five years the state did nothing, to change procedure of accrued payroll and pay wages. Other system violations of the right to fair trial include the lack of professional responsibility of judges; violation of presumption of innocence and right to defense; insufficient validity of court decisions; almost complete absence of acquittals; absence of independent expert appraisal.

The absence of public data, transparency and accountability of power to society, groundless classification of information and limitation of free exchange of information seem the most dangerous for the future of our country as compared to other violations of human rights. And the point is not only that it creates positive environment for topping corruption. The infomedia sustain all political, administrative, economic and any other decisions in all areas of human activity. The more information is available, the more reasonable and effective decisions there will be. The most important political decisions usually have legal rationale and become fixed in normative acts. So, we have the three-level system of decision making: information, policy, and law. It may be represented as a tree structure: roots, trunk, and crown. The tree is the larger and stronger, the more developed is the rootage. And when at legal (third) level they adopt acts which banning or limiting access of participants of the problematic political discussions (second level) to information (to the first level), then the quality of political decisions deteriorates inevitably. It is not natural, when a crown prevents roots from feeding a tree. It occurs every so often, when executive power or even parliamentary agencies try to limit and control the dataflow. It is usually done with the best intentions, but isolationist societies begin stagnating, their intellectual elites emigrate, and economic complex turns into the raw material appendage of more open and therefore more dynamic neighbors. Thus, it is necessary to revise the priorities of information policy and fix the openness of information at the legislative level.

There are also these human rights violations, which in 2009 caused the greatest concern: the practice of systematic torture and other forms of ill-treatment and arbitrary or unjustified detention and arrests by law enforcers. According to the Constitution, the detention must be made by a court ruling, and only as an exception without sanctions, while in practice, everything is done to the contrary. The illegal violence used to coerce confession in committing a crime is widespread, and it is extremely difficult to root out this practice, as it is considered a norm, and you can fix a criminal as you like. The absence of effective investigation by the office of public prosecutor, acknowledged in many rulings of European court on human rights, lack of proper judicial control of the methods of inquiry and sufficient powers of courts for exclusion of evidence coerced with the tortures and other forms of maltreatment creates an atmosphere of impunity, when tortures become a routine.

The political opponents tried to use law enforcement authorities as instruments of political strife. And the top brass gives evidence of it maintaining that their communications are controlled; despite repeated statements nobody has looked into it. It is indirectly confirmed by substantial rise (over 1.5 times as compared with 2005) of data readout from communication channels sanctioned by appeal courts: 15m in 2005, over 25m in 2008. These numbers are much higher than that in the European countries, where annually over 1000 sanctions are issued only in France and in the Netherlands. One third of 2008 sanctions were given to the operational units of SSU. Such increased surveillance of military and policing branches of the citizens is troublesome; the more so, when the guarantees of the right to privacy remain very weak. Meanwhile the introduction of ID tax code as a universal personal ID illegally used in all operations, constant attempts to enter

² Approved by the Decree of the President of Ukraine from May, 10, 2006, № 361/2006.

biometrical data to new foreign and internal passports and other illegal actions overtly violate the right to privacy.

The State penal department, which guards its closeness and impunity carefully, goes on bumbling the job. It is only public authority in Ukraine, which underwent no changes during independence, remains unreformed and anachronous. The reshuffle in August 2009 gave hope of reforms, but it seems that fate has decreed otherwise.

Other law enforcement authorities also need reformation, especially office of public prosecutor, which executes unusual functions of general supervision and its full powers may lead to conflict of interests.

The national commission on strengthening of democracy and promoting the rule-of-law worked out a progressive Concept of reformation of criminal justice³, which is a good basis for reformation. However the state is in no haste to reform law enforcement authorities. Even submission to the parliament of the Criminal procedure code, which they kept drafting times without number and the adoption of which might further changes in law enforcement authorities, was time and again put aside, although there was a long-standing consensus of legislators about this bill.

In 2008–2009 the National commission on public morality stepped up its activity. To our mind, its decisions were groundless and disproportionate interference with realization of freedom of expression of opinion, these interferences met no public necessities. In general, the existence of special agency on protection of public morality is doubtful in democratic society.

The brutal violations of right of ownership continued, in particular, illegal seizure of lands or other property contrary to the law, wish and decisions of local territorial communities or proprietors. The chairmen of settlement radas were illegally brought before court, when they opposed the illegal seizure of land.

The political freedom at home was curbed step by step. The constitutional reform in 2004 triggered the real crisis of passive right to vote. In accordance with the article 38 of Constitution “Citizens have the right to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of state power and bodies of local self-government.” However, the Law on parliamentary elections foresees no free access of citizens to the passive voting right. And when political parties list exceptionally their own members in the electoral register, it means brutal violation of Constitution — the right to be elected. It actually means introduction of imperative mandate without prior arrangement. It seems that the soviet “democratic centralism” remains an ideal for the political elite of Ukraine. Under current electoral system the independents wishing to participate in a political process without joining a party (each of which surprisingly reminds of the CPSU) are left in the basket. Neither their intellect nor organizational capabilities are used that precipitates the decline of political elites.

In the second half of 2008 the political crisis was aggravated by full-blown economic crisis, which the government struggled to control; the difficulties were triggered by the loss of dirigibility and impossibility to make decisions quickly. The poor and middle class took the telling blow. The poor found it harder to survive as a result of climbing price and inflation, increase of utility rates and absence of adequate social protection; as a result, they got into greater dependence upon their employers reminding us of feudality. The mounting unemployment grew, especially the hidden one, affected the skilled and office employees. The dip of GDP was the biggest in Europe. The scale-of-living gap between rich and poor became even greater.

Under such conditions the state with economic and social rights could but worsen; especially as ensuring and defense of these rights is not a priority for the government. Like in 2007, the government held up the realization of economic and social rights in the budget 2008 and 2009 despite the decision of the Constitutional court prohibiting of suspense of rights by the annual appropriation act. That is, the government demonstratively did not wish to execute the decision of the Constitutional court on protection of socio-economic rights.

³ Approved by Presidential Decree number 311/2008 of April 8, 2008 “On Decision of the National Security and Defense Council of Ukraine of February 15, 2008 “On reforming the criminal justice system and law enforcement”.

Summarizing the overview of human rights in 2009, we should conclude that the country, with some exceptions, had no integral policy intended to improve situation with human rights and fundamental freedoms. Attempts of NGOs, subdivisions and individual employees from MIA and Ministry of Justice, National commission for strengthening of democracy and rule-of-law to improve the situation caused certain progress, but political crisis, attitude of political forces toward human rights as to something second-rate and insignificant as against political expediency hampered changes for the better. There remained tasks to strengthen the constitutional guarantees of human rights and fundamental freedoms, adopt the new Criminal procedure code, conduct reform the judicial system and criminal justice in accordance with the concepts decreed by the President, change priorities of information policy passing the bills “About the access to public information”, “About information”, “About public broadcasting”, about NGOs and, revise the laws about protection of public morality and its usage, to re-draft bills about free legal aid, about convocation of peaceful collections, draft Code about labor substantially violating human rights. The revised legislation might become a basis for humane penal law policy, change of social policy and further reforms. These changes could be triggered by presidential elections in the early 2010. However, in the wake of the elections the situation with human rights and fundamental freedoms deteriorated even more.

NEW TENDENCIES CONCERNING HUMAN RIGHTS VIOLATIONS IN 2010

Following the elections, have not only failed to demonstrate any intention to improve the situation, but have even reduced the positive processes which had been underway and new trends in violations of human rights have emerged, together with disregard for such rights. Thus, there has been a strong attack on civil rights and political liberties.

There were far more violations of freedom of peaceful assemblies during this period then from 2005–2009 put together. On 25 March the Cabinet of Ministers issued an instruction to the Kyiv City State Administration “on using comprehensive measures for organizing work with citizens and their organizations, including preventing and stopping in future the holding of protests near the premises of the President’s Administration and the Cabinet of Ministers”. This instruction is a flagrant violation of freedom of peaceful assembly and a number of articles of the Constitution.

This was while the Minister of Internal Affairs stated that for peaceful gatherings one should allocate “some big field on the outskirts of Kyiv where nobody will disturb anybody”. Traffic Police officers prevented people from many regions getting to Kyiv for an opposition rally on 11 May. The transport companies were warned that they could have their licenses removed if they took the people to the rally. Only one nationwide TV channel, STB, reported this. In general, the use of the police as an instrument in fighting political opponents and the public has become a regular feature. For example, in Kharkiv on 15 May police officers prevented local residents from holding a peaceful protest over the rubbish being left on the city streets. Two protesters were detained. During the events to mark President Yanukovich’s first 100 days in office on 3 June, the police obstructed opposition supporters from holding a protest near the Ukraina Palace where the President was giving his address. At the same time, activists from the Party of the Regions were able to hold a meeting in support of Yanukovich opposite the Palace without any obstruction. On 8 July the traffic police prevented buses with member of the Front for Change (led by Arseny Yatsenyuk) from Zaporizhya, Mykolaiv, Ternopil and Chernihiv from getting to a rally in Kyiv against the draft Tax Code. On 27–28 July the traffic police prevented pilgrims from the Ukrainian Orthodox Church of the Kyiv Patriarchate from getting to Kyiv for the events around the Festival of the Baptism of Kyivan Rus. The list of cases where the police have interfered in political and civic actions is getting longer and longer. More detailed review on human rights abuses from the side of police is given below in the separate subsection.

Both Ukrainian and international experts have reported a marked deterioration in the situation with freedom of expression since the end of February 2010. You can still find a lot of material critical of the new administration on the Internet and in the printed media. However on television censorship

has re-emerged in various ways, including banning or simply avoidance of reports critical of the government, reduction in editorial control and the issuing of specific instructions to include or remove certain political issues and facts. In general the news on television and radio stations have again become bland and vapid, and talk more about natural and other cataclysms abroad than events in Ukraine. The reduction in freedom of expression can also be seen in the disappearance of several hard-hitting talk shows, and the cancellation of the broadcasting licenses of two independent TV stations, *TVi* and *Kanal 5*.

The number of physical attacks and cases of harassment of journalists has increased in the last six months, with the reaction of the authorities being inadequate. Those responsible have not been held to account. Vasyl Klymentyev, Chief Editor of the newspaper “New Style” disappeared on 11 August in Kharkiv. Klymentyev’s disappearance is reportedly linked to his reporting on corruption in the Kharkiv region. The police initiated a homicide investigation despite his body not yet being found. Investigation, in our opinion, is sluggish and inefficient.

There has been a considerable reduction in political liberty overall. The Rector of the Ukrainian Catholic University Father Boris Gudzyak reported that an SSU [Security Service of Ukraine] officer had tried to get him to sign a letter, without leaving him even a copy, in which the Rector would agree to warn students off taking part in any protests “not authorized by the authorities” Father Gudzyak did not even read the letter and made the visit public. It is, however, certain that many rectors of institutes signed such a letter. We are also aware of a separate Order from 22 April this year according to which in district Departments of Education in Kyiv and in each secondary school, people were appointed responsible for “providing information regarding the city authorities, enhancing the quality of information and analytical material on socio-political and highly publicized events in the city and districts, including providing swift information about what is happening in the district on a day to day basis”. The motive for the issue of this order is simple: “increasing the attention of the President’s Administration leadership to information regarding the city authorities”, and this information will be sent to the department of internal policy of the State administration.

The existence of such letters from the SSU and orders demonstrate the wish to impose total control over civic life in educational institutions. At the same time, students across the country, particularly those protesting against the new Minister of Education, have for some time complained of being under pressure. At present this is on the level of “preventive chats” in the Dean’s office, yet these are laced with threats of expulsion if the students don’t give up protest activities. The SSU has applied the same “preventive measures” with regard to activists of NGOs in connection with their protest activities and journalists.

It is clear that we are dealing here with “prophylactic measures”, when the SSU have taken a written undertaking from blogger Oleh Shynkarenko to not criticize the authorities “in strong form” on his Live Journal blog. Everybody now knows that the SSU not only reads individual blogs but may turn up on their authors’ doorsteps. Obviously, in all democratic countries secret surveillance does take place aimed at preventing terrorist acts or real threats to the life of a public figure or to State security. Neither the blogger who wrote the words “kill the reptile” with President Yanukovych in mind, nor the members of the Kharkiv regional branch of the Union of Ukrainian Youth [SUM] who wrote a letter to President Obama, nor Nico Lange, Director of the Kyiv Office of the Konrad Adenauer Foundation, who wrote a critical article about authoritarian tendencies during Yanukovych’s first 100 days in office, presented any such danger. If they had, then the blogger and representatives of SUM would have been arrested so that their criminal behaviour could be proved by the court, and Nico Lange would not, after 10 gruelling hours at the airport, have been let back into the country (although the Prosecutor General’s Office, as well as the SSU, have still officially called his actions “interference in Ukraine’s internal affairs”).

In a democratic country such intimidation and pressure on citizens and guests to the country are not merely prohibited by law, but absolutely unthinkable, and there is simply no place for so called “prophylactic measures”.

The policy on memory has changed radically. Material on the history of political repression has been removed from the websites of the President and regional administrations. New attempts to foist a Soviet view of history, and to rehabilitate Stalinism, with a bust of the dictator being

erected in Zaporizhzhya, elicit outrage. Only 141 Verkhovna Rada Deputies supported a draft resolution condemning the erection of the monument. While declaring the wish to unite the country, the Party of the Regions, together with their coalition partner — the Lytvyn Bloc and the Communist Party — are effectively dividing it, since nothing could be more divisive than such steps.

The same can be said about the “reworked” history textbooks. Already this year, the Ministry of Education has changed the textbooks for the fifth grade. Next academic year there is supposed to be a revised history textbook for the 11th grade.

The Ministry of Education has adjusted the history syllabus for the 5th grade and proposed the relevant changes to the textbook: “Introduction to Ukrainian History”: reference has been removed to the artificial nature of the Famine of 1932-1933, the repressions in Western Ukraine in 1939 after the Soviet Union occupied it; fragments of a text about the Heroes of Kruty (students who died defending Kyiv in 1918); the actions of the Ukrainian Resistance Army [UPA] during the Second World War, and the Orange Revolution. There are around 20 proposals for changes to the textbook with a significant number of these concerning the policy of the Russian Empire and USSR in Ukraine, and aimed at forming an unaggressive image of them.

There have been flagrant abuses of the right to privacy. Such abuses from the side of the Ministry of Internal Affairs are considered below. The President’s Administration has introduced illegal collection of personal information which is in flagrant breach of the Constitution and the recently passed Law on Personal Data Protection (which, incidentally, has very serious flaws). The Deputy Head of the President’s Administration and the Head of the Central Department of Regional and Staffing Policy, S. Skubashevsky, sent a circular to the Head of the Crimean Council of Ministers and to the Heads of regional administrations in which they propose “in order to receive information regarding the socio-political, socio-economic situation in Ukraine’s regions” by 9 July 2010 to “prepare passports of the regions as of 1 July 2010 (following a fixed format) and send them by email. These passports should be updated and sent on a quarterly basis.

There are 11 sections of the passport with these including, as well as some about the population structure, socio-economic readings, social sphere, etc, the following:

6. Political parties, civic organizations, professional societies;

9. Results of the last elections;

10 Heads of the district, enterprises, institutions, organizations, well-known and influential people (those with impact on the political situation

11. Means of communication

In Section 6, as well as lists of professional societies, district and city branches of parties, civic organizations, they want the number of members, address, as well as full names, telephone, position and home address of their heads.

Section 9 wants the results of all elections from 2004, as well as information about factions and groups within councils, including personal data about the heads, information about their influence on the council and relations with the head of the council.

In Section 10 you need to give personal data about heads of enterprises, institutions, organizations and educational institutions of the area; heads of agricultural and farming businesses; council deputies, heads and deputy heads, and secretaries of rural councils, as well as so-called “influential individuals”. The data collected includes information about their party affiliation (political orientation) and who they supported at the presidential elections in 2010.

Section 11 wants detailed information about television and radio companies and the printed press set up in the region, including their sources of finance.

The collection of personal data is clearly being carried out to ensure control over political activity in the country and the advantage of the ruling party.

This same purpose is pursued by the “Standard agreement between co-founders of a media outlet and the editorial office regarding guarantees for the independence of editorial policy”. This contains the requirement for co-founders of the media outlet to “publicly declare their support for a political force at the elections, stating which specific political force, as well as the forms of such support”. Editors are required to provide written notification to the co-founders of membership of a party or civic organization.

This standard agreement between co-founders of a media outlet and the editorial office was drawn up on the instructions of the Cabinet of Ministers on 26 July 2010, supposedly to ensure the independence of editorial policy.

Both Ukrainian and international observers and experts who monitored the Local Elections gave very negative overall assessment. The organization and course of the 2010 Local Elections demonstrated a clear move by the regime backwards, towards disregard for democratic standards and freedoms. They consider these elections to have been the worst in the last five years. An overall assessment of the elections (from the adoption of the Law which significantly reduced rights, established particular preferences and restricted public control, to the process for determining the outcome) gives grounds for asserting that the 2010 Local Elections did not comply with the standards for free, honest, fair and transparent elections. The public had the possibility of observing but everything was done to prevent fully-fledged public control.

Plans for a radical review of the direction and content of educational reform announced by the Minister of Education and Science, Dmytro Tabachnyk, the opening of preparatory courses and the possibility of entrance exams to higher educational institutions along the old grounds mean an effective cancellation of independent external assessment, the loss of equal access to higher education and a restoration of the former scale of corruption in higher education. Serhiy Kvit, President of the National University of “Kyiv-Mohyla Academy», believes⁴ that the policy of Dmytro Tabachnyk directed at authoritarian and centralized governmental control of higher education in Ukraine and the degradation of science and learning in the country more generally. The Ministry of Education and Science of Ukraine produced a Draft Law “On Higher Education” that, in fact, threaten to inhibit the normal development of institutions of higher education by not providing them with sufficient autonomy to make it possible for them to attain a level of international competitiveness. It is necessary to discard this ill-conceived Draft Law and to create a new Draft on other basic principles.

The Verkhovna Rada adopted a number of draft laws which seriously violate human rights (for example, Law on local elections, many articles of what do not meet universally accepted democratic norms and standards) and rejected concepts and draft laws aimed at protecting them, for example, Concept of reformation of judicial system, Concept of reformation of criminal justice, the progressive Criminal Procedure Code, etc.

The judicial reform proposed by the President, despite a considerable number of positive innovations, violates the Constitution and international standards for the right to a fair trial as well as contradicts to the interests of citizens. The following do not comply with the Constitution:

- The functions of the High Council of Justice have been broadened, in breach of Article 131 of the Constitution, to include appointing and dismissing the heads of courts, as well as examining complaints from judges who have been refused indefinite tenure.
- The Supreme Court, which in accordance with Article 125 of the Constitution has the status of highest court within the system of courts of general jurisdiction, is stripped of effective possibilities for standardizing case law in these courts. The law removes its right to pass the final ruling in a case and leaves it the right to examine cases only in the cases of divergent application of material law, not procedural law. And only when the application for a review is allowed by the relevant High Court whose ruling is appeal to the examination.

The following are not in line with international standards:

- The failure to stipulate objective criteria and a competition for transferring judges, including selection as high court judges.
- The retention of an inquisition-style (not adversarial) procedure for bringing proceedings against judges, under which a member of the High Qualifying Commission of Judges or High Council of Justice is at once investigator, prosecutor and judge in relation to that particular judge.

The following are not in the interests of citizens:

- The possibility of court examination of a case without the participation of a person who was not notified of the court hearing, for example, through the fault of the post office;

⁴ <http://khpg.org/en/index.php?id=1292197932>

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- Considerable reduction in time limits for lodging appeals or cassation appeals against a court ruling;
- Major reduction in time periods for examination of cases at each level to one or two months, and in some categories of cases to 20, 15 or even 5 days;
- Removal of the right to ask for a judge to be removed where the circumstances which form the grounds for this become known after the examination has begun.

After adoption of the Law “On the Judicial System and Status of Judges», citizens have received a swift, but unfair justice system from dependent judges. For ensuring just court proceedings and true independence of judges it is necessary to return the Law to the Verkhovna Rada for new consideration.

It should be noted that the preventive safeguards in the checking of draft laws by the Ministry of Justice to see that they comply with case law of the European Court of Human Rights are effectively not working.

There have been repressive measures and violence against trade union activists, civil activists and human rights defenders. In the beginning 2010 the Krasnodonvuhyllya company⁵ is destroying the Independent Miners’ Union because it refused to give its consent to a worsening in pay conditions in breach of legislation. On 14 September journalist and human rights defender, head of the Kherson Regional Branch of the Committee of Voters of Ukraine, member of the Board of the Ukrainian Helsinki Human Rights Union, Dementiy Bily, was beaten up by the security guards of Kherson’s Mayor, Volodymyr Saldo, who is standing for re-election as candidate from the Party of the Regions in October⁶. The list of cases where civil activists and human rights defenders are persecuted is getting longer and longer. Such events were in Kyiv, Kharkiv, Lviv, Donetsk, Vinnitsa, Zaporizhzhya, Kherson, the Crimea and other cities. The number of such cases over the second half of 2010 is far in excess of the total number of similar incidents during the previous five years. On 27 October UHHRU distributed an open letter demanding the authorities to stop persecution of human rights activists. In this letter UHHRU also calls on the international community, international organizations and foreign embassies to influence Ukraine’s policy to stop persecution of human rights activists for their activities as well as on the European Union and EU countries to more actively apply the Guiding Principles of the EU on the protection of human rights⁷ and to draw up a plan for inculcating these in Ukraine.

Administrative pressure by the authorities has increased which is evidenced by the significant increase in complaints against arbitrary behavior by tax and other regulatory bodies. In the second half of 2010 relations between small business and authorities moved into an open confrontation in connection with the preparation and adoption of the draft of the Tax Code. These events are considered more detailed below.

We would note that President Yanukovich has on a number of occasions reacted to cases of human rights abuse in his speeches, asserting that “criticism from opponents is a vital component of democratic society”, that “you mustn’t save on human rights” and so forth. However one has the impression that these statements are a ritual and nobody plans to follow such recommendations.

We are also forced to note that there is almost no reaction from the authorities and bodies of local self-government to appeals from the public, protests against unlawful actions, statements regarding violations of human rights with these simply being ignored. At the same time, the number of protests is on the rise. Over the first 6 months of 2010 the number of peaceful public gatherings rose by 30%, with the number exceeding that for all of 2009. In the second half of 2010 it was obviously much more than the first. The new regime must therefore grasp that pressure through means of force on society will only exacerbate conflicts. However, the government, on the contrary, has resorted to outright political persecution in the second half of 2010. This issue is considered below.

⁵ Coal mining — translator’s note.

⁶ See more detailed description of this incident: <http://khpg.org/en/index.php?id=1284549080>

⁷ <http://olddoc.ishr.ch/hrdo/documents>

MIA AND HUMAN RIGHTS¹

There were much more human rights abuses from the side of the MIA than last year. Reports of torture and other forms of unlawful violence by the police, some with a fatal outcome, have recently become more frequent. Thus, during 2010 there were about 50 reports on deaths as a result of police action (in 2009 — 21 reports). According to monitoring carried out by the Kharkiv Institute for Social Research and the Kharkiv Human Rights Protection Group, around 780–790 thousand people are estimated to have suffered from such violence in 2010 (in 2009 — 604 thousand people). We consider this to be directed linked with the incorrect and unprofessional orientation of the MIA management to such indicators of work as the number of people prosecuted which Minister Mohylyov spoke of during the TV program on 9 July. This is even worse than assessing work by the percentage of crimes solved as was the case until 2005 since it will lead to wide-scale falsification of the figures in order to have good readings and get bonuses. Is this not where the 30% increase in the number of registered crimes during the first six months of 2010 comes from?

One can be safe in predicting that this quantitative figure will rise at the expense of trivial crimes, while the organizers and those who order serious crimes, drug traffickers and the leaders of organized criminal gangs will remain at large. There will also be widespread demands that those accused confess to some other crimes which they did not commit purely so that they can be added to the list and improve reporting. This is not to mention the entirely forgotten presumption of innocence.

There have been brutal violations of the right to privacy from the side of the Ministry of Internal Affairs (MIA). For example, according to Instruction № 292 from 23 April 2010, it is planned to introduce on railway tickets full name, date of birth, series and number of a person's ID. The objective is supposedly for the public's good, to seek out criminals. Yet the MIA management is entirely indifferent to the fact that such an approach is a flagrant violation of the right to privacy and treats all Ukrainians as to potential criminals. The introduction of such a system significantly hampers freedom of movement which can only be restricted in conditions of global social threats — war, terrorist acts, mass riots or natural cataclysms. None of these are taking place in Ukraine. Instead there is the overt wish by the MIA management to control the movement of citizens in an arbitrary and unhampered fashion as was the case with officials of police states. Do we really wish to show guests coming to Euro 2012 such a police state in Ukraine?

In addition, with Instruction № 236 from 8 April 2010 the powers of Internal Affairs officials are unwarrantedly increased since heads of divisions are required to ensure on the railways “constant control over the stay of foreign nationals on service structures, carry out thorough checks of foreign nationals' documents, give particular attention to whether they have registration cards issued by border guards.” Acting in this fashion constitutes wide-scale violation of the law. It is clear to anybody that constant surveillance over a person and checking of their documents are specific procedure which is quite strictly regulated by law. It may not therefore be applied on a mass scale whether in relation to Ukrainian or foreign nationals.

¹ Prepared by Yevhen Zakharov and Oleh Martynenko, Head of the Board of the Association of Ukrainian monitors on human rights observation in the MIA activities

Another example of systematic and wide-scale violations of the right to privacy which have increased dramatically under the new management of the MIA is the mandatory fingerprint recording of people detained. This should be carried out against people accused of a crime, or subjective to administrative penalties in the form of deprivation of liberty, yet is applied much more widely against certain groups of the population, for example, the Roma who are specially detained for that purpose, then released. Such actions reinstate old forms of discrimination against the Roma which the MIA had, over recent years, got rid of.

During the 100 days of the new management, regional and national media outlets have published more than 350 critical publications regarding the work of the police during peaceful gatherings. The nature and scale of these violations leaves no room for doubt that the police unlawful acts were carried out on the orders of the MIA leadership. These included preventing people taking part in peaceful gatherings; giving preference to one of the sides during them; unwarrantedly stopping peaceful gatherings and detaining their participants; unlawful failure by the police to respond to scuffles between opponents, and excessive use of force and special means against participants in peaceful actions. One can cite many examples.

We are forced to state that the course chosen by the new MIA leadership with regard to freedom of peaceful assembly has been aimed at the development of largely repressive measures despite the lack of any threat of mass riots or terrorist acts. In fact, the police should gain skills in as large as possible a spectrum of law enforcement tactics with minimum use of force.

The Minister of Internal Affairs Anatoly Mohylyov has often spoken about human rights. He even said on 9 July during the television show “Big Politics” on the Inter TV Channel that *“in relation to each violation of human rights we will carry out the most rigorous investigation”* (our underlining). Yet human rights violations by Internal Affairs officers arise in the main during certain ministerial instructions.

In the analysis made of the first 100 days under the new MIA leadership by the former Adviser to the Minister on Human Rights and staff of the Department for the Monitoring of Human Rights in the Work of the Police, it is conclusively demonstrated that no less than 60% of cases involving removal of weapons, ammunition and explosive substances are regularly falsified, again to create the appearance of improvement in police work.

There is equal pretence in the assertions about the MIA’s attention to human rights. All projects which concerned human rights in the work of the MIA have been stopped. As the authors of the above-mentioned report write: “the new MIA leadership, headed by Anatoly Mohylyov, has returned to a model of a police department as a closed and self-sufficient system with its own interests which are radically divergent from those of the public. The nature of the “reform” measures over the last several months leaves no room for illusions and clearly demonstrates that the police do not like civic activity and intend to significantly restrict it. We are forced to note also that the publicly declared statements from the MIA about the need for cooperation with the public have no practical application and remain merely populist slogans.

For example, the Department for the Monitoring of Human Rights in the police was dissolved by ministerial order back on 18 March, and its regional staff made redundant with flagrant infringements of labor legislation. Only a person who is blind or entirely biased could fail to see the enormous work done in the police aimed at ensuring respect for human rights in the work of the police and reform of the MIA achieved by the Department in less than 2 years. Hundreds of ordinary citizens who complained of unlawful actions by the police received assistance from the staff of the Department. With their help significant abuses by the police were uncovered. It was thanks to members of the Department that the mobile groups on monitoring observance of human rights in places of detention under the MIA began working systematically and conditions in temporary holding facilities improved.

In some regions of the country unlawful use of force by the police has been observed, as well as total failure of the police to act when unidentified individuals in plain clothes used violence against peaceful demonstrators, protesting against the illegal actions of the local authorities. This was the case in Kharkiv, for example, where the local authorities passed an unlawful decision to cut down

503 trees in the old part of the central park to build a road (primitive barbarism!). The tree felling was not authorized by the Ministry for Environmental Protection, ran counter to the General Plan of the city, the graphic part of which was unlawfully classified as “for official use only” in 2008. Nor were the public hearings required by law carried out. More trees than officially planned were, however, felled because of the use of force against the trees’ defenders.

We must also note wide-scale infringements of the rights of police staff who are totally dependent on management, often forced to work 10–14 hours without overtime while receiving an extremely small salary. In the MIA there are frequent cases where employees’ labor rights are infringed, when their salary is illegally reduced, or when they’re made redundant without the norms of the Labor Code being observed. There are also cases of unlawful dismissal. Against this background and with some district police stations not having proper toilets (there is none at all at the Zhovtnevy District Police Station in Zaporizhya) and staff forced to use local cafes or shops, the recent procurement of expensive cars for the management seems especially grotesque.

In summing up, one can differ in assessment of the changes in the country over recent years. However there is a clear awareness among Ukrainian citizens of the fact that the government should serve the people, and not vice versa. If the authorities on the taxpayers’ money employ the police to protect human rights, this is how it should be. Therefore the police do not have the right to act without taking the population’s needs into account, it cannot pretend that it doesn’t matter how many people lose their life or health as the result of the unlawful behavior of law enforcement officers. In view of this the MIA leadership should radically change their attitude to cooperation with the public and to human rights, and stop violating them. They should reject work statistics which only foster unlawful violence and the imitation of fighting crime. If it is not capable of this, it needs to be changed.

THE TAX CODE PROTESTERS' MAIDAN¹

In my opinion, the Tax Code Protesters' Maidan² (or Maidan-2) was the most important event in Ukraine in 2010 in the field of human rights. For the first time since the Orange Revolution about one hundred thousands of people, outraged by the government's actions, came out onto the main square of the capital to stand up for their freedom, rights and interests. They protested against the draft Tax Code. They were supported in most regions of Ukraine.

Why is this human rights issue?

We can take the proposals regarding small businesses which have a simplified system for taxing their accounts. The draft code proposed a considerable reduction in the types of activity where the simplified system can be applied.

For those that remain on this list, the single tax rate would be several times higher, while double again for those carrying out business or providing services not only at the place they are registered.

This means that millions of people in Ukraine — programmers and other IT specialists, designers, artists, musicians, accountants, auditors, translators, lawyers, engineers, academics, small-scale producers and others will be deprived, through this Tax Code, of working freelance according to their wish and preference.

Yet it is those people engaging in diverse forms of small-scale business etc who make up the rich tapestry of the world. This means discriminating against people who are capable of acting independently, using their intelligence, their abilities and skills to earn a living.

Their choice will be seriously narrowed: either to join the grey economy (which is repugnant and, in fact, impossible) or become hired employees, and this when in Ukraine the relations between owners and employees are often similar to feudal relations (and for a free person there is nothing more terrible than to depend on the will of another person), or to emigrate.

We can forget about a market for free professions in Ukraine. Can the government seriously want people who independently earn a living for themselves and their family to leave the country?

The government constantly repeats statements about its wish to reform the economy; create new jobs' foster the development of modern technologies and intellectual production. Yet with its draft Tax Code the government will achieve the opposite effect.

Furthermore the basis for taxation will collapse, and this is when the budget deficit now stands at 15%, and the government's debt on social payments is a third of the budget.

What is the government counting on? What does it want? New serfdom? Is it really not clear that such attempts are today doomed?

On 18 November the Verkhovna Rada passed the Tax Code, and this meant a death sentence to free enterprise and economic independence in Ukraine. The proposed changes flagrantly violated the right of millions to work. People engaged in enterprise lost freedom of choice of type of work and conditions and were effectively not be able to freely choose their way of life. A person's right to choose his or her own fate which covers the entire range of human rights and freedoms was significantly violated.

¹ Prepared by Yevhen Zakharov, Co-Chair of KHPG and Member of UHHRU Board.

² The protest on Maidan Nezalezhnosti, Independence Square — translator's note.

On 22 November the people started a mass action on Maidan Nezalezhnosti and won. The President and Prime Minister acceded to the demands of the business owners. The most offensive norms of the draft Tax Code were revoked by the Verkhovna Rada on 2 December. The simplified taxation system for small business owners remains for now in force.

Yet, is this state lasting? Where are the guarantees that the government will not hastily pass laws directed against the interests of ordinary Ukrainians for the benefit of oligarch clans? For example, taking away a certain part of the times of activities eligible for the simplified system? And gathering up potential organizers so that they don't protest. Such thoughts arise when you look at the actions of the law enforcement bodies with regard to November's Maidan Protest.

It had only just begun when on 23 November a criminal investigation was initiated over group infringement of public order (Article 293 of the Criminal Code). On 3 December a criminal case was initiated under Articles 28-I §2 and 194-I §1 of the Criminal Code (deliberate destruction or damage to others' property, acted by group of persons with prior conspiracy). In this case, "deliberate destruction or damage to others' property" means "damaging the marble tiles on the square when driving 132 metal stakes in to hold up tents»³.

It would seem that the authorities are planning to prosecute Maidan activists and are trying to scare people off, forcing them to shun protests. They are for the nth time shooting themselves in the foot, and seem incapable of grasping that methods of force against ones own people are doomed to crashing defeat.

³ <http://www.pravda.com.ua/news/2010/12/28/5727669/>

POLITICAL PERSECUTIONS¹

DEFINITION OF CATEGORIES PERTAINING TO POLITICAL PERSECUTION

Following the 2010 presidential elections, the new administration steadily moved towards political harassment of their opponents and critics. A lot has been reported about this by the media, Ukrainian and foreign specialists. Therefore the legal and human rights communities need to establish a definition for the categories “prisoner of conscience”, “political prisoner”, “politically motivated persecution” in today’s Ukraine/’ We will be guided in this by the experience of Amnesty International and the Soviet human rights movement of the 1960s to 1980s which defined the above-mentioned concepts and which received further development in numerous documents of the Council of Europe, OSCE and other international organizations.

Generalizing international legal practice while taking into account Ukrainian social and political reality and the experience of the Soviet and in particular Ukrainian human rights movement, Ukrainian history, and taking as a premise the categorical rejection of violence as a means for upholding ones rights and interests, for political or social protest, we propose the following definitions.

Persecution can be based on the law when criminal proceedings are initiated against a person (or their rights are restricted in connection with the initiating of a criminal investigation over a crime), or coercive measures of a medical nature, including psychiatric, are used against a person without grounds; or when a person is accused of committing an administrative offence; or a person becomes the object of civil or economic legal proceedings. The persecution can be entirely unlawful. This can involve, for example, intimidation via prophylactic talks; threats of dismissal from ones job or expulsion from an academic institution; being deprived of ones work and legal income; unlawful actions by the law enforcement agencies (beating, unlawful gathering of information about a person, unlawful surveillance, detentions, searches, etc); obstruction in circulating information; being forced to join a certain political party; being forced to take part in measures of a particular political party, and so forth. These actions may be carried out both by public officials, or by private groups or individuals with the authorities tolerating such actions.

The persecution is politically motivated if the actions of the State bodies and their officials are based on a) illegitimate considerations of a socio-political nature or b) by actions of the individual persecuted in defending citizens’ rights, freedoms and legitimate interests.

We propose using the definition first presented by Sergei Kovalev, well-known human rights defender and first Human Rights Ombudsperson of the Russian Federation, himself a former political prisoner. According to this we deem a **political prisoner** any person imprisoned where a considerable and reliably assessed role in their criminal or administrative proceedings can be attributed to the regime’s political motives — and only such a prisoner. It is of no significance whether it is specifically political causes that prompted the actions which the person is accused of as a crime or

¹ Prepared by Yevhen Zakharov, Co-Chair of KHPG and Member of UHHRU Board.

offence; what is important is only the presence of political interest of the regime in the result of the case. Since in the application of the law assessments and judgments beyond the framework of the law are unacceptable on principle, political motivation in court proceedings may result in procedural or material infringements such as:

- elements of falsification in the charge;
- unwarrantedly severe preventive measures or punishment;
- unlawful sentences or rulings regarding administrative offences;
- bias of the court in evaluating the evidence presented by the defense and the prosecution;
- various restrictions regarding the possibility of defending oneself, including with the help of defense counsel;
- arbitrariness in choice of evidence, ignoring obvious facts;
- use of norms of the law irrelevant to the deed committed;
- selective (discriminatory) nature of court prosecution compared to analogous cases involving others.

We consider it to be without question that full removal must be demanded of any political motivation in the sphere of justice, regardless of the gravity and consequences of the crimes.

It should be noted that besides politically motivated discrimination against those whom the regime deems to be their opponents, it sometimes resorts to persecution of its supporters or those who implement its repressive decisions. This is as a result of internal conflict or in order to mask selective repression. Such persecution is also politically motivated and just as unacceptable.

We propose considering as **prisoners of conscience** those who are deprived of their liberty on consciously unlawful, from the point of view of international standards, grounds or on unwarranted charges in connection with:

- their convictions or public expression, civic or political activity of a non-violent nature which does not demand discrimination against any others;
- looking for, retaining or circulating open or publicly important information;
- refusing to wear a military uniform or take part in acts of violence due to religious or other convictions.

People who resort to violence or propagate violence and enmity are not considered prisoners of conscience.

For comparison, the Amnesty International definition states that *a prisoner of conscience is a person deprived of his or her liberty solely for peacefully expressing their political, religious or scientific views*.

There is analogous definitions from Council of Europe experts. It includes the following statement:

Burden of proof

The assumption that a person is a “political prisoner” should be confirmed *prima facie* by evidence, following which the State depriving a person of liberty should prove that the imprisonment is fully in compliance with the requirements of the European Convention on Human Rights as interpreted by the European Court of Human Rights according to the merits of the case; that the requirements of proportionality and non-discrimination have been observed and that deprivation of liberty was the result of a just procedural review.

AUTHORITIES’ ACTIONS QUALIFIED AS POLITICAL PERSECUTIONS

Based on the above definitions, one can draw the following conclusions:

There are at present no prisoners of conscience in Ukraine. There are however a fairly large number of people who have been persecuted for political motives. These are participants in protests who are being intimidated in various ways, sometimes connected with violence — business entrepreneurs, students, members of civic organizations, political parties, trade unions, etc; journalists

and civic activists with whom the MIA or SBU [Security Service] have held prophylactic talks, or in relation to whom there has been demonstrative surveillance; staff of public sector institutions who, under threat of dismissal, have been forced to join parties, take part in rallies, etc.

In our opinion, the criminal cases initiated against the participants of the Tax Code Protest, the members of the organizations Tryzub and VO Svoboda, as well as former high-ranking officials — Yury Lutsenko and Yevhen Korniychuk — should be considered political persecution. All of the accused in these criminal cases who have been deprived of their liberty are political prisoners. This conclusion follows from an analysis of the rulings regarding choice of preventive measure and the circumstances of their arrest and remand in custody considering below. The former Economy Minister Bohdan Danylyshyn who has received political asylum in the Czech Republic was a political prisoner. One can say with a great degree of certainty that political persecution is involved in the cases of Valery Ivashchenko, Ihor Didenko, Anatoly Makarenko and other former government officials remanded in custody during the criminal investigation.

The criminal cases against the Coordinator of the Vinnytsa Human Rights Group, Dmytro Groisman and the Vinnytsa trade union activist Andriy Bondarenko must also be considered politically motivated. The political grounds are indisputable for the reinstatement of the old criminal cases against members of the national organization UNA–UNSO regarding the events of 9 March 201 (all the accused have already served sentences except the National Deputy Andriy Shkil) and the Head of the Secretariat of the Mejlis of the Crimean Tatar People Zayir Smerdlyayev (he is charged with taking part in mass riots and resisting the police during a rally of the Crimean Tatars on 22 June 2006).

Political persecution was also involved in the court rulings in Kharkiv regarding administrative arrest and fines against those protesting against the felling of trees in Gorky Park in May and June 2010 under Article 185 of the Code of Administrative Offences, supposedly for flagrantly disobeying the lawful instructions of the police. Two young people from Kharkiv, imprisoned for 15 days, were declared prisoners of conscience by Amnesty International, the first time in 6 years (the only such case prior to that in 20 years of independence had been in 2004). Virtually all civic activists who received administrative punishments under Articles 185 and or 185-1 of the Code of Administrative Offences (infringing the procedure for organizing a peaceful gathering) after holding a peaceful event can a priori be considered victims of political persecution. To be certain each such case should be viewed in isolation.

The list here of political persecution in no way claims to be comprehensive. It should be noted that a technique is often applied whereby the authorities persecute people who are not opponents of the regime as such but whom they consider aligned with their opponents (for example, people who from the point of view of the authorities can provide, provide or have provided, financial, organizational or technical support to their opponents). People are sometimes also persecuted in order to receive information or grounds for persecuted the “necessary” person. Then the scale of persecution becomes wider and it is difficult to define the specifically political grounds for such persecution since there may be no link whatsoever between the persecution and political views of the victim, however this is indirectly linked with the political views of the “necessary” person and the aim of persecuting the latter. Examples can be seen in the course of events around the former Prime Minister Yulia Tymoshenko and the current Head of the Supreme Court, Vasyl Onopenko.

PERSECUTION MEMBER OF THE FORMER GOVERNMENT

Second half of 2010 has been marked by an increase in prominent criminal prosecutions for crimes allegedly committed with the use of official position.

We would like to be able to welcome efforts by the authorities to fight corruption, misuse of power and impunity among members of the State apparatus. However concern is elicited by the fact that the criminal prosecutions are aimed exclusively at members of opposition political parties.

We have in mind the initiating of criminal cases against Yulia Tymoshenko, Bohdan Danylyshyn, Yury Lutsenko and others. Under analogous circumstances criminal cases against representatives of the current government have not been initiated.

In some cases members of the opposition are accused of actions which members of the present government are engaged in now with impunity. For example, in one case the charge is of not returning a deposit made during the privatization of the Odessa Port Factory, although this deposit has still not been returned with liability for this being borne by the official presently occupying this post.

The charges against Tymoshenko and her ministers General Prosecutor Office and the Government motivated, in particular, by the results of an investigation conducted by U.S. lawyers on behalf of the Government Azarov. The investigation was carried out by the Washington-based Trout Cacheris PLLC which Ukrainian information agencies and most media outlets call an “auditing company”. The firm itself is more modest, stating that it is “a small legal firm which specializes in complex court proceedings, both civil and criminal”. It has 9 lawyers. By comparison the international auditors Ernst & Young have offices in 140 countries and 144 thousand lawyers and financial specialists. The government nevertheless opted for a small firm from Washington. Prime Minister Azarov claims that the American’s discoveries will help rid the country of corruption.

U.S. lawyers covered the period from 2008 to the beginning of this year. They claimed that Tymoshenko’s Cabinet spent \$140 million on 1000 German minivans for alleged medical use by the Health Ministry that were later used in Tymoshenko’s mobile campaign advertisements. It also said the former Ukrainian government misappropriated some \$280 million (€200 million) that was received for the sale of carbon credits as part of the Kyoto protocol. That money was used by the country’s Pension Fund, which was strapped for cash amid a severe recession. In addition, the study claimed that Tymoshenko’s government misspent \$24 million (€17 million) on sugar that was never delivered to Ukraine, and misappropriated \$44 million (€32 million) while importing vaccines and medical equipment.

Transparency International, however, believes that the “Washington audit” only discredits the fight against corruption in Ukraine. Nicholas Marshall, the organization’s Regional Director, told: “We welcome the fight against misuse of taxpayer money in Ukraine. Any government official in a democratic country should be held accountable. But judging by the information coming from Ukraine, the recently released audit has serious flaws and in my view was not independent. It was carried out at the bidding of a new government against its predecessors. It is very difficult to assert that we are dealing here with a fully-fledged investigation and not a witch hunt”.

Nicholas Marshall sees no sense in thus “uncovering” your political opponents as soon as you’ve got to power. The problem of corrupt State authorities at various levels is by no means a new one. He says that it would be hard to assert that only the last government was involved in such machinations. According to their annual reports there have been non-transparent dealings with public funding for the last 20 years. He points out that the country has been at the bottom of the ratings regarding corruption. “Therefore, in my view, if Ms Tymoshenko misappropriated money, she must answer for it, however then so much all her predecessors”.

Nicholas Marshall points out that in law-based states investigations into cases of corruption among the higher state authorities are dealt with not by governments which replace one another, but by independent law enforcement bodies. He stresses that the fight against corruption should be carried out on a constant basis, and the appropriate mechanisms for this should finally be created.

“The current investigation carried out by a law firm linked with one party is populism. We all know that the Ukrainian economy is corrupt through and through. It’s not difficult to find abuses. It’s not worth singling out any particular politician, it’s a general phenomenon.”

With the entrenched tradition of lawlessness and abuses, disregard for the law and governance through individual dictate which has been typical of the authorities over many years, selective criminal prosecutions solely aimed at members of the opposition spell the effective use of criminal court proceedings for political ends. Such practice runs counter to democratic values based on equality of all before the law and undermines the foundations of criminal justice.

This seems especially unacceptable given the unpunished assault on opposition National Deputies in parliament and attempts by the government to block the work of branches of opposition political parties.

Selective application of legislation is a typical weapon of undemocratic regimes. Fearing defeat in conditions of fair political competition and political freedom, the regime in such countries removes opposition figures with the use of criminal prosecutions. This can be compared to the selective presentation of news when somebody decides which news to circulate, this resulting in the lack of full information and a distorted impression of what is going on in society.

Furthermore, when members of a political party that has come to power at each step carry out unlawful actions with impunity, while their political opponents are prosecuted for the same actions, this compromises justice and establishes dictatorship of force. It also undermines any public faith in the honesty of the regime's intentions and its adherence to the rule of law.

There can be no hope of convincing the Ukrainian public and the world that persecution B. Danylyshyn and Ye. Korneychuk for not following tender procedure are aimed at eradicating corruption and saving public funds when the same funds were used without any tender, accountability or transparency to pay for a government-commissioned "audit" into the former government's affairs.

There can not speak about the correctness of the prosecution before the trial. However, there are concerns that the acts of former members of the government are punishable. But instead of considering this issue the government in response to accusations of persecution of the opposition began strictly pursue its supporters. Thus the validity of government action is doubtful too. For example, prosecution of former speaker of the Crimean parliament Anatoliy Gritsenko look very dubious.

In conditions where there is an established court system and tradition dating back over many years, one could hope that the courts would stand in the way of manipulation of the criminal process. However the judicial reform carried out this year has made judges highly dependent on politicians.

The President and the majority in parliament which are at present part of one political force effectively have the opportunity, via the High Council of Justice, to exert influence on judges. This body of power plays a key role in the appointment and dismissal of judges and in bringing disciplinary proceedings against them.

The Prosecutor General stated immediately after his appointment that he would implement any order of the President. Later utterances clearly demonstrate his total dependence on the President.

A member of the Party of the Regions has been appointed Head of the High Court on Civil and Criminal Cases, while his deputy is the Prosecutor General's brother.

All of this gives rise to well-founded doubts that the court proceedings in these political cases will be run in keeping with the standards of the right to a fair trial.

The President constantly asserts that his aim is to build a European-style democratic State. The best proof of this would be to stop the prosecution of the political opposition under the guise of fighting misuse of power.

YURY LUTSENKO CASE

In the ruling passed by the Pechersky District Court in Kyiv on the choice of a preventive measure for Yuriy Lutsenko (former Minister of Internal Affairs — translator), all above-mentioned features in the definition political prisoner are pronounced (with it not even being during the examination of the case on its merits and assessment of the evidence!) which gives yet more grounds for classifying his remand in custody as political persecution.

Disregard of things that are obvious

The court ruling spells out in black and white that "The term of remand in custody is to be counted from 27 December 2010." Does this means that on Sunday, 26 December Lutsenko was not deprived of his liberty? He went voluntarily with 11 Alpha Special Force officers and two repre-

sentatives of the Prosecutor's Office to the SBU [Security Service] remand unit [SIZO], voluntarily spent the day, evening and night, in the morning voluntarily went in handcuffs to the court and voluntarily entered the cage... The court clearly ignored this detention, obviously not wishing to link their hearing with a new charge.

The only grounds for changing the preventive measures from a signed undertaking not to abscond to remand in custody is moving "from the registered place where a person lives, is staying or is temporarily at without the investigator's permission" (Article 151 of the Ukrainian Criminal Code). The court ignored the absence of such facts.

The court gave the first grounds for remand in custody as being avoidance of procedural actions and the decisions of the investigator, clearly meaning the assertion of the investigator that Lutsenko was deliberately avoiding reading the case material.

The court ignored the fact that Lutsenko had read the case material on 15, 21, 22 and 23 December, and did not appear when called by the investigator on 14, 16, 17, 20 and 24 December, explaining that his lawyer was busy on other criminal cases.

The court also ignored Article 218 of the Criminal Procedure Code according to which the reading of the material of a criminal case is not a procedural act of the investigator, but the indisputable right of the accused which he exercises independently, or with a lawyer at his own discretion.

Remand in custody changes nothing in this situation and will in no way expedite familiarization with the case material.

Interpretation of natural actions as criminal

The grounds for remanding Lutsenko in custody were, for example, his denial of guilt and refusal to testify against himself. The court thus deprived him of his liberty for exercising his constitutional rights which guarantee the right to a fair trial.

The accused is effectively being forced to reject the right to retain silence guaranteed by the Constitution, the European Convention and other international agreements.

By justifying remand in custody as required by influence on witnesses, the court agreed with the investigators who consider the public statements of his point of view regarding the criminal case in the media, for example, in an interview to *Dzerkalo Tyzhnya* [the Weekly Mirror] and the UNIAN information agency, as pressure on them. We are once again seeing the Soviet practice where people answered for their words through arrest.

Overt lies

The court ruling states that the court has taken into account "the accused, Y.V. Lutsenko, his material and family state, his place of residence, whether he has children, his state of health which does not exclude or prevent the latter's remand in custody".

In fact no document relating to this was examined during the court hearing since the court rejected the application from the lawyer for the examination to be adjourned so that such documents could be prepared and submitted.

The absurdity of the court's conclusions

In my opinion the court ruling looks quite absurd. Lutsenko was arrested on 26 December in connection with a new criminal case. Yet the court examined change of preventive measure within the framework of the criminal case already investigated and deemed Lutsenko guilty of having avoided reading the material of that case. At the same time it transpired during the court hearing that on 24 December the investigation into this case had been restarted! That, as far as I can see, makes the reason given for remanding him in custody absurd.

THE ILLEGALITY OF YEVHEN KORNIYCHUK'S ARREST²

The first shocking aspect of this case is the cynicism (from a purely human point of view) of the arrest by the Prosecutor of Yevhen Korniychuk. This was on 22 December 2010, the day that his daughter was born. Mr Korniychuk went straight from the maternity unit to the Prosecutor General's Office following a summons from the investigators. His two underage children were at home at the time. It later transpired that Korniychuk had been summoned for the first time in a case initiated against him under Article 365 §3 of the Criminal Code (Exceeding power or official authority).

What is interesting is that it turns out this case under Article 365 §3 has been initiated twice which is in itself a legal nonsense. First on 15 December 2010 by the Investigator on Particularly Important Cases of the Prosecutor General's Office, Harbuza, and then on the day his daughter was born, by the First Deputy of the Prosecutor General Renat Kuzmin.

In fact, with respect to the same matter, against the same person, on the same grounds and with the same charges, two criminal cases cannot be initiated. If that happened, then the initiating of one of them was clearly illegal. When initiating for the second time a criminal case against the former Minister, Kuzmin did not revoke as unlawful the decision by investigator Harbuza which is indicative. One must therefore understand that at the present time there are two different rulings on initiating a criminal case against Yevhen Korniychuk under Article 365 §3, and thus two criminal cases.

However if the assessment of Yevhen Korniychuk's arrest from a purely human point of view is, so to speak, a mainly emotional aspect, at the level of law the legal aspect, the presence of lawful grounds for arrest, takes precedence. We need to establish, in the first instance, the nature of the charge laid.

Korniychuk is accused of having, while First Deputy Minister of Justice, on 23 February 2009 (we would note, almost two years before his arrest) he signed a letter regarding the presence of conditions for the use by Naftohaz Ukraine of procurement procedure from one bidder, "Magisters". The First Deputy of the Prosecutor General Renat Kuzmin (we will return to his decision which was issued later, with his position much higher, than that of investigator Harbuza) sees in this misuse of official authority which cause Naftohaz considerable damage. Incidentally, and this is also noteworthy, Naftohaz itself did not report such damage to the Prosecutor's Office. The pretext for the initiating of a criminal case was an application from Volodymyr Sivkovych, who, according to media reports, is on friendly terms with Renat Kuzmin.

The law entitles the investigator to arrest a suspect, but only where there are lawful grounds. *These grounds, the author explains, are the following according to Article 106 of the Criminal Procedure Code*

- 1) where a person is caught committing a crime or directly afterwards. Clearly this was not the case with Korniychuk, since the alleged offence is two years old;
- 2) when witnesses, including victims, directly point to the given person as the perpetrator; in the given case this does not apply;
- 3) when traces of the crime are found on a person's clothing, on the person or in his/her home;

The law then goes on to say that "*given the presence of other information providing grounds for suspecting a person of a crime, s/he may be arrested only if this person tries to escape or where the place where s/he is living or staying is not registered, or when the suspect's identity has not been established.*"

However it is well-known that Korniychuk did not attempt to abscond. On the contrary on the day of his arrest he went voluntarily to the Prosecutor's Office at the investigator's summons despite

² This subsection borrowed from the article "The Korniychuk Case — evidence of the start of repression in Ukraine?" by Oleh Bereziuk, see <http://khp.org/en/index.php?id=1294714529>

the above-described family circumstances. *The author explains why the other two continues are clearly not applicable in the case of Kyiv resident and former Deputy Minister of Justice, Yevhen Korniychuk.*

Thus in the given case the Prosecutor had none of the grounds envisaged by law for arresting Mr Korniychuk. This means that it was overtly unlawful and can be deemed Prosecutor's arbitrary lawlessness, this requiring legal assessment from the point of view of Article 371 of the Criminal Code (knowingly wrongful arrest) and Article 365 (exceeding power and official authority).

I am convinced that the Pechersky District Court in Kyiv (Judge Vovk) which at the Prosecutor's application remanded Korniychuk in custody for 2 months) also had no grounds envisaged by law for applying this preventive measure.

The author stresses that, pursuant to Article 148 of the Criminal Procedure Code, preventive measures (any, not only remand in custody) are applied where there are grounds for believing that a person will try to abscond or avoid carrying out procedural decisions, impede the course of justice or continue their criminal activities, as well as to ensure the enforcement of procedural decisions

From an analysis of the material published by the press, Korniychuk's behavior, his family circumstances, etc make it possible to conclude that there were no adequate grounds for remanding him in custody or even applying a writing undertaking not to abscond.

In any case arrest and remand in custody are clearly excessive measures of procedural force, suited neither to the circumstances of the case, nor to the actual suspect.

In the given situation it would have been entirely sufficient to take from Korniychuk a written undertaking that he would appear if summoned and would inform of any change of residence (Article 148 §3 of the Criminal Code).

The arrest and detention of Korniychuk can be seen as a demonstrative show of brute force and sense that they can do anything, an attempt to denigrate a person and use violent means of reprisal.

PERSECUTION OF PARTICIPANTS OF THE MAIDAN-2

The "Small business owners' Maidan" had only just begun when the Shevchenkovsky Department of the Kyiv Police on 23 November initiated a criminal investigation under Article 293 of the Criminal Code, over group infringement of public order on 22 November: the blocking of vehicle transport on Khreshchatyk St.

Nobody has yet been charged in this case.

However the Minister of the Interior Anatoly Mohylyov stated in parliament on 14 January that the people who committed this crime are known and an investigation is presently underway against them, He also stressed that responsibility for the crime committed was borne by the heads of four civic organizations which were the organizers of the protest.

Mohylyov also stated that the protest's initiators had not informed that they were erecting tents yet despite this "they had hammered into the marble covering of Maidan Nezaleznosti more than one hundred metal spikes, in his words, 132. Any conscious individual is clear that that is also a crime, the damaging of property not belonging to you. Thus the organizers did not take sufficient measures to prevent offences, and promoted its being first committed during the protest".

Under this fact on 3 December a criminal case was initiated under Articles 28-I §2 and 194-I §1 of the Criminal Code. On 23 December Ihor Harkavenko was detained, on 25 December — Oleksandr Mandych, both of whom are charged with committing this offence.

Harkavenko was remanded by the court in custody, while Mandych on 28 December was released under a signed undertaking not to abscond.

The decision to initiate a criminal case against Serhiy Melnychenko is dated 23 December, but this has not thus far been handed to him since he was first in hospital then left Kyiv for the New Year holiday.

On 6 January a similar criminal case was initiated against Oleh Altyrsky and on 14 January against Roman Fedchuk. Both have had to give signed undertakings not to leave the place.

There have also been reports on the Internet of the involvement in this case of Oleksy Zaplatkin and Vitaly Hruzynov. The Press Secretary of the Central Police Department in Kyiv, Volodymyr Polishchuk reported that they were not suspects, and could be simply witnesses. Yet the Minister of the Interior stated that they were on the wanted list.

From one formal decision on initiating a criminal case to another we find the same sacramental phrase: such and such and such and such who “acted according to prior conspiracy with persons not identified by the detective inquiry investigators, deliberately damaged the marble covering of Maidan”.

Only this list of “such and such” is increasing.

In the decision presented to Harkavenko, such and such are Harkavenko, Zaplatkin and Hruzynov. While in the decision initiating a case against Fedchuk, — already all 7 of the above-named.

The problem is only that Harkavenko, according to his lawyer Oleh Levytsky, has no idea who Zaplatkin, Hruzynov and Mandych are, he simply doesn’t know them.

None of the Maidan activists know Zaplatkin and Hruzynov at all, cannot identify them, and have no contact with them. Pure phantoms!

These people who are not acquainted can clear not have come to a “prior conspiracy” and therefore paragraph 2 of Article 28-I cannot be applied.

It is also improbable that Harkavenko, Mandych, Zaplatkin and Hruzynov hammered stakes into the marble covering on Maidan.

Firstly, they were neither organizers nor members of any civic associations or trade unions, nor activists who stood out in any way, Nobody remembers their having participated in any protests. Only Mandych is recalled by some of the residents of the tent camp as having spent the night there once or twice.

Harkavenko came once or twice and expressed his disagreement with the protesters.

Secondly, all know that the tents were erected by National Deputies [MPs] during the night from 23 to 24 November. This is not known only to the investigators who write of “persons not identified by the detective inquiry investigators”. For this reason the charges of putting spikes into the granite on Maidan by the real participants — Vasylchenko, Fedchuk and Akhtyrsky — are extremely dubious.

Why did the police initiate a criminal case against four chance individuals who weren’t involved in Maidan-2 at all?

In my opinion, the answer is simple — all four have previous convictions.

And everyone can see how the Minister of the Interior in parliament lists their past sins. That, supposedly, is your “face of the protest” — purely criminal.

It turns out that it’s all the other way around: the criminal case is made up.

Does the Ministry of the Interior really think that nobody sees that? They would be better to terminate the cases, and not shame themselves before the whole world.

Let’s turn to the other criminal case — under Article 293.

Undoubtedly blocking traffic is bad. Yet who is responsible for it? In the statement of notification against the planned protest, the organizers named a figure of 100 thousand participants. It would have been quite sensible to assume that with such a number of people on Maidan Neza-lezhnosti that there could not be traffic on Khreschatyk, and to close it at least for the first hours of the protest.

Why did the Ministry not do this?

There are, moreover, no grounds at all for asserting that the blocking of traffic was deliberate, and that it was not the result of a large number of people gathered and badly organized measures by the police.

And in general, is it really those who took part in the Tax Code Protest Maidan who should bear liability, and criminal at that, when they were forced to extreme measures?

They were placed in conditions when they lost the ability to work freely. That led them out onto Maidan. In my opinion, the moral liability for this conflict lies with the authors of the Tax

Code who insisted on passing unacceptable norms and refused to discuss the draft code with business owners.

The criminal cases against the participants of Maidan-2 are therefore immoral!

They are also simply stupid after the President and Prime Minister acceded to the demands of the business owners.

The Interior Minister does not want to recognize this, continuing the investigation, expanding the circle of those accused.

They are in this way provoking people to new protests.

It is time to stop this campaign of intimidation.

PERSECUTION OF MEMBERS VO “TRYZUB” AND VO “SVOBODA»

January 2011 saw a wave of detentions, searches, interrogations of members of the organizations VO Svoboda³, VO “Tryzub” and other similar organizations. At first the talk was of suspicion of having carried out the explosion of the bust of Stalin in Zaporizhzhya late in the evening of 31 December, however later these suspicions were discarded and there have been no reports of those responsible for the explosion being found. At the end of January 9 members of the “Tryzub” were in custody over the beheading of the same bust of Stalin on 28 December: Vasyl Labaichuk; Andriy Zanuda; Edward Andryushchenko; Roman Khmara; Pylyp Taran; Yury Ponomarenko; Vitaly Vyshnyuk; Anatoly Onufriychuk and Vasyl Abramiv. All of them were detained between 8 and 19 January and charged under Article 296 §2 of the Criminal Code (hooliganism carried out by a group of people). It was reported that the detainees had all their things removed and were issued instead light clothing, that they were given virtually nothing to eat and that some of them were beaten, and that the police had put obstructions in the way of them seeing lawyers. The question of a preventive measure was reviewed considerably longer than the three days set down by law. All 9 accused were remanded in custody.

On 10 January a member of the Zaporizhzhya branch of VO Svoboda, Yury Hudymenko, was detained over a criminal case reinstated by the Regional Prosecutor under the same Article 296 §2 of the Criminal Code. The case had been initiated in May 2010 over the daubing with paint of the monument to Felix Dzherzhynsky however was then terminated due to the lack of elements of a crime in Hudymenko’s actions. The investigator applied to the court to have Hudymenko remanded in custody, but the court did not initially agree, only extending the term of detention by 10 days. However on 20 January a ruling was nonetheless passed to remand him in the SIZO [pre-trial detention unit] for two months. Artyom Matviyenko who is also charged with daubing paint over the monument, together with Hudymenko, is under a signed undertaking not to abscond.

Several members of Tryzub have been detained and released. Another four are being held in custody. Andriy Stempytsky and Stepan Bychek are accused of unlawful possession of weapons. Ihor Zahrebelny and Artyom Tsyhanyok of setting fire to the office of the Communist Party in Zaporizhzhya back in 2009.

It is difficult to speak with certainty about the criminal cases mentioned at the present stage since the investigation is not completed and some of the charges are unknown. However some things can, a priori, already be considered.

In the 2001 version of Article 296 of the Criminal Code, hooliganism is “flagrant violation of public order motivated by overt disrespect for society, accompanied by particular impudence or exceptional cynicism.” Yet the accused had no intention of insulting society, expressing disrespect since the overwhelming majority of society have a negative attitude to Stalin and Dzherzhynsky as the organizers of mass murder and protested against the erection of the bust of Stalin by the Zaporizhzhya communists. In both cases, the motive was entirely clear — to express their attitude to Stalin and Dzherzhynsky.

³ The Freedom Party — translator’s note.

Thus, these acts were merely expressions of their views. It is interesting to draw a parallel between these forms of expressing ones views to the considerably more audacious form, that of burning the national flag in protest against the politics of the regime. According to Article 65 of Ukraine's Constitution respect for State symbols is a duty of Ukrainian citizens, while Article 338 of the Criminal Code carries a punishment for public dishonoring of the state symbols of either Ukraine or other countries. The situation in the USA is different with the standards of freedom of expression of views being considerably higher.

It became common to burn the State flag in the USA during the period of mass protests against the Vietnam War at the end of the 1960s. In 1968 a federal law was passed on respect for the American flag. Analogous laws were passed in the majority of states. These laws qualified the public burning of the national flag as dishonour and a criminal offence.

After the application of these laws, the case reached the US Supreme Court. In 1989 the Supreme Court in the case of *Texas vs. Johnson* judged that the burning of the flag as a form of protest is guaranteed by the First Amendment and therefore all laws which ban such actions are unconstitutional. President George Bush, who held the opposite view, suggested that the Congress pass a special federal law establishing criminal liability for disrespect of the flag. The law was passed, however the Supreme Court immediately declared it unconstitutional since it violated the right of Americans to express their views. Since that time defenders of the flag have been trying to bypass the judgment of the Supreme Court by passing new amendments to the Constitution especially devoted to defense of the flag. Over recent years at least 12 such attempts have been made, yet no amendment has been adopted.

We can also apply the European mechanisms for protecting human rights: freedom of expression is defended by Article 10 of the European Convention. The actions of those accused of hooliganism fall under that Article. The actions of the agents of the State in response constitutes interference in exercising freedom of expression and, in accordance with Article 10, must be based on the law *"in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"* and *"be necessary in a democratic society"*

We would note that the reaction of the communists and their supporters to the daubing of part on the monument to Dzherzhynsky; the erection of a bust of Stalin; the reaction to the beheading of the bust of Stalin are also ways of expressing their views. That is, in these cases, we are dealing with political discussion and actions linked with this. In accordance with European Court of Human Rights case law in the area of political discussions, "Article 10 leaves no room for restriction of freedom of expression". The

European Court has confirmed this in connection with numerous cases involving *Kurds vs. Turkey* (1994–1994) — applicants Aslan, Polat, Syurek, Karataş, Bashkai, Ibrahim Aksoi, Okutan, Kyurchyu, Varhii, and many others.

In order to establish whether there has been a violation of Article 10 one needs to determine whether the interference was well-founded. That is, firstly, whether it pursued a legitimate aim. If so, then, secondly, whether the interference was proportionate to the aim pursued. And thirdly, if so, whether the interference was necessary in a democratic country (for example, whether it was an adequate reaction to an urgent public need).

In considering this, we can draw an analogy with the well-known case of *Salov vs. Ukraine*. Donetsk lawyer Serhiy Salov was the authorized representative of presidential candidate Oleksandr Moroz at the 1999 elections. On 30 and 32 October he distributed 8 copies of a special issue of the newspaper *Holos Ukrainy* [Voice of Ukraine] from 29 October which asserted that the current President, Leonid Kuchma had died on 24 October. The issue was a fake. On 31 October 1999 the Kyiv District Prosecutor in Donetsk initiated a criminal investigation against Salov on a charge of obstructing the electoral rights of citizens (Article 127 §2 of the Criminal Code). On 1 November 1999 Salov was arrested for circulating false information. He was held in a SIZO during the investigation and court proceedings from November right up to 1 June 2000, when the preventive

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measure was changed from remand in custody to a signed undertaking not to abscond. On 6 July 2000 a district court found him guilty of obstructing the exercise by citizens of their electoral rights by means of deception, in order to influence the results of the presidential elections. He received a five year suspended sentence with a two-year trial period in view of the fact that Salov's actions "did not cause actual serious consequences". The Regional and Supreme Courts upheld this ruling. Salov applied to the European Court alleging a violation of Article 5 §3, Article 6 §1 and Article 10 of the European Convention. The European Court found that these violations had taken place.

In considering whether Article 10 had been violated, the Court agreed that the newspaper which Salov had circulated contained false information and found that the interference of the State had pursued a legitimate aim, that of ensuring the right of voters to truthful information during the 1999 presidential campaign. However in view of the insignificant influence which the circulation of 8 copies of the newspaper and the seriousness of the punishment imposed, the Court found the interference to have been disproportionate pursuance of the legitimate aim. There was no consideration of whether such interference was necessary in a democratic society.

In the cases over the daubing with paint of the monument to Dzherzhynsky and beheading of the bust of Stalin, the proportionality of interference and need in a democratic society have clearly not been observed. Furthermore, the interference of the State was not based on the law since the legal qualification of the offence as hooliganism is incorrect and used in order to apply the most severe punishment possible.

We can thus confidently predict that if the members of Tryzub and VO Svoboda accused of hooliganism apply to the European Court of Human Rights, in both cases the Court will find violations by the State of Article 10. It is clear that Article 5 of the Convention which defends the right to freedom and personal security has also been violated. There are no lawful grounds for deprivation of liberty during the investigation which, according to European Court case law, would be deemed well-founded, in these cases.

However it is apparent that the daubing with paint and beheading of the bust cause damage. If the law enforcement bodies had raised the issue of compensation for the damage caused, this would have been an adequate reaction.

In our opinion, this is extremely dangerous and is reminiscent of the deliberately hyped up trials of the 1930s — 1950s, aimed at intimidating the population and undermining the law in the country. This looks like repression directed at inciting ideological enmity between the East and West of the country. Such behavior without any explanation or justification from the State could provoke the public, especially young people, to unforeseeable actions.

From this analysis it follows that the ten people accused of hooliganism over the beheading of the bust of Stalin and the daubing with paint of the monument to Dzherzhynsky are political prisoners in accordance to the definition given. Political persecution must stop! The charges of hooliganism must be dropped and those involved released from custody.

CONSTITUTIONAL LAWMAKING AND CONSTITUTIONAL PROCESS IN UKRAINE: 2009–2010¹

In Ukraine, 2009 became history as the year of realization of necessity of overcoming of strategic and tactical faults of current Basic Law, understanding of the need of better constitutional pre-conditions of the progress of Ukraine on the road to Eurointegration. Already in the late 2008 everybody recognized such common faults of Constitution as chronic discord in the mechanism of realization of state power, impossibility of maintenance of public dynamics at the level of modern requirements, crisis of representative function of parliament, actual ignoring of the category of civil liberty as the main object of constitutional support and so on.

As for more concrete negative issues, it was a common feeling in official and unofficial discourses, that the Constitution of Ukraine (upon amending on December 8, 2004) introduced and went on maintaining actual dual executive power; authorized subjects with different system of values to carry out domestic and foreign policy; provides no guarantees of local self-government and effective representation of regions of Ukraine; tolerated weak connections between electorate and deputies of all levels; provided no proper guarantees of constitutional rights and freedoms; contained no discretionary space for realization of political program of the country's leader; practiced overt juridical maximalism at the level of norms-principles, equitable rights, freedoms and duties of man and citizen and so on.

Both society and political elites tried to overcome these confusions and work out new approaches to constitutional regulation and drafted a number of official and unofficial amendments to the Basic Law of Ukraine; among the authors were the All-Ukrainian Association *Svoboda* (April 2008), President of Ukraine V. Yushchenko (April 2009), "Bloc of Yuliya Tymoshenko" (June 2009), and Kharkiv Human Rights Group (May 2009) to name just a few.

The reformative efforts of higher constitutional level included the activity of the Constitutional Court of Ukraine apparent, first of all, in its Decision from April 8, 2010 in relation to possibility of some people's deputies of Ukraine to directly participate in forming a coalition of deputy factions in the Verkhovna Rada of Ukraine, and also in the Decision in the case of constitutional appeal of 252 people's deputies of Ukraine concerning the compliance with the Constitution of Ukraine of the Law of Ukraine "About amendments to the Constitution of Ukraine" from December 8, 2004 (the case of conformity with the procedure of making amendments to the Constitution of Ukraine) from September 30, 2010. Therefore, we will consider the most essential attempts one by one.

THE BILL ON AMENDMENTS TO CONSTITUTION OF UKRAINE BY PRESIDENT OF UKRAINE V. YUSHCHENKO

In March-April 2009 President of Ukraine V. Yushchenko came forward with draft amendments to Constitution of Ukraine. From the start the bill riveted attention by the new content of constitutional Preamble. If at the time the Constitution used the term "Ukrainian people", the

¹ Prepared by Vsevolod Rechytzky, Expert on Constitution of Helsinki Human Rights Group.

presidential project distinguished between terms “Ukrainian nation” and “Ukrainian people”. If President V. Yushchenko really aimed to attain “consent and conciliarism² of Ukraine”, then he began off the track, especially as the article 14 of Bill went on maintaining the Ukrainian state was responsible “for promotion and consolidation and development of Ukrainian nation”. It looks only logical to ask: why not consolidation of Ukrainian people as a whole? In fact, ethnically, culturally and linguistically people could become more consolidated and united in time. On the other hand, if the Bill distinguished between terms “Ukrainian nation” and “Ukrainian people”, would Ukrainian Poles, Armenians, and Hungarians vote for presidential initiative in the future?

There was a doubtful norm stipulating that Ukraine should keep the definition *the social state* (article 1). Paper wouldn’t blush, but in 2009 Ukraine still remained a state-exploiter. The official statistics shows the miserly manpower costs in production price in Ukrainian industry. The same with the salary bracket of employees of government-financed organizations. For example, in 2009 the salary of a parliamentarian or minister in Ukraine equaled ten salaries of a surgeon of a higher category or approximately five-to-seven salaries of a university professor, while at the same time the expenditures covering the completion of elite hospital in Feofaniya (Kyiv) exceeded the size of budgetary funds intended for all domestic rural medicine³. No wonder, the next year Ukraine was the second lowest among 40 European states by the standard of well-being⁴.

Meanwhile the article 4 of presidential project repeated article 3 of the Basic Law: “The human being, his or her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the *highest social value*.” As ethical maxim and moral imperative it was clear. The problem consisted in an attempt to develop this stipulation into the direct action norm and higher juridical force at the same time. For example, how to order a soldier to give battle, if everything he defends is of lesser value than the fact of his physical existence? Or is the Cabinet of Ministers of Ukraine ready to sell out its limousines and cover the costs of marrow transplantation abroad for a pupil from an orphanage?

It is known, that G. W. F. Hegel, O. Kozhev and F. Fukuyama — each in his time — wrote about underdeveloped political and moral nature of nations, which are ready to waive their freedom for primitive physical survival. For instance, O. Kozhev in his *Essay on Phenomenology of Law* maintained that “the human or historical reality emerges due to mediation of active denial of natural, animal reality — in ability to risk one’s life in the strife for recognition.”⁵

The article 17 of the president’s bill stipulated that “no ideology can be acknowledged by the state as obligatory.” The ideologies have not expired in the world; but is it an excuse for constitutional maximalism? By the *Lisbon Agreement* and *Charter of Fundamental Rights of the Union* the European states undertook to guarantee free migration of people, commodities, services and capital as an imperative of freedom, democracy, human rights and free market, or didn’t they? The supremacy of law and limited government is also ideology, or isn’t it? Modern Poland, having adopted the Constitution in 1997, performed in more economical and simpler way. The Basic Law of Rzeczpospolita banned ideology of nationalism, fascism and communism, but not ideology at large. In fact, the state is a traditional guarantor of stability and order; without ideology it loses its reference-points. The civil society with hardly a credo of general faith is another kettle of fish.

More ammunition for criticism one finds in the article 22 of the Bill on the state symbols of Ukraine. The draft Constitution specified that the State Anthem of Ukraine is the national anthem “Ukraine Has Not Yet Perished” set to the music of M. Verbytsky, with words by Pavlo Chubynsky that are confirmed by the law.” But P. Chubynsky not so much authorized the words, as their arrangement in original sentences and poetic rhymes. Since the Ukrainian parliamentarians changed cases in the key stanza, P. Chubynsky’s authorship is out of the question.

² The author employs the modern Ukrainian term *sobornist*, which in fact brings together such meanings as unity of faith, religion and civil aspirations (translator’s note).

³ See: Речицький В. Чому точаться такі бої за депутатські мандати?// Слово (США), № 18, 5 травня, 2006. — С. 20, 24.

⁴ See: <http://www.eprevda.com/ua/news/2010/10/18/252448/>

⁵ Кожев А. Атеизм и другие работы. — М.: Праксис, 2006. — С. 304.

As to the inclusion of the “Spiritual Hymn of Ukraine” into the presidential project (article 22), it was an attempt to transfer the instruments of law to the area of human heart. Such sacralization of constitution was hardly justified under given circumstances. The norms of basic law should be rational, pragmatic and stay within the bounds of legal regulation. All the more the article 40 of the Bill stipulated the right of everybody “to the freedom of thought, conscience and religion.” Thence the question: how can the inalienable freedom of conscience and thought under conditions of constitutionally fixed spiritual hymn? The rights and fundamental freedoms constitute the space of individual autonomy protected against state and other imperiously-authoritarian interference. Rights and freedoms belong to a sphere of personal responsibility. In the area of individual spirit the constitution and democracy are not so much unnecessary, as relatively powerless.

The section II of V. Yushchenko’s bill was dedicated to the rights, freedoms and duties of man and citizen. Its text read almost like that of the current Constitution of Ukraine. In particular, all socio-economic rights in the draft were left in current redaction. Most of them proved useless in legal procedure. That is all rights and freedoms were expressed in the draft as inviolable legal imperatives, although one third of them were not backed by legal guarantees of realization. Once again the obvious impracticability of socio-economic rights compromised the rest of constitutional text. Beginning from 1936 these “rights-utopias” accustomed Ukrainian citizens to the idea that the Constitution is not a law, but “glad rags”. Do many people in Ukraine have “sufficient standard of life for them and their families” (article 53), guaranteed “right to work” (article 48), “conditions for effective and accessible for all <...> medical service” (article 54) and so on?

at the same time the division II of the bill contained no hints at academic freedom; free movement of persons, commodities, services and capital; separate right for citizens and other persons to access official and other publicly meaningful information; special rights for children and persons of advanced age. Such approach was erroneous for the country announcing its wish to join European community. Planning integration into the EU, it would be good to adjust the constitutional draft to the Charter of Fundamental Rights of the EU as appendix to the Lisbon agreement — the de facto basic law of united Europe — signed in December 2007.

On the other hand, the regulation of human rights and freedoms in the presidential bill was better than that in the current Basic Law. The presidential project looked less maximalist and, at the same time, more pragmatic, closer to common sense. For example, the bill meant to prohibit not “*any* child abuse” (operative rule), but prohibition of “child abuse”; not only “right to life” (operative rule) but also prohibition of death penalty and execution (article 28). Another positive point was reduction of administrative detention to 24 hours (operative rule — 72 hours).

However, on the whole the presidential code of human rights and freedoms remained a collection of rights not of potential citizens of the European Union, but a modified typical legal status of a person in a post-totalitarian country. The bill failed to pay attention to the educational, scientific, intellectual, virtually-symbolic aspects of Ukrainian community. Only a small space was allocated to define the rights of foreigners and apatrides. The bill failed to mention the international obligation of Ukraine to refrain from collective deportation of foreigners (article 4 of the Protocols № 4 to Convention about protection of human rights and fundamental freedoms in 1950 with amendments made by Protocol № 11). The guarantees of rights of foreigners by article 1 of the Protocol № 7 to Convention (1950), which were omitted from the presidential draft at the constitutional level, were important for Ukraine as well.

The presidential project did not acknowledge unisexual marriages, ignored the citizens’ right to buy traumatic weapon and possibility of political strikes. Like the statutory Constitution, the bill acknowledged the responsibility for giving and execution of *overtly* criminal instructions and orders, although giving and execution of *simply* criminal orders also might have been contrary to law. Unlike the Charter of Fundamental Rights of the European Union, the presidential bill made no provisions for protection of human rights and freedoms in the places of imprisonment and so on.

In addition, this project admitted the possibility of limitation of constitutional rights and freedoms *as such*, while the 1950 European convention on protection of human rights and fundamental freedoms permitted only temporary limitations. It is an important legal nuance, as the

Ukrainian doctrine of equitable rights is built on principles of political philosophy of J. Locke, which considers the rights and freedoms natural and inalienable.

Another flaw of the presidential project in the area of ensuring of human rights and freedoms consisted in fuzzy observance of requirements of three-component test according to which the European Convention on protection of human rights and fundamental freedoms (1950) allows to limit rights and freedoms only if this limitation: a) is necessary in democratic society; b) is stipulated by law; c) exactly meets its purpose. strange as it may seem but V. Yushchenko's bill did not raise up to the constitutional level the norm of the second part of article 7 of the 1950 Convention about protection of human rights and fundamental freedoms admitting the possibility of trial and punishment of person for any action or inactivity, which at the time of their commitment presented a crime in accordance with the general principles of law recognized by the civilized nations. If this norm had become constitutional, it would allow Ukraine, at least formally, to raise the issue about bringing to book of those guilty of Holodomor in 1933.

The section III of the draft was dedicated to expression of political will met no special criticism. However, there is a problem with the section dedicated to the legislative branch of power. The introduction of two-chamber National Assembly became a novel. The bill stipulated certain limitations of deputy's inviolability and possibility of compatibility of deputy's mandate and ministerial portfolio. Maybe this two-chamber idea was prompted to the President of Ukraine by complexity of post-communist governance. Once again the presidential rule in Ukraine ran into the phenomenon of surrounding political vacuum. The moment the domestic political situation complicated, the head of state had nobody to rely on. On the other hand, only senators could effectively oppose the extremes of presidential authoritarianism.

Gradually it became clear that the existent format of Verkhovna Rada was not sufficient for the progress of Ukraine. The Ukrainian parliament was and is the richest in Europe by the wealth of its members (A. Kwaśniewski); however, politically it always lacked ability to take the responsibility. The noisy scuffles of coalition and opposition went on and on without any good for the country. However, the tactical drawback of V. Yushchenko's project consisted in the fact that the senators had to be elected directly by the population of Ukraine still prone to populism. Obviously, it would be better to elect senators by regional and town radas. They would have been legitimized, if they had been elected from local deputies.

The division of state power into separate branches fixed in the article 7 of the project did not prevent ministers from remaining deputies. Moreover, not being the head of executive power, the President reserved the possibility to bloc government regulations. Actually any act of the Cabinet of Ministers could be canceled under pretence of the threat to national security. The president's idea to pass the budget act by both "democratic" Chamber of deputies and "aristocratic" Senate was feeble as well, because the budget decisions might be better made by the lower chamber. There were no objections against the rest of the points of the section. One could only note the absence of reconciliation procedures if the chambers of the National Assembly were not in accord. The project said nothing about the possibility of setting up of parliamentary reconciliatory commissions. On the whole, the presidential model of National Assembly of Ukraine looked rather conflicting, if not antagonistic. There was also lack of logic in determination of the legal status of the Senate. If the upper chamber had to be elected by citizens, and not appointed from the circle of elites, then why it could not be dissolved?

There were also discrepancies concerning the early expiration of the term of office of the President as a result of impeachment (article 124). On the one part, the draft Constitution stipulated that the basis for impeachment is the commitment of "intentional crime" by the President of Ukraine. On the other part, it is impossible to understand how the National Assembly of Ukraine may know that the acts of the president fall within the purview of criminal law? The article 66 of the project read: "the person is presumed innocent <...> until proved guilty according to law and until the court pronounces the verdict of guilty." According to Constitution, the Supreme Court must participate in the impeachment must. Meanwhile the presidential project omitted it. But how under conditions of division of powers (without lords-judges) is it possible to know about the commitment of criminal act by the President?

At the same time, the article 125 of the project maintained that in the case of the early expiration of the term of office of the President his powers are conferred on the Head of the Senate. This chain of substitutions is justified, but too short. For example, what should the state do if the President and Speaker of the upper chamber perish simultaneously? The modern civilization makes leaders mobile, but the risks of their life grow, as the Polish tragedy near Smolensk showed. This challenge should be constitutionally responded to.

The sections six (Cabinet of Ministers of Ukraine) and seven (Court and justice) of the presidential project drew no special criticism. Nonetheless the indicated age of 27 years for a judge contradicts international practice. The experts believe that 30 years is the more adequate age for judicial selection. However, the draft contained a useful novel of *constitutional appeal*. This institute is a method of human rights and freedoms protection at the top constitutional level. The betterment included the new procedure of appointment of judges of constitutional court. Now each of them owes his/her office to the President of Ukraine and Senate.

As to territorial organization of power, the situation looked almost critical, because Ukraine cannot do without regional state administrations or their analogues. The article 166 of the fourth part of the project read: “in order to realize their full powers the heads of state administrations *can* (my italics — V. R.) set up offices in regions and cities.” But how could the heads of oblast and urban administrations set up regional offices prior to state budgeting? There are 490 rural regions in Ukraine; thence the scale of government expenditures. On the average every oblast has twenty regions; therefore the issue of to create or not to create the regional state administrations was not a local one.

The presidential project gave Ukraine a chance to make a step forward to success. Having a chance to change Constitution, the President had to use it in the best way. In particular, the Basic Law had to be amended with sections on civil society, ecoefficiency, special regimes of martial law and national emergency and so on.

Several citizens' information rights (right to access to official information) needed expansion; the academic freedom deserved a special constitutional article. On the whole, the new Constitution of Ukraine should have treated human rights and fundamental maintaining standards of the European Union. It might help Ukraine to relatively easily stop empty legal top-level rhetoric. The project of Constitution should have employed an axiom: the constitutional assertion of all equal rights and freedoms automatically meant the possibility of their legal defense. As far as these requirements were not taken into account by an official project, they became the subject of law-making efforts of Kharkiv human rights group⁶.

The model project of the Basic Law authored by the HHRG was a full-scale commented project of the new Constitution of Ukraine. This project was an important result of research and creative efforts of the HHRG in the area of protection of human rights and fundamental freedoms in Ukraine in 1994–2009. The model project envisaged the two-chamber structure of Ukrainian parliament — National Assembly of Ukraine, suggested presidential governance (the President of Ukraine is a Head of State Executive Power). The project of Constitution of Ukraine by HHRG asserted human and civil rights and freedoms according to international standards. The project proceeded from the fact that the legal framework in Ukraine is a future part of the space of European Union. Therefore the project of Constitution contained formulations which stood the test of time in such documents as the European Convention on protection of human rights and fundamental freedoms (1950) (and optional protocols to it); International pact about civil and political rights (1966); International pact about economic, social and cultural rights (1966); Charter of Fundamental Rights of the European Union (2005), Convention about access to information, participation of public in the process of decision making and access to justice in relation to environment issues (1998), European social charter and so on. The project of Basic Law foresaw (at the level of determination of principles of constitutional rule) protection of the freedom of speech on the basis of paradigm of the “First amendment” to the Constitution of the USA, prohibition of collective

⁶ For the commented version of the draft project see: Проект Конституції України — 2009. Перспектива прав людини. — Харків: Права людини, 2009. — 144 с.

deportation of foreigners, mandatory application of three-component test in the case of limitation of constitutional rights and freedoms, consolidated academic freedom alongside with ban on limitation of the freedom of speech in science, art and education. As a basic element of constitutional rule in Ukraine the project promoted free movement of people, commodities, services and capital.

The project's ideology was based on the heritage of national and general — Euroatlantic constitutional thought. The mass publication of Ukrainian version of the project with in-depth scientific commentary appeared twice on paper and was also placed on the HHRG site which made the text accessible for wide circles not only of Ukrainian public and experts. The project of Constitution according to HHRG was mailed directly to the people's deputies of Ukraine, leaders of Ukrainian political parties, scientific and academic and educational establishments at home as well as anchorpersons of the top-rated political TV programs.

CONSTITUTIONAL INITIATIVE OF THE BLOC OF YULIYA TYMOSHENKO

The draft amendments to the Constitution of Ukraine according to the Bloc of Yuliya Tymoshenko (BYT) appeared in the Ukrainian segment of the Internet in June 2009. This project was less systemic, than V. Yushchenko's one; that is why its juristic commentary follows the articles' enumeration in the Basic Law of Ukraine. The list of emendations started with the article 22 of the Constitution of Ukraine: the third part should be added a stipulation that in the case of adoption of new laws or amendments to current laws of Ukraine there would be no narrowing of the purview and volume of constitutional rights and freedoms. At a glimpse, it looked rational, as the first part of article 22 of current Constitution maintains that "human rights and freedoms envisaged by this Constitution are not exhaustive." That is the BYT's project only underlined that one can establish "the narrowing of purview and volume of present rights and freedoms" is possible only in relation to concrete right *written and fixed in the Constitution*.

Actually the problem of narrowing of constitutional human rights and freedoms was and is much wider. The development of human civilization is connected with the development of "the discipline of freedom", that is why in part three of article 22 of the Constitution of Ukraine it would be better to replace the words: "*narrowing of purview and volume of constitutional rights and freedoms*" (which sometimes cannot be avoided even diachronically) with: "*violation of existent human rights and freedoms*". The social progress automatically results in higher social discipline that in legal sense means the increase of volume of normative regulation. For example, year in and year out the realization of incorporeal right becomes more complicated almost everywhere and so on.

The BYT suggested adding the norm about possibility of *forming of electoral blocs by parties during elections*, and also by the norm *rendering the appeal against party decisions impossible* to the article 36 of the Constitution of Ukraine. They also suggested adding to the same article a clause that the state provides money for parliamentary parties. That is if the first suggestion of BYT brought the idea of creation of party blocs up to the constitutional level, the second one tended to put party democracy beyond control of Constitution and law. Obviously, sometimes corporate decisions can threaten lawfulness. For example, party can make decide to create armed security structures, which would better remain liable for appeal in court.

As for the state financing of politically effective parties, it is hardly the Constitutional problem. Almost every developed country furnishes financial assistance for its political system, but under conditions of Ukraine the duty of the state to support parliamentary parties contains overt corruption potential. One cannot welcome state support for winning parties in Ukraine knowing what kind of support the elected representatives of the people established for themselves in the form of official salaries, privileges and benefits (they get an apartment practically for nothing; the discrepancy between salaries of government-financed employees in Ukraine makes almost 1:40, which is tenfold more than in the USA and Western Europe). The state must finance the participation of parties in the elections, but further budgetary support should be put off for the future.

The BYT's amendment to article 41 of the Basic Law foresaw entitlement of Ukrainians *to obtain information about enterprisers' associations*. As far as this article relates to section II "Human rights,

freedoms and duties”, a simple question can be brought up: what is the use of the constitutional right to obtain information about enterprisers’ associations for a man from the street? Such right is exercised by the governmental financial and controlling and auditing services, but as a right of a private person it has to be envisaged in current legislation. The suggestion of BYT to amend article 55 of the Constitution with a clause that the *individual decisions of the President of Ukraine, Verkhovna Rada of Ukraine, and Cabinet of Ministers of Ukraine are subject to the appeal in the Kyiv Appellate Administrative Court* also looked unjustified. The legal sense of this norm draws no objections. The place of this novel looked doubtful only in constitutional text. In fact, it is a typical law related to national judicature.

One could but welcome the suggestion of BYT to amend article 63 of the Basic Law of Ukraine with a clause on the right of a witness to the criminal case to get legal aid. There was a welcome amendment by BYT to article 65 of the Constitution about the possibility of *introduction of contract military service*. However, there remained a problem with the availability of material resources and budget funds.

The amendments of BYT to article 77 of the Basic Law stood out. The BYT suggested amending article about elections of Verkhovna Rada of Ukraine with the following clauses: *in relation to the introduction of open-list proportional representation; lowering of polling barrier down to 1%; tying in nominees with constituencies by party decision; introduction of two-round voting: two first-round winning parties are admitted to the second round; one-round election, if a party has become an absolute winner; rights for a party to change the priorities of nominees on electoral list during seven days after the approval of results of elections; early elections during 45 days*.

The first proposed clause drew no special commentaries. If the proportional representation stands, the open lists seem justified. Correlating the first and third clauses, one could conclude that BYT stood for introduction of some elements of Polish electoral system, in which the national list was complemented with regional ones.

As regards one-percent-minimum access, there is hardly a rational argument in favor of it. Politically such advances to political demimonde looked senseless. In fact, such inflexible scheme permitted the winner to get everything. According to BYT, the two-round elections led to inflexible pattern of governance with small parties getting nothing. For example, if in the first round of elections the third party on the electoral list got a heavy vote, it had to ax its representation after the second round. And vice versa, the winning party increased its representation after the second round. The procedure can hardly be justified. In addition, the terse project of BYT allowed interpreting amendments so that after the second round there might remain only two parties (blocs) in the national parliament. In fact, this one-percent-minimum access was nothing but hypocrisy.

The proposed-by-BYT possibility to change the priorities of nominees on the list during seven days after approval of results of elections looks like undermining of these results. In the world there exist electoral systems with preferences, when voters can change the order of nominees on the party list. However, in this case a party could discretionarily *manipulate* the voters’ will. And it was difficult to make out whether this prioritization concerned only nominees screened by voting, or whether there was also a chance for those left in the basket to join the final through list.

The BYT’s protocol suggested to amend the Constitution of Ukraine with the new article (77-1) determining the composition of the Central Election Committee. The project *suggested electing CEC consisting of 21 members chosen by lot from a number persons taking part in the contest conducted by the Higher Qualification-and-Disciplinary Commission*. The new list of duties of CEC included elections of not only deputies, but judges as well. As it ensued from the amendments to article 126 of the Basic Law, *the Higher Qualification-and-Disciplinary Commission applies its authority to judges of Supreme and Constitutional Courts of Ukraine, and also to members of the Central Election Committee*. On the whole, the decisions of the commission had to apply to *qualifying evaluation of judges of the Supreme and Constitutional Courts of Ukraine; bringing to book judges of Supreme and Constitutional Courts of Ukraine, and members of CEC; dismissing of the judges of Supreme and Constitutional Courts; submission for consideration of the Central Election Committee of nominations to the position of members of election committees*.

Suggesting setting up a new body —the *Higher Qualification-and-Disciplinary Commission* — the project of BYT as much as hinted at the procedure of its establishment. The commission *had*

to be formed by lot (draft amendments to article 126 of the Basic Law). Maybe, it would be better to lay out the specifics of procedure. It was also difficult to understand the logic of BYT's amendments to article 78 of the Constitution of Ukraine; according to the new text *the people's deputies were allowed to become ministers*. Moreover, the expression *the people's deputy* means approximately the same as the notorious *people's democracy*; combining representative mandate with the portfolio conflicted with the draft article 6 of the Constitution of Ukraine about branches of state power. If the state power in Ukraine is divided into three parts, one person cannot combine functions characteristic for different branches of power. It reminds of the Paris Commune which simultaneously decreed and executed its own revolutionary laws...

The BYT's suggestion to article 81 of the Basic Law foresaw the possibility to strip a deputy of mandate as a result of expulsion from the faction by decision of the leading body of the party. In this way the BYT placed the connection between party and deputy higher than the connection of deputy with his voters. However a deputy is an elected representative of the people and not of a party. Maintaining that electoral rolls must be open, the BYT placed party higher than the will of people.

Of course, the Constitution of Ukraine should not recognize the imperative mandate. It is a classic in democratic countries (France, Italy, Spain, Great Britain and so on). Meanwhile, modern deputies personify *personal* understanding of national interests. The free mandate is known in Europe since 19th century; thence proceeds the impossibility of early recall of the senator or deputy. Moreover, the imperative mandate exists in China, on Cuba and in several developing economies. Ukraine would better stay out of that list. As far as an expulsion of the deputy or senator from the party does not result in the loss of representative mandate, the deprivation of party support at the next elections is considered a sufficient punishment.

The amendment of BYT to article 83 of the Constitution of Ukraine foresaw *the right of the Prime Minister of Ukraine to convene special sessions of Verkhovna Rada of Ukraine*. The term *coalition* they suggested to replace with the term *parliamentary majority*. The majority of constitutional composition of parliament had to nominate the Prime Minister, while the minority formed the opposition.

The BYT suggested removing part three from article 84 of the Constitution of Ukraine, which stipulates *personal voting at the sessions of Verkhovna Rada of Ukraine*. This novel permitted to vote by proxy. This procedure is a rarity and exception in the world practice.

However, the most important amendment was an attempt to change the competence of Verkhovna Rada of Ukraine. The BYT suggested to place under the authority of parliament: *fixing the date of early elections of people's deputies; approval of decrees of the President of Ukraine in relation to confirmation of decisions of the Security Council in the case of armed aggression against Ukraine; appointment of the Prime Minister of Ukraine (without nomination of the President of Ukraine)*. The parliamentary opposition was entrusted with: *appointment of the chairman and members of the Chamber of Accounts; Ombudsman of Verkhovna Rada of Ukraine; participation in forming (appointment of 25% of composition) of the National Bank Board of Ukraine, National Board of Ukraine on TV and Radio Broadcasting, National Commission on Energy Regulation, National Commission on Communication; appointment of the Head of Judicial Administration of Ukraine; appointment and dismissal of the Prosecutor General of Ukraine following the presentation of 150 people's deputies*.

These suggestions seemed consequent. On the other hand, what about guarantees if the opposition makes 5–6 percent of constitutional composition of the Verkhovna Rada of Ukraine? Taking into account the realities of Ukrainian policy, one could expect in Ukraine the consolidation of parliamentary majority after the model of Belarus or Russia. Moreover, the very removal of the President of Ukraine from forming of the government rendered his national elections unnecessary.

Interference of BYT in article 85 of the Basic Law envisaged exception from the competence of parliament the appointment and dismissal of one third of composition of the Constitutional Court of Ukraine. They suggested replacing the necessity of collective support of an appeal to the President of Ukraine with *the right of every people's deputy to the country's leader for explanation*. Another important novel suggested by BYT consisted in *exclusion from the competence of Verkhovna Rada of Ukraine of consideration of question about responsibility of the Cabinet of Ministers of Ukraine on proposal of the President of Ukraine*. This forbade the President to initiate the resignation of the cabinet.

According to the BYT amendments to article 88 of the Basic Law, the rule stipulating that the opposition elected the Chairman of the Verkhovna Rada of Ukraine and parliamentary majority elected the first deputy and deputy chairman should be abrogated. At a glimpse, such expansion of the minority rights seemed the triumph of liberalism. However, there remained a question of what the Verkhovna Rada of Ukraine was expected to undertake, if a substantial part of minority decided to join the winners? In such case the opposition might be represented by a marginal faction.

As the BYT suggested decreasing the parliamentary elections passing score to one percent, a hypothetical five-person minority could be formed in the parliament. Then a marginal leader could control the Verkhovna Rada of Ukraine. Still more doubtful was the suggestion of BYT to *retire the Prosecutor General of Ukraine on the motion of 150 people's deputies*. Why should the Prosecutor General of Ukraine retire because of dissatisfaction of one third of elected representatives? In this case the logic of changes looked like the logic of absurdity. In democratic policy the fallacy is embodied by a *minority*. History may revalue the decision of majority, but common rule is to trust the majority in the present.

At large, the BYT suggested that the terms of reference of opposition included the *election of the Chairman of Verkhovna Rada of Ukraine; chairpersons of committees on Budget, Freedom of Speech and Information, Human Rights and National Minorities, on Fighting Organized Crime and Corruption, on Legislative Support of Law Enforcement, on State Building and Local Self-Government; electing of the first deputies in all other parliamentary committees; electing of the head of standing committee of inquiry; appointment of the Ombudsman of Verkhovna Rada of Ukraine; appointment of the head and members of the Chamber of Accounts; appointment of one vice-Prime Minister; appointment of deputy ministers; appointment of the Deputy Prosecutor General of Ukraine; appointment of 25 % of composition of the National Bank Board of Ukraine, National TV and Radio Broadcast Board of Ukraine, National Energy Control Commission, National Communication Control Commission; right to supplementary report on the State Budget Bill of Ukraine and the program of government activity; right to form a shadow cabinet; right to make up an agenda of the Verkhovna Rada of Ukraine for one day per calendar month*.

The commentary to these novels comes to above arguments. How would these norms work, if the opposition shrinks to a small group? Despite this threat, the projected status competed with that of the country's leader. If Ukraine had a two-party system, one might understand the logic of Y. Tymoshenko. In real circumstances it did look strange.

The amendments of BYT to article 90 of the Basic Law contained the possibility of *expression of no-confidence to the parliament at an All-Ukrainian referendum conducted on national initiative*. In turn, *the President of Ukraine was empowered to dissolve the parliament on the grounds as follows: 1) if during sixty days after the resignation of the Cabinet of Ministers of Ukraine the new government is not formed; 2) if the parliamentary session cannot begin within thirty days*.

The suggestions of BYT to article 92 of the Constitution of Ukraine established the status of people's deputies of Ukraine *by law only*. As for Verkhovna Rada of Ukraine, its organization and work could be determined also by by-laws.

The amendment of BYT to article 93 of the Constitution of Ukraine gave a *right of initiation of bills to the Supreme Court of Ukraine* (which is unobjectionable), and an amendment to article 94 allowed the Chairman of Verkhovna Rada of Ukraine to sign the laws of Ukraine if the President of Ukraine had not signed a law or had not returned it according to veto procedure during fifteen days after its reception from Verkhovna Rada. The latter suggestion was hardly positive for the dynamics of lawmaking. If earlier a law could be blocked by the President of Ukraine, now the Chairman of Verkhovna Rada of Ukraine could do it as well (the project made him the leader of parliamentary opposition).

The amendment of BYT to article 98 of the Basic Law *empowered the Chamber of Accounts to conduct an inquest and pre-trial investigation inclusive with the right to commence an action and refer a case to the court*. This novel expanded the circle of pre-trial investigation agencies, but its expediency looked problematic. In particular, it is impossible to understand, why investigator of the office of public prosecutor cannot do his job on the ground of special financial examination. It is also evident that renaming of agencies does not result in changing their functions. The novel could lead to professionalization of investigation in a certain category of cases, but it is not a problem of constitutional level, or is it?

The BYT also intended to substantially change the competence of the President of Ukraine suggesting a new wording of article 106 of the Basic Law: “The President of Ukraine: ensures the state independence, national security and legal continuity of the state; address the people and send an annual and special messages to Verkhovna Rada of Ukraine on internal and external situation of Ukraine; coordinates foreign-policy activity of the state; makes decision on recognition of foreign states; appoints and discharges *on the motion of the Prime Minister of Ukraine* of the heads of diplomatic missions of Ukraine in other states and at international organizations; accepts letters of credence and recall of foreign diplomatic representatives; *on public initiative* holds an All-Ukrainian referendum on the changes of Constitution of Ukraine and *vote of confidence to the Verkhovna Rada of Ukraine*; announces off-year elections of the Verkhovna Rada of Ukraine within terms determined by this Constitution; *appoints the Commander-in-Chief of the Armed Forces of Ukraine*; heads the Security Council; *appoints one fourth of composition of the National Bank Board of Ukraine*; *appoints one fourth of the composition of National Board of Ukraine on TV and Radio Broadcast, National Energy Control Commission, National Communication Control Commission*; awards higher military ranks, confers higher diplomatic ranks and other higher special ranks and class ranks; grants state awards; establishes presidential decorations and confers them; *tables a motion on appointment and dismissal of the Chief of Security Service of Ukraine*; makes decision to grant and deprive of citizenship of Ukraine, grant refuge in Ukraine; carries out right of pardon; has the right to veto laws accepted by Verkhovna Rada of Ukraine (except for laws on amendments to the Constitution of Ukraine) with subsequent return of them for reconsideration by Verkhovna Rada of Ukraine.”

The governmental countersign of the acts of President of Ukraine was cancelled. Despite the fact that the President of Ukraine had to be elected by people, his authority reminded ceremonial duties. With such authority he could well be elected by Verkhovna Rada of Ukraine. The question was whether Ukraine needed a President at all.

The article 107 of the Constitution about the Security Council was renovated in the BYT's project. The project suggested excluding the clause that *the Security Council coordinates and controls the activity of executive bodies in the area of national security and defense from article 107*. Instead the article 107 should be supplemented with the clause, in accordance with which the Security Council should be convoked by the President of Ukraine if there is a necessity to proclaim the state of emergency or martial law, occurrence of natural calamity, anthropogenic or ecological disaster, threat to state independence, territorial integrity of Ukraine, life and health of population of Ukraine.

It was suggested to constitutionally determine the *full composition* of National Security Council. The ex officio members of the body were supposed to be as follows: *the President of Ukraine, Prime Minister of Ukraine, Chairman of Verkhovna Rada of Ukraine, Minister of Defense of Ukraine, Minister for Internal Affairs of Ukraine, Minister for Foreign Affairs of Ukraine, Chief of Security Service of Ukraine, Prosecutor General of Ukraine, Minister of Emergencies of Ukraine and Protection of the Population against the Aftermath of Chornobyl Disaster*.

It was also suggested to stipulate in the Constitution the full list of questions receivable for consideration of Security Council, notably: *to make decision on the motion on declaration of war and in the case of armed aggression against Ukraine, on the use of the Armed Forces of Ukraine and other legitimate armed units of Ukraine; to make legitimate decision on general or partial mobilization and introduction of martial law in Ukraine or in certain localities in the case of threat of attack, menace to state independence of Ukraine; to make decision, if necessary, on introduction in Ukraine or in separate localities of the state of emergency, and also to declare, if necessary, separate localities of Ukraine the areas of ecological emergency with follow-up approval by Verkhovna Rada of Ukraine*.

Actually, the BYT intended to put the instruments of security guarantees under strict parliamentary control. Juridically the amendments reflected the response of Y. Tymoshenko to the activity of Security Council chaired by V. Yushchenko. At the time the government decisions were often amended by Security Council; therefore the renewal of the Basic Law gave rise for squaring of political accounts.

The novels of BYT to article 108 of the Constitution of Ukraine boiled down to impairment of presidential inviolability. The operating article was suggested to be supplemented with the clause that *the President of Ukraine cannot be detained or arrested until a guilty verdict in relation to him*

comes into effect. It was logically intended to modernize the impeachment procedure. In particular, BYT suggested reducing the procedure of impeachment to the stages: 1) *the majority goes to Supreme Court of Ukraine;* 2) *on the basis of conclusion of the Supreme Court of Ukraine the Verkhovna Rada of Ukraine by two thirds of constitutional composition relieves the President of Ukraine of his duties.* Impeachment is an exceptional measure against an unlawful activity (inactivity) of country's leader. As far as, on proposals of BYT the office of the President of Ukraine became mostly decorative, the procedure of impeachment lost its purposefulness.

The BYT suggested complementing article 113 of the Constitution of Ukraine with the norm that *the Cabinet of Ministers of Ukraine is accountable to Verkhovna Rada of Ukraine and is not accountable to the President of Ukraine. In its activity it had to follow the decrees of the President of Ukraine only in accordance with paragraphs 5–7, 9–18 of article 106 of the Constitution of Ukraine.* It was suggested below that *the Prime Minister of Ukraine was appointed by Verkhovna Rada of Ukraine on majority motion.* Thus all ministers of the Cabinet of Ministers of Ukraine had to be appointed by Verkhovna Rada of Ukraine on presentation by the Prime Minister. Article 116 of the Constitution of Ukraine suggested excluding the duty to fulfill the acts of the President of Ukraine from the competence of the government.

The additional powers of the Cabinet of Ministers of Ukraine included the appointment of one fourth of composition of *the National Bank Board of Ukraine, National Board of Ukraine on TV and Radio Broadcast, National Energy Control Commission, National Communication Control Commission.* The Cabinet of Ministers of Ukraine became responsible for appointment of *the heads of local state administrations.* In addition, they suggested amending the Constitution of Ukraine with the article on exclusive authority of the Prime Minister of Ukraine. In particular, *the Prime Minister of Ukraine had to run the Cabinet of Ministers of Ukraine, central executive bodies and local state administrations; to act on behalf of the Cabinet of Ministers of Ukraine; to sign the acts of the Cabinet of Ministers of Ukraine; to control foreign-policy of the state; to negotiate and conclude international agreements of Ukraine; to submit presentations to the President of Ukraine on appointment and discharge of the heads of diplomatic missions of Ukraine in other states and international organizations; to submit presentation to the Verkhovna Rada of Ukraine about appointment and discharge of all ministers; to submit presentation to the Cabinet of Ministers of Ukraine on appointment and discharge of chiefs of other central executive bodies.*

The project suggested stipulating that *the chairpersons of the local state administrations be appointed and discharged by the Cabinet of Ministers of Ukraine on the motion of the Prime Minister of Ukraine.* Moreover, *the decisions of the heads of local state administrations could be countermanded by the Cabinet of Ministers of Ukraine or heads of local state administration of higher level.*

From BYT's suggestions to article 119 of the Constitution of Ukraine it followed that the local state administrations had to change their status. From now on they became representative bodies of the Cabinet of Ministers of Ukraine on respective territory. They took it upon themselves to control the implementation of Constitution and laws of Ukraine, acts of the Cabinet of Ministers of Ukraine. They also had to coordinate the local activity of territorial subdivisions of ministries.

If BYT's suggestions had been realized, Ukraine would have become a republic ruled by a tyrant. Taking into account that the constitutions did not limit the Premier's tenure, Ukraine could find itself under premier's unlimited dictatorship. As is known, in Great Britain M. Thatcher premiership lasted for about two decades. It is hard to tell how long the premiership could last in Ukraine. Ideally the BYT's model of executive power could limit the premier's tenure by two successive convocations of the parliament. However, about the project it passed it by in silence. The said model was even more dictatorial, than the traditional presidential republic.

Taking into account that the majority of presidents in western democracies are reelected only once, one can surmise that the BYT's project puts Ukraine at risk of restoration of authoritarianism in the form of parliamentary republic. Pretending to renovate the Constitution the BYT tended to tighten its grip on centralized power. The latter was an erroneous step unacceptable for a European state. Consequently, the political hazard of Y. Tymoshenko could become not only a means of fight against L. Kuchma-like authoritarianism.

The project of BYT envisaged a new approach to the range of duties of public prosecutor's office and justice regulations. For example, it suggested creating the *State judicial administration* with its head

appointed by Verkhovna Rada of Ukraine. This body could set up courts and go about other administrative functions. Besides, the article 122 stipulated that *the inquest, pre-trial investigation with a right to bring the case before court, referral it to the court and appearance for the public prosecution should be carried out by the office of public prosecutor, Ministry of Internal Affairs of Ukraine, State Tax Administration of Ukraine, State Customs Service of Ukraine, Security Service of Ukraine, Main Controlling and Auditing Administration, Ministry of Finances of Ukraine and standing investigator of Verkhovna Rada of Ukraine.*

By its status the office of public prosecutor had to *appear for public prosecution; speak for the state in court in cases stipulated by law; supervise the enforcement of the judgment in criminal cases; conduct pre-trial investigation.* The Higher Board of Justice had to be dismantled and replaced with the system of *qualification-and-disciplinary commissions*; the duties of oblast qualification-and-disciplinary commissions had to cover local courts and territorial election committees, and the duties of interregional commissions had to cover appeal courts and district electoral committees. The duties of the Higher Qualification-and-Disciplinary Commission had to cover the judges of Supreme and Constitutional Courts of Ukraine and members of the Central Election Committee.

According to BYT, the duties of the said commissions should include: *qualifying evaluation of judges; bringing to book of judges and members of election committees; discharge of judges; making a motion to the Central Election Committee about appointment of members of election committees.* According to the protocol of BYT's constitutional amendments, every qualification-and-disciplinary commission's composition had to be formed by drawing lots. It was a no-go suggestion, though. The initial screening of nominees, list of outside participants, place and time of drawing lots remained undetermined.

As for the territorial management of Ukraine and constitutional status of Autonomous Republic of Crimea, the suggestions of BYT boiled down to as follows. *The Chairperson of the Council of Ministers of Autonomous Republic of Crimea had to be appointed and discharged by Verkhovna Rada of Autonomous Republic of Crimea by agreement with the Prime Minister of Ukraine.* It was suggested that on the grounds of non-compliance of normative legal acts of Verkhovna Rada of Autonomous Republic of Crimea with the Constitution of Ukraine and laws of Ukraine *the Prime Minister of Ukraine can invalidate these acts and refer them to the Constitutional Court of Ukraine to determine their constitutionality.*

The local self-government bodies were expected to resort to proportional representation elections with open lists. It had to be a two-round event: *only two first-round winning parties were admitted to the second round; if a party became an absolute first-round winner, the elections were announced a one-round event; the leading body of the party determined the priority of nominees; the party could revise the priority of nominees during seven days after approval of the results of elections on the basis of criteria set by the leading body of the party; by decision of the leading body of the party the people's deputy could be deprived of representative mandate.*

According to BYT, local self-government elections did not differ from election of Verkhovna Rada of Ukraine. As far as no new local parties were to emerge in Ukraine, the local self-government bodies standing apart from the state, according to BYT, were subject to top-to-bottom party discipline. So, the difference between the state administration and self-government became unimportant.

It is known that interests of the state may not coincide with the interests of local communities. Meanwhile the BYT tended to revive the soviet system of representation of people. Maybe, the leaders of BYT were experts at the theories of liberalism; however, in practice they gave preference to the simplified and non-liberal political model. Less disapproval was caused by BYT's idea of renewal of rada executive committees as executive branches of local self-government. This step failed to improve the pessimistic image of their constitutional project, though.

NEW PRIORITIES IN MAKING PARLIAMENTARY COALITION

The new priorities of making parliamentary coalition became a distinctive trait of constitutional process in Ukraine. This is a result of the Decision of Constitutional Court of Ukraine on April 8, 2010 admitting the possibility of individual membership in a coalition of deputy factions of

Verkhovna Rada of Ukraine. The decision of the Constitutional Court was complex and triggered mixed public reaction. The Court was in a fix answering two questions: 1) how do the stipulations of the Constitution and Parliamentary Regulation correlate and what are the political consequences? 2) is it constitutional for the people's deputies of Ukraine staying outside the coalition-forming factions to join the parliamentary coalition?

The first answer could not be unambiguous, as there were no precedents. We can but several points to make. The most important points include: (i) that there exist parliamentary regulations in all parliaments of the world and (ii) they are obligatory. Commonly, in constitutional democracies, the main rules, which relate to parliamentary procedure, proceed from respective basic laws. The regulations cannot change the procedural principles set by the act of a higher legal validity.

Hence there was a conspicuous blanket⁷ norm of the 9th part of article 83 of the Constitution of Ukraine, which made the Regulations not to develop or specify corresponding constitutional stipulations, but... to *establish principles* of "forming, organization of activity and disbanding of coalitions of deputy factions in the Verkhovna Rada of Ukraine". It allowed a legislator to use the Regulations of Verkhovna Rada and define something more important, than only elementary rewording of Constitution. Such was the peculiarity of normative regulation in Ukraine.

The practice of such acts as regulations is more or less similar in Spain, USA, Russia, Germany, and Japan. In other developed countries there may be no such separate document as regulation, but then the rules of parliamentary procedure function as legal convention or written rules set by parliament at various times and under different circumstances (Great Britain). Each country finds its own way to correlate parliamentary regulations with constitution. For example, there is a strict constitutional control of regulations in France, where draft regulations of chambers (as well as amendments to them) are to be referred to the Constitutional Council to confirm their compliance with the Constitution of France. In other states (Germany, Austria, Gabon, Kenya, Malta) the compliance of regulations with the basic law is resolved by Constitutional or Supreme Court.

Therefore, the regulations are a normative act adequacy of which to the constitution is checked with special procedure. However, the correlation of Regulations and Constitution in Ukraine is complicated by certain circumstances. For example, the surprisingly rapid, by Ukrainian realities, formation of M. Azarov's government may be considered as formal violation of the norms of Constitution and returning to common sense. In fact, in 2004 the Ukrainian constitutional legislation was at variance with the requirements of organic normativeness as a result of impermissible voting of constitutional amendments in one package with the ordinary law. In 2004 the political reform was conducted with violation of lawmaking logic that later led to system confusions in the body of Basic Law. Anyway, beginning from December 8, 2004 the Constitution of Ukraine contained two discordant legal trends. The first one (supported by the decision of Constitutional Court of Ukraine on April 8, 2010) consists in absolutizing of the free mandate of people's deputy of Ukraine; the second trend is an attempt to bring parliamentary existence under corporate (party, faction, in the long run coalition) discipline.

Therefore the Constitution of Ukraine featured arguments in favor of two competitive legal positions. Thence the Constitutional Court of Ukraine had primarily to minimize the consequences of normative opposition. To perform its mission the Constitutional Court had to determine what legal trend is more organic. In fact, the law must stand above human passions and emotions, if it embodies human mind. However, in young democracies, which Ukraine belongs to, the law often embodies different political pursuits.

For example, article 5, first part of the article 38, first part of the article 79, second part of the article 80 of the Basic Law of Ukraine reflected the logic of weakly structured Verkhovna Rada of Ukraine. Such approach granted free mandate for the people's deputies of Ukraine — freedom of choice of parliamentary conduct. But if it was a free mandate, no faction or coalition discipline could be considered an absolute. Therefore the parliamentary coalition could exist only for creation of national government. The moment the Cabinet of Ministers was formed, the prolongation

⁷ Applying to all areas or situations.

of coalition became unnecessary. Otherwise the fate of government and domestic political stability could directly depend on the stand of a few deputies.

Moreover, both individual and corporate membership in coalition did not induce the people's deputies to vote "pro" or "contra" on any motion. It was expedient only as a method of nomination of Prime Minister and members of government of Ukraine. It was a major issue, because political ideologies and party discipline are still in the making in Ukraine. In real life they look like artifacts and phantoms.

Therefore the actual (through admittance of individual coalition membership) returning of Ukraine to the model of forming of the Cabinet with a simple majority vote looked like returning of Ukrainian constitutionalism to the common sense. Since the political system of Ukraine was organically simple, the introduction of complex legal rules for operability assurance was premature and harmful. This circumstance *de facto* justified the Decision of Constitutional Court of Ukraine on April 8, 2010, which acknowledged the legitimacy of coalition on the basis of combination of faction and individual membership.

The permission to form coalition by means of admission of individual deputies meant permission to support Prime Minister and members of the cabinet on the basis of personal liking and trust. Strictly speaking, the people's deputies had such opportunity from the very beginning. Simply corporatism and party hypertrophied discipline competed in Ukrainian law with free deputy mandate, because the only ideologically competitive domestic paradigms include somewhat subdued socialism and underdeveloped capitalism.

In particular, the accentuated (part 2 of article 80 of the Constitution) freedom of parliamentary conduct, prohibition of imperative mandate for the people's deputy were display of west political liberalism. While the excessive, taking into account the state of political system of Ukraine, pretensions to party and faction discipline (point 6 of part 2, part 6 of the article 81) embodied remains of soviet democratic centralism.

Such "constitutional dualism" led to adoption of the Law of Ukraine "On the Regulations of Verkhovna Rada of Ukraine" on March 9, 2010. Already the title "Regulations of Verkhovna Rada of Ukraine" pointed not to legal validity, but to functional purpose of this normative act. However, the adoption failed to fully satisfy the requirements of point 21 of the first part of article 92 of the Constitution of Ukraine: "Only the laws of Ukraine determine: <...> organization and procedures of the Verkhovna Rada of Ukraine, status of people's deputies of Ukraine."

The Constitutional Court of Ukraine had already acknowledged the "Regulations" as the decree of Verkhovna Rada of Ukraine unconstitutional, because, according to Constitution, it should have been a full-fledged law. Did the "Regulations" become such law after March 9, 2010? Maybe no; because a law of Ukraine affirming other normative act does not turn it into a part of a law. For example, the Constitution of Autonomous Republic of Crimea is the constitution of autonomy, and not the law of Ukraine, and the international agreements ratified by Verkhovna Rada (in the form of law) are not the laws of Ukraine. Such acts have a specific level of stability, legal validity and so on. Adoption of the Constitution of Autonomous Republic of Crimea by the law of Ukraine does not require the constitutional majority vote of Verkhovna Rada of Ukraine, but legally ratified international agreements remain juridically higher than the laws of Ukraine. Such sources of law are not also subject to other domestic rules of legislative process. Their emendation requires participation of special subjects and another procedure.

All of it shows that at the level of current legislation the flaws in the Basic Law of Ukraine can be eliminated only partly. Point 15 of article 85 of the Basic Law of Ukraine changed in 2004 ascribed the "adoption of Regulations of Verkhovna Rada of Ukraine" to the authority of Verkhovna Rada of Ukraine and point 21 of the first part of article 92 asserted that regulations should be a law; therefore the simple *approval* of "Regulations" by law this collision can be tackled only partly.

The answer to the second question arises from the analysis of article 81 of the Constitution of Ukraine; e. g., part sixth of article 81 of the Constitution of Ukraine maintains that the non-membership of people's deputy of Ukraine elected from a political party (electoral bloc of political parties) to the complement of faction of this political party (electoral bloc of political parties) or

deputy's withdrawal from composition of such faction results in the pre-term stopping of credentials of the people's deputy, *ideologically* conflicts with articles 5, 38, 69, 79, 80 of the Basic Law of Ukraine, which stipulates no "disciplinary" mediation of parties, blocs, factions or coalition in relationships of citizens with their elected representatives.

According to the spirit and the letter of the Basic Law, the mandate of the elected people's deputy of Ukraine is not subject to political verification after the elections. The political selection and control of nominees to people's deputies of Ukraine should be carried out only at the stage of electoral listing. Afterwards the fate of people's deputies should not depend on party's stand. However, relations among people's deputies, parties and people were deformed by amended articles 81 and 83 of the Basic Law in 2004. On the basis of these amendments the Ukrainian parties were entitled to early stop the empowerment of people's deputies for their activity admitted under free mandate (part 2 of article 80 of the Constitution of Ukraine).

On the whole, strengthening of party discipline in the parliament is only a trend in modern constitutional legislation. If the "British" model shuts out free expression of will of the deputies about fundamental political issues, the "American" model of people's representation allows the parliamentarians to be relatively free in their political choice. However, even with strict party discipline the parliamentarians in the west are not subject to deprivation of mandates for dissident voting, political declarations or actions. If people cannot recall the deputy, then parties have even less grounds to this purpose. Therefore the norm of point 6 of part 2 of article 81 of the Constitution of Ukraine on possibility of termination of deputy's authority by decision of the party (bloc) was unjustly hard and inconsistent with the general spirit of Basic Law. On the one part, constitutional norms made the people's deputies *individually free*, on the other, they thrust upon them corporate loyalty. All of it was really unfortunate not only because the organic parliamentary existence should be discursive. It is more important that the strict faction discipline in Ukraine combined with its immature political system.

Usually the parliamentary republics use high political culture of parties as a pre-condition of their existence. Ukrainian parties do not have such culture. Their number testifies to excessive ambition and obstinacy of Ukrainian political elite. Main versions of political ideologies (conservatism, liberalism, moderate nationalism) remain unformed in Ukraine. These flaws may be eliminated only by gradual evolution, and parliamentary republic in Ukraine remains practically problematic.

One cannot ignore that historically almost never Ukrainian parliamentarism was successful. Activity of Central Rada, "collegiate dictatorship" of Directory and later decisions of Workmen's Congress were marked with frank abuse of political rhetoric, eclecticism and populism. Although the Central Rada adhered to democratic procedures and its leader M. Hrushevskyi did not give himself up to authoritarianism, the Ukrainian parliamentarism suffered a disaster. From the times of B. Khmelnytskyi till the Hetmanate of P. Skoropadsky, Ukraine had effective democracy on the basis of strong centralized power. Moreover, the ethnocultural division of Ukraine into "east" and "west" constantly reproduces the pendulum effect at parliamentary and governmental levels. Moderate fluctuation of priorities in the parliament is rather normal, but in Ukraine it always threatened to turn into fluctuation of state *strategies*.

The decision making in presidential republics is dynamism, while in parliamentary republics it is *slowed-down*, which should be accounted for in Ukraine, where political parties and factions remain excessively "self-sufficient". Therefore Ukrainian parliamentarism risked to be chronically stagnant in its response to challenges of time. No wonder that the Constitutional Court took these aspects into account in its Decision. It had to make a difficult choice, but a considerable percentage of the progress of Ukraine depended on it.

From the legal point of view (article 83 of the Basic Law), the subjects of forming of parliamentary coalition in Ukraine were deputy factions. As for individual deputies, they could express the solidarity with the founders of coalition by free ballot (part 2 of article 80 of the Constitution). On the other hand, this very ballot made them potential participants of *any* constituent procedure.

Considering that the people's deputies of Ukraine represent all nation and have no imperative mandate; that they are elected by people not to coalition, but to Verkhovna Rada of Ukraine; that

the electoral rolls may include both party members and nonpartisans; that after taking the oath the people's deputy has a right to free vote on any issue; that *the only* function of coalition is to form the government of Ukraine, the issue of joining a coalition by individual deputies is tackled positively almost automatically. Therefore there gradually emerged the principle: *the coalition should be formed by corporate subjects — parliamentary factions, but it may include individual deputies as well.*

Simply speaking, the permission for individual deputies to join the coalition was but permission to support the nomination of Prime Minister and members of the cabinet by personal voting. The deputies had and have this right from the moment of taking the oath. The form of deputy's activity consists of verbal and textual argumentation, pro and con voting on *any* issue. And not a single faction can imperatively influence its (argumentation) use.

Moreover, the deputy's "classic" joining the coalition through intermediary of faction does not automatically make him to vote for a choice made by coalition. Even as a member of faction, which is a part of coalition, the deputy preserves the right not to vote for the candidate running for Premiership. For that very reason *every* parliamentarian should have the right to enter a coalition and help to form the cabinet. Otherwise the formation of government can become unfeasible or dependent upon corporate agreement only of "influential" elected representatives. The latter is illogical, because by Constitution every people's deputy in relation to people of Ukraine has equal rights with other people's deputies.

In any case, the degree of development of Ukrainian political system in 2010 pushed the national constitutional model to relatively simple representation of people. It became a sufficient argument to legalize individual membership in coalition employing the Regulations of Verkhovna Rada of Ukraine. Especially as the Constitution of Ukraine, as stated above, presumed that the Regulations *determined the principles* of activity of coalition of parliamentary factions. Certainly, in future it would be expedient to turn the Regulations into a classic law. The strict corporate model of forming the cabinet would better be recognized as threatening for the political development of Ukraine.

ABROGATION OF POLITICAL REFORM

The final word about Ukrainian constitutional crisis of 2004–2010 rested with the Decision of Constitutional Court of Ukraine which considered the constitutional presentation of 252 people's deputies of Ukraine about the constitutionality of the Law of Ukraine "On amendments to the Constitution of Ukraine" from December 8, 2004, № 2222 (the case about adhering to the procedure of amending the Constitution of Ukraine) from September 30, 2010.

No sooner the above decision was published on the site of Constitutional Court of Ukraine on October 1, 2010, than the free public began to comment its political and legal properties, while public officers "dependent" public started adjusting normatively-legal acts in accordance with Constitution of Ukraine of June 28, 1996 in the version prior to emendations made on December 8, 2004.

Did the Constitutional Court of Ukraine exceed its authority? Maybe not, because the control over the procedure of amending of the Basic Law of Ukraine is its routine duty, like control over merits of drafts of constitutional norms. One can declare legal acts unconstitutional if there are "violations of procedure of their consideration, adoption or implementation stipulated by the Constitution of Ukraine" (article 15 of the Law of Ukraine "On the Constitutional Court of Ukraine"). It is known that the most powerful guarantee of correctness, compliance of legal norms with the requirements of the Constitution of Ukraine is the flawless procedure of their adoption and taking effect. According to the most popular definitions, the real democracy brings about *undetermined* results conditional on *determined* procedure. It is an axiom of political and constitutional science and practice.

The proper procedure is such procedure that provides for sufficient time and necessary conditions for intellectual analysis and balanced estimation by all authorized initiators of bills. Moreover, the *constitutional* procedure goes far beyond simple recipes for high quality legal products. Violation of proper procedure in Constitutional law can misrepresent the will of people. The violation of con-

stitutional procedure of emendation of the Basic Law of Ukraine means ignoring of both imperative and non-mandatory norms of section XIII of the Basic Law which can be amended by Verkhovna Rada of Ukraine only in the case of confirmation of such attempt by national referendum. Juridically it means that the procedural aspects of constitutional lawmaking have the same maximum degree of legal protection as the determination of bases of constitutional system of Ukraine. Simply speaking, to change the procedure of making amendments to the Constitution of Ukraine, it is necessary to get approval of novels at the national referendum (article 156 of the Constitution of Ukraine). Whether the constitutional procedure of making amendments to the Basic Law of Ukraine was violated in December 2004 is but a rhetorical question, because all interested parties know that it was violated⁸. The court made reference to two qualitatively different procedural violations, though in fact there were many more. First, grammatically and stylistically amended draft constitutional provisions were not transferred for examination to the Constitutional Court. The critics of judicial decision on September 30, 2010 can say that amendments unverified by the Constitutional Court of Ukraine were editorial and not of principle. Maybe, but even if the parliament will allow replacing only one legal notion by its synonym, as a result the norm will change, because there are no absolute synonyms. Besides, everyone knows the power of syntax and grammar, and that once you get your feet wet...

Second, the amendments were adopted in package with the bill norms of ordinary level. Third (which was dropped from the Decision of the Constitutional Court), the amendments were submitted under conditions of *actual state of emergency*. At the time Ukraine was seized with political and personal strives, the authority of the President was radically undermined, and nobody cared to listen to him as a source of power. The throng had just quit blockading public buildings and transport; tumultuous crowds continued rallying on Khreshchatyk, the main street of Kyiv. Obviously, such *modus vivendi* looked unfavorable for amending the basic law of any country. The experts may remember how the classic decision of the Supreme Court of the USA in the Scottsboro Trial (1932) overturned convictions, because, in particular, “the trial from the beginning and to the end took place in a tense, hostile and excited atmosphere” of the city the townsfolk of which “were extremely hostile [to the prisoner at the bar]”⁹.

Thus, not by chance the second part of article 157 of the Basic Law reads: “The Constitution of Ukraine cannot be changed in the conditions of martial law or emergency state.” Although the emergency state was not officially declared in Ukraine, everybody knows that President L. Kuchma, isolated in his suburban residence, was unable to do it. The political crisis went too far, preventive legal mechanisms failed; therefore it was too late to declare the state of emergency. There happened the Orange (typologically - velvet) revolution in Ukraine, a veritable democratic uprising, which Speaker of Verkhovna Rada V. Lytvyn called a possible prologue to the Civil War. Besides the parliamentary power in December 2004 continued being afraid of masses trying to storm the main building of Verkhovna Rada. On the New Year Eve mobs swarmed on Ukrainian squares demanding restoration of truth and justice.

Also nobody knows for sure, what means the quoted prohibition of article 157 of the Basic Law: does it mean the *actual* state of emergency (as any revolution), or only the one declared by the President and supported by Verkhovna Rada of Ukraine. If the latter is correct, then declara-

⁸ See in more details: Колісник В. Процесуально-процедурні аспекти проведення конституційної реформи // Конституційна реформа: експертний аналіз. — Харків: Фоліо, 2004. — С. 63–72; Футей Б. Коментар з приводу спроб внесення змін до Конституції України // Конституційна реформа: експертний аналіз. — Харків: Фоліо, 2004. — С. 42–45; Речицький В. Меморандум Харківської правозахисної групи з приводу загрози політичної реформи в Україні // Крyтка, № 9(95) September, 2005. — С. 3–4; Речицький В., Захаров Є., Рапп І., Северин О. Відкритий лист Харківської правозахисної групи з приводу загрози політичної реформи // Крyтка, № 9(95) September, 2005. — С. 3; Речицький В., Захаров Є. Відповідь на лист В. Чемериса з приводу загрози політичної реформи в Україні // Prava Liudyny, № 26(390) September 16–30, 2005. — С. 4; Речицький В. Меморандум Харківської правозахисної групи з приводу загрози політичної реформи в Україні (open letter enclosure HYRG of 27.09.05) // Lvivska gazeta, № 176 (742) September 30, 2005, etc.

⁹ See: Громадянські права. Рішення Верховного Суду США. XX століття. — К.: Вид-во “Оптиміа”, 2005. — С. 93–94.

tion of emergency state by a tyrant could easily frustrate adoption or emendation of any basic law. Thus, the hypothetically narrow interpretation of article 157 (the state of emergency is the exceptional consequence of the Presidential Decree) is not self-evident. Not by chance such passionate critic of the Decision of Constitutional Court on September 30, 2010 as Y. Tymoshenko called in December 2004 the voting of Nasha Ukrayina deputies in favor of political reform the treason of revolutionary cause. The absence of V. Yushchenko's pro vote fixed by electronics she explained by her personal influence on Victor Andriyovich.

Juridically still more unacceptable was the "package" voting for constitutional changes and amendments to election law. In its Decision on September 30, 2010 the Constitutional Court with reservedly noted: "The simultaneous adoption of independent legal acts, the matter of which, procedure of consideration and adoption stipulated by articles 91 and 155 of the Constitution of Ukraine, are different, which testifies to violation of the second part of article 19 by Verkhovna Rada of ...". In fact, at the time the package voting led not simply to juridical violations, but to logically and juridically impermissible reversal in normative regulation, when the part of norms of lower (ordinary) level (changes in the Law "On elections of the President of Ukraine") determined the part of norms of higher (constitutional) level, which at the time determined governance in Ukraine.

It is worthwhile to underline that from the legal point of view the package voting looked not only and not so much *simultaneous* (position of the Constitutional Court), as *summary*. Usually the package combines different bills which are voted together *covering the bulk of bills*. If the first bill from the package had envisaged quintupling of the salary of elected representatives and second one the change of constitutional rule, nobody would have doubted the success of political reform. To condone such approach means thinking that the end justifies the means. But morally justified is the opposite: low means cannot lead to noble intentions.

In his commentary in "Kyiv Post" (01.10.10) Secretary of Venice Commission Thomas Markert said: "The Venice Commission did not consider Constitution 2004 undemocratic," and that "it was a surprise that Constitution effective for six years (and used by the Constitutional Court) was acknowledged invalid." However in this case the Constitutional Court of Ukraine failed to show that it considered or had considered the *matter* of Law № 2222 of December 8, 2004 "undemocratic" or liable to criticism. In addition, Th. Markert does not take into account the fact that the Constitutional Court of Ukraine, unlike Anglo-Saxon courts, is not authorized to officially interpret the Basic Law in all those cases, when it looks expedient. Maybe it is a paradox, but the Constitutional Court of Ukraine can have the lowest opinion of the constitutional norm, but it must fulfill it until there is a corresponding subject of constitutional presentation, which will in a juridically consistent way cast doubt on it.

It is worth underlining that although the Venice Commission did not consider the change in Constitution 2004 of Ukraine "undemocratic", it in no way justified or welcomed these changes. So, in the general "Conclusion about three bills on amendments to the Constitution of Ukraine" on December 13, 2003 the Venice Commission had to state: "The Commission acknowledges and welcomes the effort of Ukraine to reform management and bring it closer to European standards of democracy. It seems that exact solutions in different bills fall short of the goal and introduced amendments to the Constitution are a *step backwards* (my italics — V. R.)."¹⁰ So, it seems that from the point of view of the Venice Commission the abrogation of 2004 political reform might be considered a step of Ukraine in the right direction.

In the Internet and on Ukrainian TV channels the discussion took place whether after abrogation of constitutional changes the early elections of the President and Verkhovna Rada of Ukraine should be held, because people elected these bodies with different, than those foreseen by 1996 Constitution, scope of authority. The possible answer may be as follows. People elect concrete persons to the office of deputy or president, but under normal circumstances they do not determine their authority in this quality. The determination of competence of the Verkhovna Rada authority of the

¹⁰ Quoted after: Венеціанська комісія: Висновок щодо трьох проектів законів про внесення змін до Конституції України // Конституційна реформа: експертний аналіз. — Харків: Фоліо, 2004. — С. 41.

President of Ukraine is the traditional prerogative of the Basic Law which stands higher than current people's will or desire. The sovereign nation can eventually change the constitution, but until it is effective, people must subordinate to it, like the state machine and the state as a whole. According to Baron d'Holbach, the Constitution *is a bridle for leaders and people*, i. e. it is a superior regulator in relation to society on the whole. Unfortunately, in Ukraine not all lawyers and politicians understand that an organic constitution is a limiter of both representative and direct power of people.

On the other hand, in the case of sudden change of competence of state structures their reelection may be an optimal crisis control method preventing conflicts. Moreover, as Y. Barabash says, "sooner or later, but the opposition among higher institutions of power under mixed government can be felt; and the reason of it is not so much in imperfection of constitutional formulations, <...> as the attempt to realize their political programs and plans by top brass." Such opposition becomes more stubborn, when constitutional status of higher public institutions change as a result of reform. The author maintains that "it is worth reelecting all representative bodies which are modified due to changing constitutional model of governance."¹¹

In Ukraine such reelections could take place only on condition of voluntary resignation of the President and dissolution of Verkhovna Rada. The statutory Constitution and laws of Ukraine contain no such imperative, which was stated by Speaker V. Lytvyn on October 1, 2010. Therefore the way out might be as follows: under the circumstances the re-election of parliament and President of Ukraine is possible, but not obligatory. Knowing domestic realities, it is difficult to believe that the Ukrainian electorate, except for 2–5% of activists, is well-informed about the transformations of constitutional status of parliament and Ukrainian country's leader.

As for the opinion expressed in the media that after the Decision of the Constitutional Court there is no legitimate power in Ukraine, it is but an overstatement. The abrogation of political reforms took effect from the moment of reading out of the court's judgment, which has no retroaction. That is everybody holds his office, if this job is still there. The authority of certain staffers and public bodies changes, but it does not influence their democratic justification and legitimacy. People use elections to carry their candidates before Basic Law which is *the highest legal product of the same people*. Partly that is why in Ukraine, as well as in the most developed economies, they do not acknowledge an imperative mandate. In fact, there exists legalization of current political power, but there is also ascending (initial) legalization of abstract power of constitutions. Simply speaking, people give its consent in advance to determine the competence of public bodies and authority of the president or other high ranking officials. In Ukrainian case it took place on the day (night) of adoption of the Constitution of Ukraine on June 28, 1996.

All of it means that connection among people's will and competence of the President and parliament of Ukraine continued to be carried out not at tactical (elections), but at strategic (passing of the Basic Law) levels. That is election of concrete people to the job does not directly influence and should not influence their authority. Usually the change of authority should not affect concrete political fates, because in this case we have to deal with different channels of political will of people. Such channels are autonomous and do not intercross. Certainly, in this case it is worth taking into account political expediency. On the other hand, not all "flaws" of constitutional regulation are indicative of legal negligence. Silence of the basic law may result from accumulation of political experience which simply does not come in view at once.

Did abrogation of political reform trigger totalitarian trends in Ukraine according to Y. Tymoshenko? No doubt, the opposition must safeguard freedom and democracy in the society and must warn of any threats. However it seems that the Decision of the Constitutional Court of Ukraine on September 30, 2010 not so much provoked totalitarianism, as irritated the opponents of the power. What unsuccessfully and inconsistently V. Yushchenko aimed to do was carried out by political force of his basic opponent.

¹¹ See: Барабаш Ю. Державно-правові конфлікти в теорії та практиці конституційного права. — Харків: Право, 2008. — С. 31, 33; Барабаш Ю. Дострокові вибори як засіб врегулювання державно-правових конфліктів // *Pravo Ukrayiny*, № 11, 2007. — Р. 126-130.

On the whole, if we shuffle out of the instances of personal opposition, we can see that all elected authorities in independent Ukraine *de facto* followed the model which was nearer to Constitution 1996 than to the core idea of Ukrainian political reform. By decision on 30.09.10, the Constitutional Court as much as brought formal Constitution of Ukraine nearer to its more organic, adequate state. Actually, for 20 years now, the Ukrainian policy has been lacking not so refined parliamentarianism, as elementary morality, decent level of general education and political culture. Explaining as simply as possible the ABC of constitutionalism, the 1996 model of Basic Law is much better than 2004 model.

As Ukrainian democracy still remains relatively naive and simple, the main threat consists in populism, weakness of political culture and narrowness of suggestions on political market. Therefore it is important to know whether President V. Yanukovych will rest on his laurels. If so, the revival of Constitution 1996 is but palliative, because freedom-loving and democratic Ukraine deserves much better Basic Law; so, the Constitutional process in Ukraine should go on¹². The drama of political rivalry between Yanukovych and Tymoshenko can overwhelm existing contrast. One way or another, but the essence of political confrontation in 2010 is not so much in distribution of powers, as in the question of whether the Constitution of Ukraine in principle can get rid of empty rhetoric and infantilism, whether it is ready to become a guarantor of freedom of civil society, or will it stimulate creativity and at the same time limit prerogatives of bureaucratic power.

The representatives of legal community, concerning the Decision on 30.09.10, put a question, whether the Constitutional Court had a right to initiate proceeding in matters of political reform after its refusal in 2008 to analyze the matter of Law of Ukraine “On amendments to the Constitution of Ukraine” on December 8, 2004, which implemented this reform.

The possible answer is as follows: the constitutional (supreme) courts of various countries used to adjudicate radically changing their previous legal position. For example, the U.S. Supreme Court awarded juridical decisions on civil rights in the 20th century and repeatedly canceled its own decisions on this issue in the 19th century. The latter contained segregative approaches in defining legal status of certain categories of the people of the United States. That is the Supreme Court at different times understood (and interpreted) the same norms of federal law in different ways. Simply they understood equality in the 19th century more narrowly than in the 20th. There is also a broad constitutional practice in Turkey, South Africa, India, Pakistan, Bangladesh etc.¹³

In addition, the Ukrainian situation was and is substantially different from the version outlined by media as a national problem. The Constitutional Court of Ukraine has no rights to doubt the material norms of Basic Law in force, because juridically it is positioned not above, but under the Constitution of Ukraine, a part of which became in 2004, after presumption, a political reform. However in its Decision on 30.09.10 the Constitutional Court did not express its attitude toward the *matter* of the Law of Ukraine № 2222 as such. Its conclusion touches only the method of *adding* changes (exceptions, additions) to the body of Basic Law. Both virtually, and juridically the Court recognized the fallaciousness of *legalization*, but not the quality of material used to make legal implant.

It is also true that the Constitutional Court during six years based its decisions on presumption of effective political reform. However, the Constitutional Court is doomed to doubt and deny only then, when it is required by *external* subjects in a legally irreproachable form. But if any subject of constitutional presentation stipulated by article 41 of the Law “On Constitutional Court of Ukraine” timely charged the Constitutional Court to *officially interpret* Section XIII of the Basic Law of Ukraine and explain whether this section admits voting in package with an ordinary law for amendments to the national Constitution, the political reform would have crashed earlier. Once and again the Ukrainian human rights activists tried to rivet deputies’ attention to this aspect of the problem, but each time they failed due to the lack of will or politicking of factions.

¹² There is a gross hypocrisy in current constitution in Ukraine, if we compare the contents of the first part of the art. 3 of the Constitution of Ukraine (“The human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value.”) and deaths of children from poor families who cannot get money at last from Ukrainian state budget needed to treat them overseas.

¹³ See: Druzenko H. CCU on its way to institutional suicide // Zerkalo nedeli, № 41, November 6, 2010. — P. 6.

Judging from the response of Ukrainian media, the next open question was whether the Constitutional Court had a right, taking into account its authority, to decide to revive the Constitution 1996. It seems that in this case we deal with the ill-posed problem, because the Constitutional Court did not decide to revive the 1996 Constitution, but *declared the method of its renewal void*. Speaking metaphorically, the Court stated the fiasco of attacker, and not the death and happy resurrection of the victim. As the attacker (parliament) had lost in this case, the Constitution remained safe and sound and — automatically — operative. In this case it did not matter that the duel lasted six years. If introduction of constitutional novels in the context of political reform on December 8, 2008 had been carried out in one parliamentary voting and simultaneously with abrogation of a number of norms of the “old” (1996) Constitution of Ukraine, then in a similar way by one decision and simultaneously the initial constitutional text was restored. As an attempt of emendation of the Constitution of Ukraine was acknowledged unconstitutional, the old norms automatically continued functioning.

As for the terms in office and dates of regular elections of the people’s deputies of Ukraine and President of Ukraine according to operative Basic Law, they should be determined by grammatical (dates) and teleological (terms) interpretation of the norms of Basic Law. It means that the President, parliament and Constitutional Court of Ukraine should consider invalid the legal approach to the situation, which was reflected in the Decision of Constitutional Court on presentation of 53 and 47 people’s deputies of Ukraine about official interpretation of the third part of art. 103 of the Constitution of Ukraine (the case of the presidency) of December 25, 2003.

On the whole, establishment of the time-limit of staying in office of top officials mostly means that extended terms in office are undesirable or dangerous for the country. As a rule, the determination of time-limit of the presidency is about the threat of corruption, tribalism and other negative consequences of unbound political ambition. Speaking about the terms of authority of the parliament one should also take into account the arguments of political “fashion”: cyclic change of moods and likings of electorate. As it follows from the grammatical and teleological interpretation of the norms of Constitution of Ukraine, the President of Ukraine should be reelected to his post on the last Sunday of October of the fifth year of *presidency* (that is four months earlier than by the old article 103 of the Basic Law). The Verkhovna Rada of Ukraine had to be reelected on the last Sunday of March of the fourth year of actual term of office. It means that next (regular) parliamentary elections should take place on March 27, 2011. The analysis of the first part of article 77 and fifth part of article 103 of the Constitution of Ukraine shows that the extension of the term of office of people’s deputies and President of Ukraine is impermissible.

At the time M. Savenko, the Constitutional Court Judge expressed his own opinion on the decision of the Constitutional Court of Ukraine in the case about constitutional presentation of 53 and 47 people’s deputies of Ukraine about official interpretation of the third part of article 103 of the Constitution of Ukraine (about the terms of presidency) and said that the Constitution of Ukraine is “designed to preserve democratic political regime in Ukraine, limitation of possibility of establishment of authoritarian regime. <...> Unfortunately, the Constitutional Court of Ukraine not only failed to use teleological interpretation and, accordingly, did not take into account the purpose of the norm about official interpretation of which [it was] the petition asked, but blocked this purpose as well <...>.”¹⁴

It is worth readdressing now of the warning of the honest judge to the situation with possible interpretation of the first and fifth part of article 103, first part of article 76, first part of article 77 of the Constitution of Ukraine determining the authority and terms of office and date of elections of the President and Verkhovna Rada of Ukraine. In practice the constitutional court of the civilized country may and must correct its own faulty decisions and errors. The Constitutional Court of Ukraine has just defended the inviolability of domestic Basic Law. Now it would be only logical to expect the next step: minimization of terms of office of people’s deputies and leader of Ukrainian state in accordance with the letter and the spirit of constitutional rules.

¹⁴ See: Конституція України з офіційними тлумаченнями Конституційного Суду України. — Харків: Вид-во “Ксилон”, 2008. — С. 273.

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I. THE RIGHT TO LIFE¹

1. PROTECTION OF LIFE OF PEOPLE UNDER CONTROL OF THE STATE

The state is responsible for the life of people under its control, for example, imprisoned or detained on remand, conscripts of armed forces, placed at state hospitals (especially those where people are undergoing compulsory treatment), etc.

Numerous violations of the right to life in places of deprivation of liberty or temporary detention (temporary holding facilities, or ITT; pre-trial remand centers or SIZO, penal institutions, etc) remains significant problem. Appalling conditions, and medical treatment being often unavailable or inadequate, lead to people dying. A flagrant example of non-rendering adequate medical assistance is the case of Tomaz Kardava:

On October 10, 2008 Tomaz Kardava arrived at Kyiv SIZO. At the moment of his placement to SIZO he was diagnosed with closed craniocerebral injury: brain contusion with nucleus formation in the right frontal lobe, tenth rib fracture on the right side, viscera contusion, kidney contusion, rectum hematoma, chronic hemorrhoids in remission, chronic persistent hepatitis type C”.

While in custody, Kardava frequently complained on his condition and asked for medical assistance. After medical consultations he was diagnosed with “ischemic heart disease: atherosclerotic cardiosclerosis and sclerosis, hypertension 2nd level, in crisis, inadequate blood supply 0–1 level, discirculatory encephalopathy, consequences of old closed craniocerebral injury, cervical osteochondrosis, medium–scale myopia, chronic hepatitis in acute condition”.

On April 1, 2010 Kardava after examination was diagnosed with “mixed liver cyrrhosis, active phase, progressing condition, hepatic cellular insufficiency, portal hypertension, hypersplenism phenomenon, chronic pyelonephritis, chronic cholecystitis”.

During all that time Kardava was not provided with adequate medical assistance. His health condition had become worse, he suffered and experienced pain. During last court sessions he could not seat or stand, he was laying on the floor. He and his lawyer appealed to Shevchenkivsky District Court to release him from custody or to send him to a medical institution where he would be given appropriate medical assistance. Appeals were overruled by the court.

On March 31, 2010 Kardava’s lawyer addressed the European Court with an appeal to apply the Rule 39 and to send Kardava to any Kyiv hospital where he would be able to receive urgent and adequate medical assistance. On the same day, European Court applied the Rule 39, indicating the necessity to check whether Kardava required respective medical assistance and to send him to a medical institution.

On April 1, 2010 Kardava was sent to Kyiv Emergency Assistance Hospital. On April 2, the doctor prescribed medications to Kardava for 3–4 days. Relatives of the patient purchased the medications, including the injections. Neverthe–

¹ Prepared by Mykhailo Tarakhkalo, attorney for Kharkiv Human Rights Protection Group.

less, when Kardava's relatives and his lawyer attended him in the hospital, they found out that the medications from the pack were not used; from April 2 to April 7 he was not under the doctor's supervision, because the doctor had been absent and the position of doctor on duty was absent in the department for arrestees. All that time Kardava was held in the ward in insanitary conditions together with other patients.

On April 7, 2010 Kardava died.

The procedure of institution of criminal procedures against persons involved in Kardava's beating is still in process. An application to open a criminal file against SIZO employees had been filed.

Also the attention should be paid to the case of Huseyn Ashahanov who died in inter-regional hospital for convicted at Sofiivska correction facility № 45.

Huseyn Ashahanov, born in 1972, was serving his sentence in Orihiv correction facility № 88. According to his cellmates he was in good condition, rarely complained on health problems, attempted to live a healthy way of life, he did not smoke, did physical exercises on a daily basis.

According to his cellmates and friends whom he was in connection, in September 2009 Ashahanov applied to medical division complaining on feeling sick. He had been made two injections of an unknown medicine. After that Ashahanov started to feel permanently sick, he lost relish for food, after eating he often vomited. His temperature constantly was on a level 37–37,5 oC. Ashahanov for several times applied to the medical division with complaints, insisted on examination and treatment. The examination of Ashahanov was not made, the treatment was not assigned.

On November 3, 2009 the condition of Ashahanov according to his cellmates became much worse. He could not stand up from the bed due to weakness, suffered nausea and vomit, he felt constant shivery, his temperature went up to 40 degrees and upper. He did not go for a walk because of his poor health condition. In two months he, according to his cellmates lost about 20 kilograms of weight. In time when he was able to stand up from the bed he addressed the medical division. He was given one-time pills (analgene or benadryl) that lowered body temperature for a very short time. Several times he was taken to medical division, each time for a period no longer than 5 days. There was neither constant treatment nor even any examination. At times when Ashahanov could not get up from the bed and call medical assistant for help, he was not provided medical assistance at all, because guards did not respond to his complaints just releasing him from daily checks, allowing him not to get up from the bed.

On January 19, 2010 Ashahanov was taken to the interregional prison hospital at Dnipropetrovsk SIZO with the diagnosis: "HIV-infection with a full-blown immunosuppression. Clinic stage IV". There he remained to January 22, 2010.

Only on February 13, 2010 he was transferred to the interregional hospital for the convicted at Sofiivska correction facility № 45, where he died on March 26, 2010.

During the autopsy it was established that he almost completely lacked hypodermic adipose tissue, that meant an utter exhaustion of the organism".

In 2010 cases of people's death in police under undefined circumstances became more often.²

A flagrant example is the case of Igor Indylo, who died in the district police station of Shevchenkivskyy District in Kyiv on May 19, 2010. According to TSN news service information the Verkhovna Rada Ombudsman Nina Karpachova called the case a murder.³

According to the act of forensic medical-hystolytic examination № 927 dated May 20, 2010:

² Police with people: four deaths and one in a hospital/ <http://helsinki.org.ua/index.php?id=1276772125>; After communication with the police a man hanged himself. Ministry of Internal Affairs claims there were no tortures <http://helsinki.org.ua/index.php?id=1282121533>;

³ Karpachova called students death in the police station a murder. <http://tsn.ua/ukrayina/karpachova-smert-studenta-u-kiyivskomu-viddilku-militsiyi-ce-vbivstvo.html>

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"Death of Indylo I.I., born in 1990 occurred as a result of closed craniocerebral injury accompanied with a fracture of calvarium bones and bones of skull base, hemorrhage under the arachnoid membrane of the medullary substance with a development of compression, tumefaction and brain swelling".

One more case dealing with death in police is the case of Dmytro Yaschuk, who was found hanged in Sviatoshyno district police station of Kyiv. In this case, relatives were not allowed for a long time to examine the body and to carry out alternative forensic medical examination.⁴

In total according to mass media reports in 2010 compared to 2009 the amount of persons who died in the MIA institutions increased gradually. Thus in 2009 21 lethal cases were registered in MIA facilities and to the beginning of October 2010 already 41 deaths were registered⁵.

It is necessary to mention the situation with the right to life observance in the Armed Forces.

In practice, the amount of crimes related to the violation of rules of the relations between servicemen remained on the level of 2008 (121 in 2009 against 118 in 2008)⁶.

2. MEASURES CARRIED OUT BY THE STATE TO PROTECT LIFE

Situation with life protection of people by the police during mass public activities raise great concern. In some cases, policemen did not interfere, even when they were witnessing a threat to human life.

The striking example are the events on June 2, 2010 in Gorky park in the city of Kharkiv, when police officers present on site failed to stop cutting the trees in spite of direct threat to human life, as a result the tree cut fell on the top of the tree, where a protestant was sitting⁷.

Unfortunately, this is not a random case. According to the mass media⁸, on September 25, 2010 in the city of Kharkiv fans of local football club in presence of policemen threw stones against the bus with the players of rival team, but the police did not attempt to stop the attack, observing everything from the distance.

There is still high mortality rate of the population including children mortality.

The experts connect the problem mentioned to the lack of medical institutions financing and non sufficient medical personnel formation, stressing the need for reform in this area⁹.

Rather often mass media communicate about medical negligence¹⁰. An example of such an error is the case of Mrs. P.

⁴ In Kyiv in the district police station 25 year old men hanged himself (<http://ntn.ua/ru/news/society/2010/06/16/3965>)

⁵ Human rights activists: the amount of deaths of the detained by the police has doubled. <http://www.unian.net/rus/news/news-410784.html> To the end of December the amount of lethal cases in the MIA institutions, information of those had become public, reached the amount of 50.

⁶ INFORMATION / On the condition of legalism in the state for 2009 (according to the article 2, Law of Ukraine "On Prosecutor's Office" (http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=36585)).

⁷ Armed detachments of the police are sent to disperse peaceful manifestation in Kharkiv <http://rus.newsru.ua/ukraine/02jun2010/kharkiv.html>).

⁸ Police is interested in the attack on buses of Shakhtar football club in Kharkiv (<http://unian.net/rus/news/news-397790.html>); in Kharkiv fans buses of Shakhtar fans are damaged. Law enforcement behaved in a strange way. (<http://donetsk.proua.com/news/2010/09/27/093011.html>).

⁹ The condition of the healthcare in Ukraine requires immediate improvement. If in the nearest future there is no state attention paid to the healthcare, than bad consequences will happen. (<http://www.radioera.com.ua/eranews/?idArticle=16904>); Ukrainian healthcare. Is there a prospect to see a light in the end of tunnel? (<http://www.privatmed.in.ua/viewtopic.php?p=1965&sid=2e1430303aed2e466ae1c1dce7d83eda>)

¹⁰ «Dostors killed her with their negligence» <http://www.molbuk.com/vnomer/kriminal/30083-likari-vbili-yiyi-svoyejju-nedbalistju.html>

On March 28, 2009 the ambulance took Mrs. P to the communal healthcare establishment “State maternity hospital № 2” (further MPB № 2) because of premature amniotic fluid discharge. Mrs. P. was examined on the access point by the doctor who orally communicated to Mrs. P her diagnosis: erroneous fetus position, fetus leg falling out, premature amniotic fluid discharge. Non correct fetus position provided the background for cesarean section. Medical workers of MPB № 2 informed Mrs. P about the treatment plan that provided operation “cesarean section” and started preparing for the operation. Nevertheless, the chief physician on the phone issued an oral disposition to change the operation plan, to cancel operation preparation and to stipulate labor with medications — under non correct fetus position after amniotic fluid discharge, having violated acting orders of the Ministry of Healthcare on assistance in such cases. Because of such changes Mrs. P. had a baby with birth injuries: left shoulder fracture in the midshaft of bone, perinatal hypoxic–ischemic injury to central nervous system.

3. THE STATE’S DUTY TO ENSURE AN EFFECTIVE INVESTIGATION INTO THE TAKING OF A LIFE

The state’s duty to protect right for life provides that in case when a human life had been taken, an official investigation must take place. Such an investigation must be done immediately, by an independent and impartial authority and should carry out all reasonable steps to secure evidences related to certain incident, etc.

Nevertheless not always the investigation is carried out properly, especially in cases when the suspected are the representatives of state institutions.

According to the prosecutor’s office statistics more than 165,5 thousand of crimes remain undetected, or almost every third out of crimes committed in 2009. General amount of crimes undetected taking into consideration crimes of previous years consist of 2032637 including 1148639 grave crimes and especially grave crimes, 6913 intended homicides and attempts and more than 17 thousand intended grievous bodily injuries.¹¹

The Ministry of Internal Affairs provides the following statistics concerning the crimes registered and detected:

Crimes causing death of victim in 2009¹²

		Crimes registered			Percentage solved %	
		2008	2009	dynamics, %	2008	2009
Particular types of crime	Grave and especially grave	119678	138756	5,9	67,1	61,0
	Murder (or attempted murder)	2707	2478	–8,5	93,1	93,3
	Intentional grave bodily injury causing death of the victim	1633	1118	–31,5	94,2	93,6

¹¹ INFORMATION /On the condition of legalism in the state for 2009 (according to the article 2, law of Ukraine “On Prosecutor’s Office”) http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=36585

¹² Condition and structure of crime in Ukraine (2008–2009) <http://mvs.gov.ua/mvs/control/main/uk/publish/article/control/main/uk/publish/article/233004>

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Crimes causing death of the victim in first half year of 2010¹³

		Crimes registered			Percentage solved	
		Last year	Current year	Dynamics, %	Last year	Current year
Particular types of crimes	Grave and especially grave	59064	82536	39,7	74,9	69,4
	Murder (and attempted murder)	1317	1188	-9,8	93,5	96,4
	Intentional grave bodily injury causing death of the victim	584	460	-21,2	95,0	96,7

One should note that the number of registered crimes gives only the statistics for criminal investigations actually initiated. However, it is not unusual for investigations to not be initiated, especially in equivocal cases or where the investigators have a particular interest.

Thus, on February 18, 2010 General Prosecutor's Office of Ukraine opened a criminal file based upon the fact of abuse of duties by officials of Vovchansky District Prosecutor's Office and of Vovchansky District MIA of Ukraine Division in Kharkiv Region under section 3 of article 364 of the Criminal Code of Ukraine. The resolution opening the criminal file stated:

"...Officials of the Vovchansky District Prosecutor's Office and Vovchansky District Station of the Main Division of the Ministry of Internal Affairs of Ukraine in the Region of Kharkiv who participated in the venue inspection in order to hide the crime committed — intentional murder of an unknown man, being officials and abusing the duties cut off the head of the indicated dead body where traces of violent death had been found and hid the head in one of water bodies of Vovchansk city".

Inspections carried out by prosecutors indicate to the negative tendency of crimes concealment from the account by police officials in 2009, including grave and especially grave crimes by no registering them or by means of illegal rejection to open criminal files.

Prosecutors found out and registered more than 18 thousand of crimes hidden from the account, more than 17 thousand of them together with simultaneous cancellations of illegal resolutions to reject opening criminal files. According to the investigation results already more than 5 thousand (5093) open criminal files are sent to the court, so persons who had committed crime were established and the rights of victims were renewed.¹⁴

Apart it should be mentioned that according to the national legislation without formal act of opening criminal file it is impossible to carry out comprehensive investigation.

The only act allowing opening criminal investigation is a resolution to open criminal file (part 1, article 98 of the Criminal Procedural Code of Ukraine), creating legal basis for further legal procedure. According to the legislation of Ukraine only after opening the criminal file it is possible to carry out investigative and other procedural actions.

Interrogations, searches, seizures, expertise and other investigative actions prior resolution on opening the criminal file are not provided by the law. Before opening the criminal file in exceptional cases in urgent matters it is allowed the site examination (part 2, article 190 Criminal Procedural Code of Ukraine), arresting the correspondence and taking the information out of communication channels in order to prevent a crime (part 3, article 187 Criminal Procedural Code of Ukraine).

¹³ Condition and structure of crime in Ukraine (2010 — I half year) <http://mvs.gov.ua/mvs/control/main/uk/publish/article/control/main/uk/publish/article/233004>

¹⁴ INFORMATION /On the condition of legalism in the state for 2009 (according to the article 2, law of Ukraine "On Prosecutor's Office") http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=36585

That is why there is a common situation when the investigation body rejects to open a criminal file in order not to carry out the investigation. Especially often rejections to open criminal file happen in cases of alleged taking life by law enforcement officials, deaths in hospitals, deaths because of traffic accidents, deaths in institutions of confinement etc.

Later the rejections mentioned may be overruled by the courts, but more often it does not influence the effectiveness of the investigation because on the initial phase the evidences had not been taken.

The procedure of crime victim's access to the case-file in case of the rejection to open a criminal file is extremely complicated. The investigation body almost always rejects to such people an opportunity to inspect the case-file and the only way for them to do it is to appeal the resolution on rejection to open a file in the court and to inspect the papers already there.

Also there is a problem to acknowledge procedural status of the victim in opened criminal cases. A person is acknowledged as a victim only by a special investigator's resolution.

The investigation of criminal cases already started is carried out very often in a slow and low quality manner.¹⁵ According to the information of prosecutor's office mostly operative and investigative actions are made slowly on a low professional level, at its fulfillment considerable law infringements take place. Often criminal files are opened not on time, primary investigative actions are performed in a low-quality way. It became a common practice to adopt unlawful decisions on stoppage of pre-trial investigation and closing the cases.¹⁶

Special attention is required to the issue of deaths investigation in institutions of confinement and also due to application lethal force by policemen and other officials. In these cases mostly the initial investigation is made by the body involved (administration of the institution of confinement where a person had died or the investigation body of the MIA, State Security Service, etc., official of those applied lethal force), which gathers evidence of guilt or innocence of its officials and only after that the case-files are passed to the prosecutor's office.

In fact there is a situation when the prosecutor's office takes a decision on starting the criminal case or rejection to open it exclusively based upon the evidence gathered by the body involved, that does not correspond to the requirement of independence.

In addition, there is a problem of ineffective investigation of deaths in traffic accidents. In such a way, in December, 2010 near the Regional Direction of Internal Affairs in the city of Mykolaiv relatives of those who perished in traffic accidents tried to make a rally blaming the investigation bodies of inactivity, notably that investigation of their relative's deaths lasted for years without being passed to the court¹⁷.

In 2009–2010 European Court issued three decisions concerning violation of Article 2 of the Convention on Human Rights, stating the ineffective investigation of death cases.

So in the judgment on the case *Dudnyk v. Ukraine* (10 December 2009, № 17985/04) the European Court established violation of the Article 2 of the Convention in its procedural limb:

On May 30, 2000 unknown men caused injuries that led to death son of the applicant in the corridor of the residence hall of Cherkasy Technological University. On June 07, 2000 the criminal file was opened. The Court declared that the investigation was still pending because the personality of the criminal had not been established. The Government did not provide the Court with the information concerning investigative actions carried out for the case indicated. Based upon materials available the Court could not make a conclusion whether the measures made by national bodies on the case had been comprehensive and exhaustive. Besides national bodies cancelled for several times the decision on

¹⁵ *Gongadze v. Ukraine*, № 34056/02 (Sect. 2), ECHR 2005-XI — (8.11.05); *Muravskaya v. Ukraine*, № 249/03 (Sect. 5) (Eng) — (13.11.08).

¹⁶ INFORMATION /On the condition of legalism in the state for 2009 (according to the article 2, law of Ukraine "On Prosecutor's Office") http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=36585

¹⁷ How cops dispersed mothers rally in Mykolaiv <http://www.obozrevatel.com/news/2010/12/2/407147.htm> / in Mykolaiv the police dispersed protest rally near regional direction of internal affairs <http://1tv.com.ua/ru/news/2010/12/01/2717>.

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stoppage of the investigation indicating what investigative actions had to be made. Nevertheless, instructions indicated were not always carried out. Besides, the national bodies acknowledged for themselves that the measures taken had not been comprehensive and exhaustive.

In *Myronenko v. Ukraine* judgment (18 February 2010, № 15938/02) it also was acknowledged the violation of the Article 2 of the Convention in its procedural aspect:

On July 10, 1998 son of the applicant Y. M. was found dead in his house. The investigator questioned relatives and friends of Y.M. The autopsy was made, as a result the expert established that death of Y. M. occurred because of craniocerebral injury as a result of falling.

On July 17 the investigator rejected opening the criminal file.

On October 5, 1998 the investigator obtained the information that in evening the day before Y. M. body was found he had had a party at home where Z. and K. beat him hardly.

Repeated forensic examination of Y.M. body was made and it confirmed the results of the previous one.

In March 1999 the investigation was stopped again because of lacking sufficient evidences of complicity Z and K in Y. M. death.

Further the investigation was renewed for several times because of its incompleteness and was stopped again. Several expertises were made, and it was established that Y.M. died because of impact or impacts on the head with a solid object and not from the falling.

In opinion of the Court, the effectiveness of the investigation was greatly undermined on its primary phase. At that time, comprehensive necessary expertise had not been made. Police officials who were the first to arrive at the site were questioned approximately after half a year term. In addition, the Court stressed that rejections to open criminal file were overruled several times as unsubstantiated.

In his judgment in case of *Lyubov Yefimenko v. Ukraine* (25 November 2010, № 75726/01) the Court established that Article 2 of the Convention was violated in its procedural aspect:

Son of the applicant E died in the beginning of June, 1993 because of traumas obtained at a bar. Two days after the accident, after medical examination had been made, finding out that several head traumas caused the death, a criminal file was open and the investigation started.

Later also the investigation started because of the fact of theft of jewelry articles from Mr. E. In the end of July the investigator accused two persons, D. and S in committing bodily injuries leading to death and put them on national wanted list. Because of their absence the investigation was suspended in August, 1993. S was arrested in Russian Federation at the beginning of 1997, but he was released one month later, because Ukrainian authorities did not make the extradition request timely.

In March 2000 other suspect D. was arrested in Russian Federation and extradited to Ukraine in July of the same year. He was accused in committing bodily injuries to E. after the interrogation of D who denied his guilt and affirmed that he saw E beating other person in the bar that night. But after questioning other witnesses who were in the bar the night E died police closed criminal file at the beginning of August due to lacking evidences. Mrs. Yefimenko was informed about this decision in September. In November 2000 the prosecutor revoked the decision indicated because not all the evidences were taken into consideration and also discrepancies were found in witnesses statements. During the same month the investigation concerning S was renewed again and in May 2001 he was extradited to Ukraine. After he and all the witnesses had been interrogated the investigators came to a conclusion that injuries were caused by a third person V.B. who had died earlier. In June and July of 2001 criminal cases accusing S. and D. were closed. In September 2001 the Prosecutors Office of the Autonomous Republic of Crimea (ARC) sent the case back to the

district prosecutor to carry out additional investigation based upon numerous procedural drawbacks and on the fact that the investigation dealing with robbery of Mr. E had not been made at all.

In period from 2002 to 2004 the criminal case was closed and open again for several times because the Prosecutor's Office of the ARC and the courts indicated to the drawbacks in the investigation, notably that not one time the contradictions in statements of the suspects were eliminated, that there were no confrontations between the suspects and the witnesses made and also that several witnesses were not questioned on the issue who had been in the bar in certain time. Mrs. Yefimenko complained for several times on inability of the authorities to investigate circumstances of her son's death. The investigation of the case is still in progress.

The Court established that the case was sent back to additional investigation for several times because the prosecutor's office and the courts found several drawbacks. The investigators did not question witnesses and suspects properly, that is why it was needed to make an additional interrogation with the same questions. Several witnesses who could inform concerning the events were not questioned at all because their location was unknown. But, despite this there were no serious attempts to find out their location.

While national courts determined that investigation of E's death was made superficially, no disciplinary or other measures were applied to the related persons.

The Court came to a conclusion that there was violation of Article 2 of the Convention in its procedural aspect.

4. DISAPPEARANCES

Ukraine has not signed the UN International Convention for the Protection of All Persons from Enforced Disappearance. Besides for the convention to come into power it should be ratified by one more country — UN-member¹⁸.

In this aspect, the attention should be paid on the resonant issue of 2010 concerning the disappearance of the editor of Kharkiv newspaper "The New Style". According to the information on the official website of the MIA of Ukraine:

On August 12 at 22 30 relatives of Vasyl Klymentyev, the editor in chief of the newspaper "The New Style", addressed Dzerzhynsky district police station with the declaration that the previous day he had left home and did not come back.

While carrying out a check police officials found out that on August 11 V. Klymentyev left home together with unknown man in silver color BMW car in unknown direction.

The declaration of the offended party was registered according to current legislation. Police officials fulfilled a complex of operative and investigation measures. As far as during two days since the moment of declaration the place of the wanted was not defined, on August 15, 2010 the investigation department of Dzerzhynsky district police station of Kharkiv State Direction of Main Direction of the Ministry of Internal Affairs of Ukraine in Kharkiv Region a criminal file was open in accordance with the Article 115, Penal Code of Ukraine (intended murder).

In present the complex of investigation and operative measures is being made in order to define the location of the disappeared, all possible versions of the disappearance are worked at, related both to his professional duties of the journalist and the other.

¹⁸ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en

I. THE RIGHT TO LIFE

The investigation of the criminal case is under control of the Minister of Internal Affairs A. Mohylyov.¹⁹

Another case dealing with the disappearance — is the case of Manchenko Viktor Volodymyrovych:

Manchenko V.V. together with a friend on July 19, 2010 were detained by officials of Vyshgorod District Police Station of Kyiv Region for having made the administrative infringement. After the detention Mr. Manchenko was not seen alive anymore.²⁰

5. RECOMMENDATIONS

1. To introduce effective independent mechanisms for investigating deaths, especially those caused by the actions of law enforcement officers, in particular:
 - *create a legislative obligation to open a criminal file in any case of human death to allow the investigation body without unjustified delays to register necessary evidences or to refuse at all from such a stage of criminal investigation as opening criminal file;*
 - *introduce detailed instructions including minimal list of investigative actions that should be done in each case of death allowing the investigation body initiate closing of criminal file;*
 - *carry out regular formation (retraining) of investigating bodies officials in order to improve quality of investigation actions they perform;*
 - *determine strictly in the legislation and reduce to minimal amount of the backgrounds for appeal against resolution on opening criminal file, to prohibit the courts overruling of mentioned resolutions based upon formal reasons;*
 - *create an independent body of human death investigation in institutions of confinement and deaths of people as a result of lethal force applied by the officials of government bodies.*
2. To oblige legally the investigation body to inform victims and their relatives about the course of case investigation every certain time.
3. To ensure legally the opportunity to carry out independent forensic medical examination to evaluate reasons of causing death to a person.
4. To carry out training of the police officials who are involved in public order protection during mass activities. To make responsible the policemen who refuse to stop the infringement of the law they witness.
5. To adopt the Law of Ukraine “On Patients Rights” that would provide legal guarantees of observance patients’ right to life.
6. To carry out reforms in the field of public healthcare in order to prevent increase of children and babies mortality rates.
7. Sign and ratify International Convention for the Protection of All Persons from Enforced Disappearance adopted on December 20, 2006 (Resolution of the General Assembly of the UN A/RES/61/177).

¹⁹ http://www.mvs.gov.ua/mvs/control/main/uk/publish/article/391677?search_param=%D0%BA%D0%BB%D1%96%D0%BC%D0%B5%D0%BD%D1%82%D1%8C%D1%94%D0%B2&searchForum=1&searchDocarch=1&searchPublishing=1

²⁰ Near Kyiv a man was detained by the police and disappeared/ <http://tsn.ua/ukrayina/pid-kiyevom-cholovik-potrapiv-do-miliciyi-i-bezslidno-znik.html>

II. PROTECTION FROM TORTURE AND OTHER ILL TREATMENT¹

1. AMENDING ARTICLE 127 OF THE CRIMINAL CODE OF UKRAINE

The Law of Ukraine of November 5, 2009, amended Article 127 of the Criminal Code. The amended Part 2 of this article can be seen from the comparison table:

<i>The version of the Law No 707-VI, 11.05.2009</i>	<i>The version of the Law of Ukraine No 270-VI, 15.04.2008</i>
The same actions committed recurrently or by prior conspiracy by a group of persons, or for reasons of race, national or religious intolerance , — are punishable by imprisonment for a term of five to ten years.	The same actions committed recurrently or by prior conspiracy by a group of persons, or by an official exploiting his/her position , — are punishable with imprisonment from three to seven years.

In this way the public officer as a perpetrator of a crime disappears from the text of the article and the essence and meaning of the term “torture” defined in Article 1 of the Convention against Torture fade away. Therefore the public officer, e. g. a member of militia, using his/her power, such as conveying the suspect to militia station, applying handcuffs and/or physical force, will not deserve more severe punishment than an ordinary person, a perpetrator under Article 127 of the Criminal Code of Ukraine.

Therefore, the current version of the article does not meet the requirements of Articles 1 and 4 of the UN Convention against Torture and provides no guarantees from abuse of power by official, particularly regarding torture or ignoring their application by other persons.

In the same time, the Article introduced the element “for reasons of race, national or religious intolerance”, which is a partial elaboration of the term “discrimination”, in the Part 1 of Article 127 of the CC of Ukraine in 2008.

Thus, the current version of the article provides additional grounds for possible corruption, because the difference in qualification under Part 1 (“...with a view of ... discrimination”) and under Part 2 (“for reasons of race, national or religious intolerance”) brings about the essential difference in sanctions, up to 5 or up to 10 years of imprisonment respectively.

It should be emphasized that, trying to improve national legislation on ill treatment, the legislator makes more serious mistakes that can lead to unpredictable consequences.

¹ Prepared by Andriy Kristenko, legal expert of the Kharkiv Human Rights Group, Member of the Administrative Board of the Institute for Legal Research and Strategies.

II. PROTECTION FROM TORTURE AND OTHER ILL TREATMENT

Solutions available in the Registry of courts' indicate that Article 127 applies mainly to general subjects, i. e. to a non-official (see <http://www.reyestr.court.gov.ua/Review/3556577>, <http://www.reyestr.court.gov.ua/Review/5032766>, <http://www.reyestr.court.gov.ua/Review/9863591>, <http://www.reyestr.court.gov.ua/Review/12075700>, <http://www.reyestr.court.gov.ua/Review/1516863>, <http://www.reyestr.court.gov.ua/Review/7347533>).

The Registry contains only one decision comprising the information about the case, when the Article 127 has been applied to the members of militia. On September 29, 2008 the Court of Appeal of Kherson Oblast sentenced several militia officers for inflicting, inter alia, torture under circumstances mentioned below.

On August 13, 2005, about 21:00, the district militia officer and chief of the department of district militia officers of Belozersk Police Station (Kherson Oblast) came to the house of the victim located in the Daryivtsi Village, in order to verify the involvement of the latter in the theft of property from the Cafe *Zatyshok*. Then they apprehended the victim and took him to Belozersky Police Station, where they detained him for alleged malicious non-compliance and placed in a cell for administrative detainees. The next day, at 11:40, district militia inspector brought the victim to the district militia office. Another district militia officer in the office began torturing the victim in order to obtain his confession. He hit him several times with hands and feet on the trunk and then put handcuffs on him. The inspector took something like nunchaku and hit on torso about 22 times, on upper and lower extremities, which caused severe physical pain, moral suffering and serious injuries, life-threatening at the moment, causing multiple bruises in the form of deep muscle hematomas and strangulation furrows on his hands. As a result of inflicted injuries the victim died at the hospital on August 15, 2005.

However, on April 14, 2009 the Supreme Court of Ukraine quashed the sentence, and the case of allegations about torture was referred to new trial. ([Http://www.reyestr.court.gov.ua/Review/3835898](http://www.reyestr.court.gov.ua/Review/3835898)). The Register contains no subsequent decisions on the case.

2. PREVALENCE OF TORTURING

The problem of torturing remained topical in 2009–2010. The causes of torturing remain the same, as specified in the annual reports for 2004–2008².

According to the Kharkiv Institute for Social Research from 100 to 120 thousand people suffer from torture at law enforcement agencies³. The victims of unlawful violence in the internal affairs agencies numbered from 780,000 to 790,000 people (the same index in 2004 made over 1 million people, and in 2009 — 604 thousand people⁴). This means that in 2010 every 40 seconds militia unlawfully made somebody suffer from its violence. However the public prosecutor's office does not recognize such scale of illegal use of force by law enforcers. So, first deputy prosecutor of Kharkiv Oblast Olexandr Kyryliuk briefed the audience⁵ that during 2010 the public prosecutor's offices in Kharkiv Oblast received over 230 allegations about unlawful methods used to deal with persons under investigation during inquiries, and "in 213 cases it was decided not to commence criminal proceedings. The public prosecutor's office mounted action in three cases only." According to Kyryliuk, the allegations about torture in law enforcement agencies are primarily intended to press the court and pretrial investigators feel doubt about guilt of a person under investigation. Meanwhile we believe that the public prosecutor's office for various reasons, many of which were

² Available online at: <https://www.helsinki.org.ua/index.php?r=a1b7> and <http://www.khpg.org/index.php?r=a1b6c14>

³ <http://www.urist.in.ua/archive/index.php/t-128156.html>

⁴ Моніторинг незаконного насильства в ОВС України. — Харків: Права людини, 2010. — 192 с.

⁵ <http://www.unian.net/ukr/news/news-414848.html>

stated in previous reports of 2004–2008, does not want to investigate crimes on the part of internal affairs agencies.

The notices about maltreatment by militia keep coming to NGOs. In 2009 the network of UHHRA public receptions registered 202 complaints, while for 9 months of 2010 166 complaints of various forms of maltreatment. Here are some examples.

2.1. BEATING DETAINEES AND PRISONERS

On January 12, 2009 after the arrival of transported detainees from Dnipropetrovsk investigatory isolation ward № 3 for participation in trials at law and investigative actions they were kept for several hours in cold trucks in the street, which was followed by mass beating with special tools and restraints. As a result, 18 people got injured. The oblast public prosecutor's office filed criminal charges of causing bodily injury to persons in the detention center of the Nikopol City Department of Interior Ministry⁶.

In October 2009, having exhausted available legal instruments, the prisoner Yuri Beketov's lawyers appealed to the European Court of Human Rights. On October 30, the President of the Chamber, who had been handed over the case, after preliminary consideration decided that "the authorities of Ukraine should secure the applicant's immediate transfer to a hospital or other medical facility where he will be able to get the treatment required." However, according to lawyers, even after that, Beketov was not immediately hospitalized⁷.

On November 10, 2009 the relatives of convict Vitaliy Vozniak applied to the Public reception of the Center for Legal and Political Studies "SIM" and asked for legal aid, as they had learned that during transporting under guard to the institution of confinement he had been beaten in Lutsk investigatory isolation ward. The relatives said about many multiple injuries suffered by Vitaliy, in particular, numerous bruises and fractures of fingers of both hands.

On July 1, 2010 the European Court of Human Rights held its judgment about mass beating of prisoners at Iziaslav colony № 58⁸. It acknowledged, among other things, that the applicants were brutally beaten during training of a special unit of the Department of execution of the punishment and received no medical care afterwards⁹. And on the day of publication of the decision of European Court concerning terrible events in Zamkova colony the new facts of mistreatment of prisoners became known. The same scenario, but now we are talking about the mass beating of prisoners in penal institution number 1 in Vinnytsia. According to the Vinnytsia Human Rights Group (VHRG), mistreatment of prisoners was caused by the refusal of many of them to leave their cells for going to trial¹⁰.

2.3. MALTREATMENT AND TORTURE OF DETAINEES IN MILITIA

On July 27, 2009 five officers of Chernihiv Desniansky Militia District involved in the beating of **Hryhoriy Atroshchenko** faced criminal offence charges under Art. 365 (abuse of power or official

⁶ See details on the site of Ombudsman: Torture with hunger, cold and militia beatings of prisoners of Nikopol detention center confirmed: http://www.ombudsman.Kyiv.ua/pres/releases/rel_09_01_21_1.htm

⁷ See more on the site of UHHRU: Lawyers argue about prison torture in Kyiv investigatory isolation ward: <http://www.helsinki.org.ua/index.php?id=1257503621>

⁸ See original text on the official website of the Court: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=davydov&sessionid=59634646&skin=hudoc-en>. The same decision in Russian wording: <http://hr-lawyers.org/index.php?id=1265741384>.

⁹ See in more details: <http://hr-lawyers.org/index.php?id=1265741384>

¹⁰ More details on the website of VHRG: <http://www.vpg.org.ua/2010/07/1.html>

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authority) and Art. 366 (official forgery) of the Criminal Code of Ukraine. The militia officers are accused of torturing the man to obtain confessions of stealing mobile phone¹¹.

On February 25, 2010 about 22.00, near the Pryvokzalna Square in Kyiv, a man was attacked by unknown persons. He suffered two penetrating knifing wounds: the abdominal cavity (with liver injury) and back. In less than a week of the victim's discharge from the hospital, the Zaliznychny District law enforcers decided to speed up the registered serious criminal offense exposure. They brought the man to Zaliznychny District Militia Station and began conversation with a slap in the face. In one of the rooms on the third floor of the district station they kept the man until morning explaining that they did it on the advice of the investigator. All that time the district station officers went on punching the man's head, fisted in the face, booted on his feet (one of them, having examined the fresh wounds advised not to boot in the stomach, because he would "kick the bucket"), abused, insulted and intimidated. Having illegally kept him at the militia station for 36 hrs, they let the guy to go home. The law enforcers also emphasized that this was not their last "informal meeting" . "If they (the perpetrators of the crime) do not knife you to death, we will finish you off ourselves," the militia threatened the boy goodbye¹².

There is a special case of Yakiv Strohan, who alleged that on August 2010 he had been kidnapped by the law enforcers of the Kyiv District Militia Station, Kharkiv, brutally tortured and held in an undisclosed place (unknown apartment) for several days demanding a bribe from his wife. As no investigation by the public prosecutor's office followed, Yakiv announced these facts through the media and at a hearing of the Committee of the Verkhovna Rada on December 1, 2010. After that the charge of domestic fight re-classified in charge of attempted murder and Strohan was detained. The next day he was brought to court with visible injuries and in poor state of health. Since militia officers were well aware of media attention to the story, the lack of even attempts to hide the traces of maltreatment can be regarded as a blatant demonstration of force and impunity, addressed to the actual or potential victims of torture.

More information on cases of torture and unlawful violence in 2010 can be found at the link <http://maidan.org.ua/special/pk/>

3. INVESTIGATION OF COMPLAINTS OF ILL-TREATMENT

In May 2009, the militia officers, who in December 2005 had beaten to death Kharkiv resident **Oleg Dunych**, were sentenced to 6 and 9 years. The City Prosecutor's Office, which investigated the case, indicted three officers in 2007. The circumstances of the case were covered in detail in the report 2005¹³.

In June 2010, the Kharkiv Oblast Court of Appeal recognized the former militia officer of Vovchansk regional department of Kharkiv Oblast Timofeyev guilty of abuse of authority, which was accompanied by violence and abused personal dignity of a minor — **Olexandr Skrypnyk** (Part 2 of Article 365 of the Criminal Code of Ukraine). The court fixed the minimum penalty of imprisonment for 3 years with the deprivation of the right to fill certain positions, but released the convict from serving the sentence probation period of 2 years. The Court awarded Olexandr non-pecuniary damages of USD 15 000.

However, there are only a few cases of punishment by court of militia officers guilty of illegally applying force. The investigation of the cases of torture and ill treatment by militia is generally ineffective. Increasingly, the European Court finds a violation of procedural aspect of Article 3 concerning ineffective investigations.

¹¹ See in more details: <http://www.khpg.org/index.php?do=print&id=1250086953>

¹² See in more details: <http://www.zik.com.ua/ua/news/2010/04/02/223422>

¹³ <http://khpg.org/index.php?id=1152340607>

In the case *Vergelsky v. Ukraine* (No 19312/06, March 12, 2009) at the time, when the Court acknowledged procedural violations of Article 3, the investigation of applicant's complaints of mail-treatment still was not finished.

In the case of *Drozhd v. Ukraine* (No 12174/03, July 30, 2009) the Court found that the applicant's complaints investigation was ineffective.

In the case *Lopatin & Medvedsky v. Ukraine* (№№ 2278/03 and 6222/03, May 20, 2010) the Court found that the investigation failed to fix discrepancies in versions noting that they did nothing to question all necessary witnesses.

In the case *Lotarev v. Ukraine* (№ 29447/04, April 8, 2010) the Court found that the state authorities failed to conduct an effective investigation as required by the provisions of Article 3 of the Convention.

In the case of *Olexandr Mykhailovych Zakharkin v. Ukraine* (№ 1727/04, June 24, 2010) the Court noted the failure of the investigative bodies to fulfill the court instructions to bring the investigation to its logical conclusion.

Similar violations were established for the cases of *Davydov and Others v. Ukraine* (№№ 17674/02 and 39081/02, July 1, 2010), *Lohvynenko v. Ukraine* (№ 13448/07, October 14, 2010), *Petukhov v. Ukraine* (№ 43 374 / 2002, October 21, 2010), *Kovalchuk v. Ukraine* (№ 21958/05, November 4, 2010), *Samardak v. Ukraine* (№ 43109/05, November 4, 2010).

The problems that render ineffective investigation of complaints of torture and other mail-treatment covered in the report "Human rights in Ukraine in 2004-2008" are now aggravated due to the expansion of practice of the appeal against decision to open investigation. With this tactic in mind, the officers, the possible implication of which is the subject of investigation, may at best slow the investigation for several months, and at worst to prevent it altogether.

Some of the persons, who, according to victims, were implicated in torture, go on working in law enforcement agencies and climb up the ladder. For example, one of the officers, whom the court found guilty of torturing Mr. Savin, is still working in militia. Various public prosecutors' offices kept investigating the complaint of torture of Mr. Savin for almost 10 years, and when there remained only a few months referred the case to the court, which closed the case due lapse of statutory time limit for prosecution.

These examples create an atmosphere of impunity and shows tolerant attitude of the prosecution to the methods of obtaining confessions through torture and humiliation of human dignity.

4. SOCIOLOGICAL STUDIES IN 2009¹⁴

4.1. DYNAMICS AND EXTENT OF UNLAWFUL VIOLENCE IN THE INTERNAL AFFAIRS AGENCIES

The Kharkiv Human Rights Group and the Ministry of Internal Affairs of Ukraine and the Kharkiv Institute for Social Research conducted monitoring of prevalence of illegal violence in the internal affairs agencies of Ukraine.

The results of Social Research in 2009 conducted in several oblasts of Ukraine — Kyiv, Dnipropetrovsk, Poltava, Kharkiv oblasts and Autonomous Republic of Crimea — were compared with results of similar studies in 2004.

The mass survey included population (3000 respondents by random sample), militia officers (600 respondents by quota sampling) and prisoners (200 respondents by random sample).

These surveys were complemented with qualitative methods. There were 45 interviews (with victims of violence, experts, and militia officers) and 16 focus groups (with experts, militia officers).

¹⁴ Моніторинг незаконного насильства в ОВС України. — Харків: Права людини, 2010. — 192 с.

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The data comparison shows that since 2004 there has been a decline in the number of people suffering from beatings and bodily injuries during detention of 400,000 people. However, the estimated number of such persons is still over 600,000 people a year.

What kinds of unlawful physical violence were applied to you when you were detained and brought to militia station last year?

	2004		2009	
	% of respondents	Estimated number of victims	% of respondents	Estimated number of victims
Beating and bodily injuries	2,73	1 026 616	1,6	604 433
Prolonged detention in unsuitable places	No data	No data	0,9	339 993

These data suggest the evolving shift of unlawful violence from detention to investigation stage. In a society where the militia is constantly debated, violence becomes more latent. Now the staffers of militia prefer to use unlawful violence more secretly by using psychological violence. The problem is the lack of access to a lawyer and doctor.

These studies point to the growth of persons suffered from beatings, bodily injury, the estimated number of which is about 491,000 a year. There are also a rising number of victims of torture, cruelty which is nearing 113,000 this year. The estimated annual total makes over 604,4 thousand people.

What kinds of unlawful violence had been applied to you during investigation last year?

	2004		2009	
	% of respondents	Estimated number of victims	% of respondents	Estimated number of victims
Beating, bodily injuries	0,94	355 293	1,3	491 102
Cruelty, torture using special instruments or techniques	0,25	93 498	0,3	113 331

4.1. ASSESSMENT OF RISK OF BECOMING A VICTIM OF UNLAWFUL VIOLENCE IN THE INTERNAL AFFAIRS AGENCIES

One of the most important indicators of how society treats the problem of torture and maltreatment by militia is the idea of people in Ukraine of who should be afraid of this phenomenon in the first place.

According to the survey, 63,1% of respondents believe that today nobody is safe from torture and unlawful violence by militia.

Among the prisoners, 63,9% of respondents stressed that no one is immune from becoming a victim of unlawful violence by militia.

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

№	Category	% of respondents choosing this category	Rating
1.	Only a professional criminals, recidivists	13,2	3
2.	Any perpetrator	16,9	1
3.	Homeless, drunkards, hobos	12,2	4
4.	Juveniles	4,5	8
5.	Those who provoke, offend the militia	16,8	2
6.	Suspected felony	10,8	6
7.	Any suspect	12,0	5
8.	Foreigners	1,6	9
9.	Poor	9,7	7
10.	From this no one is immune	61,6	
11.	It poses no threat to any person	2,5	

4.3. CAUSES OF ILLEGAL VIOLENCE IN THE INTERNAL AFFAIRS AGENCIES

According to the poll, the population and militia officers have contrary opinions about the causes of illegal violence.

The ordinary citizens believe that the first three causes of unlawful violence in the law enforcement agencies are as follows:

1. The impunity of militia officers who resort to illegal methods (53% of respondents);
2. Bad screening of candidates when sadists can work for militia (43% of respondents);
3. Inadequate expertise and cultural level of militia officers (38% of respondents).

Meanwhile the militia officers think that the main causes of illegal actions of their colleagues are:

1. The legislation flaws (52% of respondents)
2. Violations of rights of militia officers are violated in the first place (50% of respondents)
3. The existence of a system of indicators and reporting, which makes militia to browbeat detainees into confessions (43% of respondents).

5. PREVENTION OF TORTURE AND MAIL-TREATMENT¹⁵

5.1. KHARKIV EXPERIMENT

Within three months (from November 2009 to February 2010), with assistance of the Public Council on Human Rights under Civil Council at Kharkiv Regional Direction of MIA the Kharkiv Institute of Social Research (HISR) sponsored by the International *Renaissance* Foundation developed the eRegistration facility for the visitors of district militia station. The facility was installed at the Zhovtnevy DMS, Kharkiv.

¹⁵ See more on the website of UHHRG: How to prevent torture in militia: <http://helsinki.org.ua/index.php?id=1267794916>

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The pilot run showed the following advantages:

1. Nearly 1.5 times rise of registered DMS visitors (1384 during run time, against about 900 people during the same period last year).
2. The report generated by the e-registration facility permits to accurately monitor the frequency and timing of visits. It is a must-have for management decisions concerning working time use and work load.
3. Higher personal interest of officers who work with visitors to timely register / de-register citizens. This is due to the fact that at any point of time each employee can be controlled for timely registration of citizens, visitors.
4. The DMS visitors' e-journal keeps record of entrance/exit cards and stores a considerable database for many years making it possible to retrieve necessary infodata.
5. The DMS visitors' e-registration is a significant safeguard against torture and maltreatment in the agencies and subdivisions of the MIA of Ukraine. For the first time in the history of Ukrainian militia the citizen visiting DMS (excluding criminal procedure status) receives documentary evidence of his stay in militia, which allows him to thoroughly defend, if necessary, his/her position in the public prosecutor's office and in court.

In March 2010, following the reshuffle in the MIA, the registration terminal was laid off, although militia acknowledged the effectiveness of its use. Now, this experiment is terminated and its further spread looks unlikely.

5.2. LIQUIDATION OF THE DEPARTMENT FOR HUMAN RIGHTS MONITORING UNDER MIA

Established in 2008, the Department for Human Rights Monitoring, which the 2008 report estimated (<https://www.helsinki.org.ua/files/docs/1245860601.pdf>) as "a new stage in relations between human rights organizations and the State", in 2009 demonstrated its effectiveness in preventing maltreatment by militia. The department staffers provided for the orderly work of Mobile Human Rights Monitoring Groups in places of detention under the MIA, which substantially improved the conditions in detention centers. In 2009, mobile groups, which became the prototype and the only valid model in Ukraine of national preventive mechanism to avert torture in detention facilities, made 424 visits to prisons.

As 2010 began with an active redistribution of spheres of political influence, the militia became automatically involved in solution of many emerging conflict issues. It also placed militia in the limelight of international observers and national experts. The keen interest stirred up because of quick and controversial transformation strategy of the executive authority in the field of public relations and actual cessation of open partnership with the institutions of civil society.

The declaration of MIA's intolerance of corruption, of determined reform of militia are there along with massive violations of human rights by militiamen and resonant cases of unlawful violence and maltreatment by militia.

One of the first orders of new Interior Minister Anatoly Mohylyov disbanded the Department for Human Rights Monitoring in the MIA agencies. This led to suspension of mobile monitoring groups, dismissal of assistants for Human Rights of the MIA Minister and stopping operation of ministry's Public Councils throughout the country¹⁶.

In view of the fact that mobile groups prevented torture in detention centers and introduced new standards for treatment of detainees, the Assistants to the Minister initiated official inspection of appeals about militia's maltreatment, and Public Councils designed projects intended to prevent torture; now the public is deprived of these instruments of civilian control in combat against torture and maltreatment.

Therefore in 2010, with the advent of new leadership in the MIA, Ukraine has taken a step back in preventing torture and other forms of abuse.

¹⁶ 100 днів нового керівництва МВС. — Харків: Права людини, 2010. — 100 с. Internet address: <http://library.khpg.org/files/docs/1277206750.pdf>

5.3. LACK OF NATIONAL PREVENTIVE MECHANISM

Ukraine, which ratified the Optional Protocol to the UN Convention against torture, cruel or disrespectful treatment or punishment on July 21, 2006 without any postponement (up to three years) under Article 24 of the Protocol, during four years and more that followed failed to create national preventive mechanism.

The Ministry of Justice of Ukraine in cooperation with NGOs in 2008-2009 developed a draft law on national preventive mechanism for preventing torture. It provided for actual public participation in the visits of monitoring groups to prisons in all oblasts of Ukraine, which were coordinated by the small (6 to 8 persons) Committee against Torture, which should have consisted of experts.

However, in August 2010 the bill and two years' work of ministerial specialists and human rights experts just disappeared; instead, there appeared a new bill, which, contrary to the advice of the Subcommittee on Prevention of Torture of the UN Committee against Torture, evaded public discussion, which caused a wave of public protests in Ukraine¹⁷, bringing the bill back for reconsideration.

On September 21, 2010 the human rights organizations wrote an open letter to the Subcommittee on Prevention of Torture about neglect of UN principles and approaches in the formation of mechanisms for preventing torture in the country¹⁸.

It seems that today the new government is ready to adopt any bill on NPM just to support its reformist image. Unfortunately, for the absence of quality bill, such NPM will not be effective, will not solve the tasks set before it, and will not meet the criteria established by the Optional Protocol to the UN Convention against Torture¹⁹.

6. RECOMMENDATIONS

1. Adopt at legislative level a strategy framework for creating a system of prevention and protection from torture and ill-treatment, as well as an action plan, based on the said concept, with clearly defined directions and stages of activity;
2. Bring the elements specified of the crime of "torture" into line with Article 1 of the UN Convention against Torture, in particular, establish liability for actions which are not violent but which should be recognized as torture according to Article 1 of the Convention against Torture.
3. Institute the gathering of statistical data in courts and law enforcement agencies on crimes which contain elements of "torture" in the understanding of Article 1 of the UN Convention against Torture;
4. Make it impossible to apply amnesty and parole for people who have committed actions, which have elements of "torture" in the meaning of Article 1 of the UN Convention against Torture;
5. Promote the creation of effective mechanisms of public control over investigations into allegations of torture and ill-treatment.
6. Provide by legislative means for the activities of non-governmental experts and expert bureaux;
7. Ensure access by victims and their legal representatives to medical documents which are of importance in proving torture or ill-treatment;
8. Assign the same validity as evidence to conclusions provided by independent medical and other experts, who conduct studies at the request of the alleged victim of torture or their

¹⁷ <http://www.pravda.com.ua/columns/2010/09/8/5362521/> or <http://human-rights.unian.net/ukr/detail/189340>

¹⁸ <http://www.khpg.org/index.php?id=1285079794>

¹⁹ Also see: <http://helsinki.org.ua/index.php?id=1283949418>

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- legal representative, as that of conclusions made by experts assigned by an investigator or court;
9. Provide individuals who initiate an investigation or other legal procedure regarding allegations of torture or ill-treatment access to free legal aid should they be unable to pay for the services of a lawyer;
 10. Introduce provisions in Ukrainian legislation on the inadmissibility of any testimony of the accused (suspect) received at the pre-trial stage of the criminal investigation without a lawyer being present;
 11. Provide the appropriate guidelines to prosecutor's offices and judges for using measures to ensure the safety of individuals who have made an allegation of torture, in particular, if such an individual is held in custody, then to move him or her to another remand center;
 12. Eliminate the practice whereby judges "extend detention" of suspects held in police custody, or, at least, introduce necessary amendments in order to transfer people whose detention is extended by a judge to a pre-trial detention center, and not leave them held in police custody;
 13. Introduce into legislation the right of access and the appropriate procedure for gaining access to an independent doctor and independent expert whom the person detained may choose, especially for persons, who are held in custody;
 14. Provide clear guidelines to prosecutor's offices and judges concerning immediate consideration of claims and complaints related to investigations into torture;
 15. Put an end to the practice of deploying special anti-terrorist units and swift response groups in response to peaceful protest actions by prisoners
 16. conduct investigations into reports of mass beatings of prisoners at the level of the Prosecutor General
 17. Create a system for ensuring the safety of people making complaints about torture and ill-treatment, as well as witnesses, especially those in places of confinement
 18. Ensure in practice uncensored correspondence by prisoners with the Prosecutor, the Human Rights Ombudsperson and the European Court of Human Rights.
 19. Set out in legislation and ensure in practice the right to uncensored correspondence between prisoners and the domestic courts, the UN Human Rights Committee and other international bodies, as long as with a lawyer.
 20. Put an end to the practice of punishing prisoners for sending complaints to State bodies via illegal channels, and in each case where a complaint was delivered by illegal means conduct a check as to whether the administration are making it possible to send complaints about the actions of the administration
 21. Apply measures to create the possibility for nongovernmental organizations to visit institutions of the Department for the Execution of Sentences.
 22. Accelerate the creation of national preventive mechanisms.
 23. Bring to justice people guilty of violating the principle of re-foulement of refugees and asylum seekers.
 24. Put an end to the practice of violating the principle of confidentiality in view of the applications of refugees, and in particular stop the practice of passing confidential information to a third country.

III. THE RIGHT TO LIBERTY AND SECURITY¹

1. DEPRIVATION OF LIBERTY AT CRIMINAL PROSECUTION

According to the Supreme Court of Ukraine information, 45100 submissions to detain on remand were considered in 2009, 39100 or 86,7% out of them were allowed. 4300 appeals from the accused and their lawyers against judges' decisions to apply this preventive measure were considered; 674 such submissions, or 1,7% out of the amount of decisions by local courts were allowed. In addition, courts considered 12600 submissions on extension of period of detention; out of them 11300 or 97, 1% were allowed.

35500 persons were sentenced to imprisonment for certain term. Out of them, in result of trial, the courts detained 7700 persons and 27800 already had been in custody at a time of conviction.

The amount of persons released from custody following of trial reduced and consisted of 6100, including 3800 persons or 62,6% in connection with conviction of person to other types (non-prison) of penalty, 37 persons in connection with acquittal. In result of appeal hearings, 511 persons were released from custody, by the court of cassation — 23 persons.

150 persons were released on bail by the courts².

To date, the court statistics for 2010 is unavailable. However, the First Deputy Chair of the State Department of Ukraine for Execution of Punishment Sergiy Sydorenko stressed that today the situation with allocation of persons in custody and the convicted is extremely complicated. Statistics of last years do not provide a background for optimistic forecast concerning their decrease: in period from January 2009 to April 2010 the amount of detained persons grew to more than 8 thousand person and now it is more than 40 thousand, while there are no more than 36,4 places in pre-trial remand centers according to the area normative consisting of 2,5 square meters per one person. Such increase of the amount of detainees complicates greatly their allocation, material and medical-sanitary support.³

Growth of SIZO inhabitants has continued for two years and a half and remains fast and considerable.

While on January 1st, 2008 32110 persons were held in SIZO's (a year before — 32 619), during 2009 the amount increased to 3882 persons more (+11,4%) and for the next half a year of 2010 — 1996 persons more (+5,24%). The same growth rate preserved to the end of the year may provide more than 10% of increase a year. Total increase for two years and a half consists of +24, 6% compared to the level of January 1st, 2008.

¹ Prepared by Arkadiy Buschenko. Attorney, Head of the Board of the Ukrainian Helsinki Human Rights Union.

² <http://www.scourt.gov.ua/clients/vs.nsf/0/09F805995C5F5CA6C2257752002A196D?OpenDocument&CollapseView&RestrictToCategory=09F805995C5F5CA6C2257752002A196D&Count=500&>

³ http://www.kmu.gov.ua/punish/control/uk/publish/article?art_id=68600&cat_id=47123

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	01.01.2008	01.01.2009	01.01.2010	01.07.2010
Total amount of persons in the institutions of the Department (reference: on January 1st, 01 222 254 persons)	149 690 (-6,87)	145 946 (-2,65)	147 716 (+1,21) to 1770 persons	150 724 (+2,04%) (+3008 persons)
Amount of persons in correction facilities (colonies)	115 393	109 961	108 187	109 238 (+0,97%)
Amount of persons in SIZO Reference: on January 1st 07 32619 persons	32 110 persons	34 148 persons	38 030 persons	40 024 (+5,24%) (+24,6% until January 1,08)
Amount of persons in educational colonies	1902	1606	1499	1462
Amount of persons imprisoned for life	1463	1538	1606 persons	1643 (+2,3%) (+12,3%)

It is possible to notice certain regional peculiarities in changes of the amount of SIZO detainees.

Considerable overload of SIZO is observed in Kyiv (+1065 persons), in Donetsk region (+1651 per three SIZO), in Kharkiv (+738) and in Simferopol (+713). At the same time, the overload rate for SIZO mentioned only increased for the last half a year.

Decrease of the contained amount in 2010 occurred only in five or six SIZO — in Odesa region, where there are two SIZO (-53), in Sumy (-25), in Zaporizhzhya region where there are also two SIZO (-10) and in Lviv (-4) and Mykolayiv (-8). If in Sumy it led to decrease of overload to the rate +238 persons, the same way as in Odesa region totally for two SIZO up to +42, in Lviv, Zaporizhzhya region (SIZO of Vilnianska town) and Mykolayiv in the beginning of the year SIZO were still not full.

№	Name of the establishment	Total amount of detained for January 01.2010	Total amount of detained for July 1.2010	Places amount according to the normative	Change in a half a year	Actual SIZO occupancy +/- to normative for January 1.2010	Actual SIZO occupancy +/- to normative for July 01.2010
1.	UVP of Vinnytsia city	1278	1331	1535	+53	-257	-204
2.	SIZO of Lutsk city	337	358	405	+21	-68	-47
3.	SIZO of Dnipropetrovsk city	2993	4092	3382	+99	-389	-370
4.	SIZO of Kryvyi Rig city	1000		1080		-80	
5.	SIZO of Donetsk city	2711	5944	1970	+384	+741	+1651
6.	SIZO of Artemivsk city	2048		1630		+418	
7.	SIZO of Mariupol city	801		693		+108	
8.	UVP of Zhytomyr city	1252	1267	1959	+15	-707	-692
9.	SIZO of Uzhgorod city	338	468	662	+130	-324	-194
10.	SIZO of Zaporizhzhya city	1038	1587	953	-10	+85	-166
11.	SIZO of Vilniansk city	559		800		-241	

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12.	SIZO of Ivano-Frankivsk city	569	616	617	+47	-48	-1
13.	SIZO of Kyiv city	3637	3915	2850	+278	+787	+1 065
14.	SIZO of Kirovograd city	1074	1125	901	+51	+173	+224
15.	SIZO of Symferopil city	2109	2197	1484	+88	+625	+713
16.	SIZO of Lugansk city	1686	2453	1382	+163	+304	+403
17.	SIZO of Starobilsk city	604		668		-64	
18.	SIZO of Lviv city	1280	1276	1389	-4	-109	-113
19.	SIZO of Mykolayiv city	979	971	1199	-8	-220	-228
20.	SIZO of Odesa city	2111	2659	1913	-53	+198	+42
21.	SIZO of Izmail city	601		704		-103	
22.	SIZO of Poltava city	809	821	982	+12	-173	-161
23.	SIZO of Rivne city	434	522	599	+88	-165	-77
24.	SIZO of Sumy city	781	756	518	-25	+263	+238
25.	SIZO of Chortkiv city	238	258	406	+20	-168	-148
26.	SIZO of Kharkiv city	3192	3546	2808	+354	+384	+738
27.	SIZO of Kherson city	1264	1317	912	+53	+352	+405
28.	SIZO of Khmelnytskyi city	551	628	636	+77	-85	-8
29.	SIZO of Cherkasy city	720	755	657	+35	+63	+98
30.	SIZO of Chernigiv city	432	621	420	+56	+12	-122
31.	SIZO of N. Siverski city	133		323		-190	
32.	SIZO of Chernivtsi city	471	541	555	+70	-84	-14
TOTAL		38030	40024	36992	+1994	+1038	+3032

If it is taken to consideration that usually the elevated level of institutions occupancy (in general and the quantity of institutions in a region) is observed in the East and South of country, than the regular underfilling of SIZO in Zaporizhzhya region, Dnipropetrovsk and Mykolayiv looks rather unusual.

In total in Ukraine 17 SIZO remain underfilled and 15 SIZO are overloaded. Among the isolators that remain the most “spacious” are SIZO of Zhytomyr, Vinnytsia, Dnipropetrovsk, Mykolayiv, Vilniansk, Lviv, Poltava, Chortkiv in Ternopil region and Novgorod-Siverskiy.

To find out the reason for such a pronounced tendency requires particular analysis. It is possible to state that mostly it is a consequence of the lack of any reforms in pre-trial detention on remand.

No radical changes occurred in the regulation of arrest and detention on remand in context of criminal prosecution. The project of new Code of Criminal Procedure of Ukraine that had been approved by the National Commission for Strengthening Democracy and the Rule of Law on December 10, 2008 is still not passed to the Verkhovna Rada (Parliament) of Ukraine. Proceeding from the declarations by various officials it is impossible to find out clearly what is happening to the project.

Besides, in the judgments of European Court of Human Rights several systematic problems of national legislation and practices are traced requiring immediate resolution.

III. THE RIGHT TO LIBERTY AND SECURITY

1.1. UNFOUNDED AND UNREGISTERED DETENTION

Several times the UN Committee against Tortures (CAT) and European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) together with national human rights institutions pronounced for the problem of unregistered (informal) detention widely applied by law enforcement bodies almost in every criminal file.

The European Court considered the problem in several cases. In the case *Osipenko v. Ukraine* (№ 4634/04, 9 November 2010) it was established that the applicant was in the premises of police station for several hours before he became a suspect. The Court considered that there were no grounds for keeping him at police and the detention was unregistered. The Court perceived as non-realistic an argument of supposedly voluntary staying in the police station.

Similar infringement was established in the case of *Lopatin and Medvedskiy v. Ukraine* (№№ 2278/03 and 6222/03, 20 May 2010).

The issue of unregistered unfounded detention is also considered application against Ukraine by *Kardava* (№ 19886/09), *Koval and others* (№ 22429/05), *Beley* (№ 34199/09), *Savin* (№ 34725/08), *Omelchuk* (№ 42195/04), *Kondratyev* (№ 5203/09), *Smolik* (№ 11778/05), *Tretyakov* (№ 16698/05) communicated to the Government.

A special aspect of unfounded detention is present in the case *Şarupici against Moldova and Ukraine* (№ 37187/03), dealing with the detention of the applicant by law enforcement officials and his rendition to Moldova law enforcement officials beyond the official extradition procedure.

Another problem of unfounded detention becoming more and more topical is set up in the case *Chosta v. Ukraine* (№ 35807/05). The case deals with two episodes of detention of the applicant for several hours by company guards on suspicion of his being intoxicated by alcohol.

1.2. USE OF ADMINISTRATIVE ARREST FOR CRIMINAL PROSECUTION PURPOSES

This problem was revealed in a rather detailed manner in the reports of CAT⁴, CPT⁵. It was also indicated in previous reports of human rights organizations “Human Rights in Ukraine” in 2004–2008.

The European Court established the violation of right to liberty through misuse of administrative arrest in cases of *Doronin v. Ukraine* (№ 16505/02, 19 February 2009), *Garkavyi v. Ukraine* (№ 25978/07, 18 February 2010), and *Oleksiy Mykhaylovych Zakharkin v. Ukraine* (№ 1727 /04, 24 June 2010). In all these cases, administrative detention and/or arrest was prior to the detention under criminal procedure.

Similar issues are raised in cases given to communication to the government, in particular in case *Kvashko v. Ukraine* (№ 40939/05).

1.3. ABSENCE OF JUSTIFICATION IN THE DECISIONS ON DETENTION ON REMAND

Absence of any justification for the decisions on detention of somebody on remand is also a systemic problem in legal system of Ukraine.

In the case *Khayredinov v. Ukraine* (№ 38717/04, 14 October 2010) national courts did not provide sufficient backgrounds for detention of the applicant and did not consider possibilities to apply any other preventive measures.

Similar violations were established in cases *Feldman v. Ukraine* (№№ 76556/01 and 38779/04, 8 April 2010), *Vitruk v. Ukraine* (№ 26127/03, 16 September 2010), *Znaykin v. Ukraine* (№ 37538/05, 7 October 2010) and several others.

⁴ See for example, Report on the results of visit on October 9-21, 2005, CPT/Inf (2007) 23, §13.

⁵ See for example, Conclusions and recommendations of the Committee on the results of consideration of the Report to the Government of Ukraine on the 38th session of the Committee CAT/C/UKR/CO/5, §9.

1.4. ABSENCE OF TIME-LIMIT FOR DETENTION IN DECISION

Another problem is detention after quashing the trial court conviction. As a rule the higher court, setting aside a conviction and sending the case to additional investigation or to the new trial, at the best limits its decision to one phrase: “to preserve the prevention measure” without making any justification and even not indicating during what period of time will such a measure remain valid. Another problematic situation is when courts while extending detention during the trials do not indicate the duration of such a measure. This is the violation of right to liberty, provided by Article 5 of the Convention on Human Rights.

Such a violation was established by the European Court in several cases, particularly in cases of *Doronin v. Ukraine* (№ 16505/02, 19 February 2009), *Znaykin v. Ukraine* (№ 37538/05, 7 October 2010), *Garkavyi v. Ukraine* (№ 25978/07, 18 February 2010), *Feldman v. Ukraine* (№№ 76556/01 and 38779/04, 8 April 2010), *Gavazhuk v. Ukraine* (№ 17650/02, 18 February 2010), *Buryaga v. Ukraine* (№ 27672/03, 15 July 2010), *Vitruk v. Ukraine* (№ 26127/03, 16 September 2010).

Similar circumstances are considered in communicated cases *Oleynikova* (№ 11930/09), and *Gerashchenko* (№ 20602/05).

1.5. RETAINING IN CUSTODY BETWEEN THE ENDING OF PRE-TRIAL INVESTIGATION AND PRELIMINARY COURT HEARING

In the report “Human Rights in Ukraine — 2008” it was mentioned that in the decisions of the European Court of Human Rights in cases *Svershov v. Ukraine* (№ 35231/02, 27 November 2008), *Solovyov and Zozulya v. Ukraine* (№№ 40774/02 and 4048/03, 27 November 2008), *Yeloyev v. Ukraine* (№ 17283/02, 6 November 2008) the systematic problem in Ukrainian legislation was named, i. e. that persons, whose files are passed to the court remain retained in custody without any court decision, only based upon the fact of the file having been passed to the court.

In similar circumstances the violation of the Article 5 §1 has been established in the case of *Mykola Kucherenko v. Ukraine* (№ 16447/04, 19 February 2009), *Gavazhuk v. Ukraine* (№ 17650/02, 18 February 2010), *Vitruk v. Ukraine* (№ 26127/03, 16 September 2010).

In 2010 the problem became so much clarified in practice of the European Court, that already the case of *Rudenko v. Ukraine* (№ 5797/05, 25 November 2010) was considered by the Committee according to simplified procedure as “clone” case.

Presently cases of *Felenko against Ukraine* (№ 35188/05), *Mustafayev against Ukraine* (№ 36433/05), *Veniosov against Ukraine* (№ 30634/05), *Kravchenko against Ukraine* (№ 49122/07) are sent to communication to the Government on similar issues.

1.6. EXTENDED BRINGING TO JUDGE

The unjustified late bringing to a judge of a person detained on suspicion of having committed a crime is still a problem. The legislation provides very long term of delivery — 72 hours and law enforcement bodies attempt to use it fully, rarely delivering a person to a court earlier. Besides, officials often apply illegal unregistered detention and administrative detention as ways to extend time of delivery to a court (see chapters 1,1 and 1,2 above).

Another, even bigger problem is an urgent bringing to a judge of a person detained under court order issued during the trial of the case.

Such a problem was considered by the European Court in the case *Kornev and Karpenko v. Ukraine* (№ 17444/04, 21 October 2010). The trial court during hearing changed the prevention measure to Kornev to detention. He was arrested and brought to the court only eight days after the arrest when the court assigned next hearing of the case. European Court established violation of the Article 5 §3 of the Convention, indicating that such a term did not correspond to the requirements of “urgency”.

III. THE RIGHT TO LIBERTY AND SECURITY

1.7. UNJUSTIFIED LONG DETENTION ON REMAND

The problem of unjustified long detention on remand, absence of sufficient grounds for such a measure, ignoring any opportunity to apply other preventive measure also remain unchanged during many years. Bail practice has not become widespread in criminal legal procedures.

Therefore, it is not surprising that decisions of the European Court on the issue become standardized. In the case of *Sergey Volosyuk v. Ukraine* (№ 1291/03, 12 March 2009), where the applicant was detained for almost for five years it was established the violation of Article 5 §3 of the Convention. Similar violations were established by the Court in judgments against Ukraine in cases of *Roman Miroshnichenko* (№ 34211/04, 19 February 2009), *Shalimov* (№ 20808/02, 4 March 2010), *Feldman* (№№ 76556/01 and 38779/04, 8 April 2010), *Moskalenko* (№ 37466/04, 20 May 2010), *Vinokurov* (№ 2937/04, 15 June 2010), *Buryaga* (№ 27672/03, 15 July 2010), *Vitruk* (№ 26127/03, 16 September 2010), *Khayredinov* (№ 38717/04, 14 October 2010), *Bilyy* (№ 14475/03, 21 October 2010), *Kornev and Karpenko* (№ 17444/04, 21 October 2010), *Petukhov* (№ 43374/02, 21 October 2010), *Molodorych* (№ 2161/02, 28 October 2010), *Osipenko* (№ 4634/04, 9 November 2010).

Out of cases passed to communication on the issue it is possible to mention cases of *Klishyn* (№ 30671/04), *Korneykova* (№ 39884/05), *Todorov* (№ 16717/05), *Nechiporuk and Yonkalo* (№ 42310/04), *Gerashchenko* (№ 20602/05), *Kondratyev* (№ 5203/09), *Ustyantsev* (№ 3299/05), filed against Ukraine.

1.8. ABSENCE OF POSSIBILITY TO APPEAL AGAINST DETENTION ON REMAND

In the report “Human Rights in Ukraine — 2004” it was indicated that Ukrainian legislation did not provide such an important guarantee for persons detained in custody as a right to initiate periodically before the court a hearing on legality of detention, although this guarantee is provided by Article 5 §4 of the Convention on Human Rights and by the Article 29 of the Constitution.

Appeal to the court against detention during pre-trial investigation and the period between passing the file to the court and preliminary court hearing is still impossible. It resulted in establishment of the violation of Article 5 §4 of the Convention in cases *Sergey Volosyuk v. Ukraine* (№ 1291/03, 12 March 2009), *Mironenko and Martenko v. Ukraine* (№ 4785/02, 10 December 2009), *Feldman v. Ukraine* (№№ 76556/01 and 38779/04, 8 April 2010).

The problem of access to a court is also related to the problem of the quality of court hearing. In several cases the Court established violation of Article 5 §4 of the Convention because the courts did not justify duly their decisions. In case of *Molodorych v. Ukraine* (№ 2161/02, 28 October 2010) the Court, having established that national courts did not provide any argument justifying continuing detention, came to conclusion that the problem was not in episodic reluctance to study the legality of the measure, but there was a problem of the lack for precise and foreseeable procedure on national level.

In the case *Rudenko v. Ukraine* (№ 5797/05, 25 November 2010) the Court established that as far as the applicant was detained in custody already after passing the file to the court without any decision, thus he had no opportunity to appeal against such detention.

The same problem is under consideration in communicated case *Kardava against Ukraine* (№ 19886/09)

1.9. THE RIGHT TO COMPENSATION

In numerous mentioned decisions of the European Court concerning various violations of Article 5 §§1–4 it was also established the violation of Article 5 §5 of the Convention, in such a way it was acknowledged the absence in Ukraine of right and system of compensations for unlawful detention.

An interesting issue of right to compensation has been raised in the communicated application *Shulgin against Ukraine* (№. 29912/05). The applicant was convicted for two crimes to seven years

of imprisonment. The Supreme Court after extraordinary review changed the sentence, excluding one of the charges as unproved and aggravating element from the other charge and mitigating the total sentence to 5 years of imprisonment. An attempt of the applicant to obtain a compensation for illegal conviction in national court was unsuccessful.

2. DETENTION OF ALIENS

CPT during their visit on 2009 noted that persons detained in compliance with the legislation on aliens were not provided with basic rights for the detainees.

Right to inform relatives, right to access a lawyer, right to information concerning the grounds for detention, their status and rights including the appeal procedures available to the detained person were not provided to the full. In addition, it was indicated that in most cases, the right to translation was not provided and aliens had to sign a bunch of documents in Ukrainian language they could not understand.

Concerning the right to lawyer, CPT noted that it was provided only with sporadic assistance from the NGO's.

As to the communication with the outer world, CPT noted that such an opportunity was considerably disrupted due to a practice of cell phones confiscation from the detained and due to absence of any conditions for attending the detained by third parties.

In addition, it was indicated that the detained had no opportunity to communicate personally with diplomatic missions and consular institutions of their home countries.

3. APPLICATION OF ADMINISTRATIVE DETENTION WITH A PURPOSE OF RIGHTS AND LIBERTIES RESTRICTION

In 2010, the practice of administrative detention and conviction for peaceful protest was renewed, which practice had not been observed since 2004.

In May-June of 2010, dozens of participants of peaceful manifestation against cutting the trees on Central Gorky Park in the city of Kharkiv were detained. Some of them were convicted later for gross disobedience to the legal requirement of the police officer; arrest was applied to several persons as a form of punishment. In particular, Denys Chernega and Andriy Yevarnytskyy were convicted to 15 days of arrest (later this term was reduced by the Court of Appeal to 9 days). The circumstances indicated that in fact they were punished for the participation in peaceful rally to express protest against actions of local authorities. It provided background to "Amnesty International" to declare them as "prisoners of consciousness". At the same time, several persons detained by the police together with them were acquitted by the court.

Trials on these circumstances gave evidence that elements of the offence "gross disobedience to the lawful requirements of the police officers" were not defined clearly, providing the authorities to apply such accusations in order to impede peaceful implementation of constitutional rights of people.

Further, the police also attempted to interfere with the public views expression by the activists.

On August 30 in Kharkiv, the police detained two activists who were distributing leaflets near the exit from "University" metro station. Their explanations were taken, than they were released, the leaflets were withdrawn.

On September 2, "Berkut" police special squad soldiers detained seven activists of the civil protest movement "The Green Front" in time they were distributing in city center the leaflets containing critique addressing the Head of Kharkiv Region State Administration and acting mayor of Kharkiv. The detained were brought to the Central Division of the Police of Dzerzhynskyy District

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Police Station, but the reason for the detention was not explained. As soon as mass media representatives appeared, “Berkut” soldiers disappeared. After certain time the activists were released, the leaflets were withdrawn.

As far as the police did not manage to find justification to the detention, the representative of Public Relations Center of the Main Direction of the Ministry of Internal Affairs in Kharkiv region informed that people distributing the leaflets came to the police on their own to provide explanations, and afterwards they were released.

On October 12, 2010 from 11.30 to 12.40 in the city of Lviv a civil organization “Guards of the Law” held a picket in front of the Prosecutor’s office with a demand to investigate crimes in the field of housing and communal services with a motto “Down with a corruption in the Prosecutor’s office!”. Picket’s organizers — the head of the organization Oleksiy Verentsov and Igor Tanyachkevych provided information on peaceful gathering for two times: several months before on series of picket’s indicating its precise dates and two days before the event itself.

While at the moment of peaceful gathering on October 12th there was no court ruling on prohibition of the event, police officials demanded to stop the picket, explaining that organizers had no permission for conducting a peaceful gathering, although according to the Article 39 of the Constitution of Ukraine the organizers have to inform about the event and should not obtain permission.

On October 14th two organizers of the picket were detained by the police, taken to the court that sentenced them to three days of administrative arrest for gross disobedience to the lawful requirement of the police and violation of the order of organization of peaceful gathering (Articles 185 and 185-1 of the Code on Administrative Offences).

It confirms one more time the use of Article 185 of the Code of Ukraine on Administrative Offences as a manipulative instrument to suppress civil liberties.

4. DETENTION OF MINORS

On December 21, 2010 the European Court for Human Rights issued a ruling in case *Ichin and others v. Ukraine* (nos. 28189/04 and 28192/04).

On January 5, 2004 two children, born 1990 and 1991 were detained on suspicion of theft of candies and other foodstuffs in high school canteen. They acknowledged their guilt and gave back a part of stolen. Later the court ruled to detain boys in placement center, considering them capable to commit socially dangerous actions, evade the investigation and interfere with investigation. They remained in the placement center for 30 days.

The European Court ruled that arrest and detention two children in custody was not justified by any reason indicated in Article 5 §1 of the Convention. As far as the children could not be accounted to criminal liability, they could not be detained for the purposes of Article 5 §1(c) of the Convention. Also their detention was not justified under Article 5 §1(d) of the Convention as far as no “educational supervision” required by this paragraph was not provided during the detention.

The way of keeping the children in placement centers remains unchanged since the time when the events in the case *Ichin and others v. Ukraine* took place, remaining unjustified in a same way from the point of view of the Convention. Moreover, the Law of Ukraine № 2507-VI, dated September 9, 2010 provides amendments to the Code of Criminal Procedure, allowing detention of minors in the placement center up to 60 days “if there are reasons for it”. The law does not indicate what reasons may justify extension of this term.

But also it should be mentioned that the same Law makes amendments to the Article 7–3 of the Code of Criminal Procedure not allowing (at least in theory) detaining in placement centers the children suspected of commitment of “socially-dangerous actions”, providing up to 5 years of imprisonment. It may narrow the application of such a measure but it does not make it more legiti-

mate from the point of view of Convention, lacking legitimacy proceeding from the ruling on case *Ichin and others against Ukraine*.

The Law provides reasonable clause, that “in case when the circumstances provided by the clause disappeared, for further detention of the child in a placement center or for clarification of the circumstances indicated in part 5 of the present Article, the investigator or the court immediately solves an issue on ending of further child detention in a placement center”. However, as far as Criminal Procedural Code up to now does not provide an opportunity to appeal against detention (see chapter 1.8 above), the implementation of the clause depends totally on good will of particular investigator.

5. DETENTION OF VAGRANTS

The problem of detention based on suspicion of vagrancy was indicated by us in yearly reports starting from the year 2004. The problem remains unsolved for many years. It had been indicated in numerous reports of international organizations.

On February 9, 2009 report of UN Working Group on Arbitrary Detentions was published⁶ and the issue of this type of a detention raised concern again. The Group noted that term “vagrant” is not determined by the law and in practice is related to anyone unable to show an identification document, stopped by the police on the street”.

Along 2009-2010, certain changes in legal regulation of such detention took place.

The Law of Ukraine № 1188-VI, dated March 19, 2009 made amendments to the Article 5 of the Law of Ukraine “On the Police”. According to these amendments, such a detention may occur only by a court warrant.

Constitutional Court of Ukraine in his decision of 29 June 2010 took even more radical step and acknowledged the clause providing the police with the power to detain on suspicion of vagrancy as a non-constitutional one. The Court proceeded in particular from the fact that the clause was a rudiment of the system that had existed at times of criminal liability for vagrancy and it did not correspond to the requirement of legal certainty given by the Constitution of Ukraine and Convention on Human Rights.

6. DETENTION FOR THE PURPOSE OF EXTRADITION

After several judgments of the European Court of Human Rights⁷ there were some changes adopted to the legislation of Ukraine that could be considered as general measures to fulfil these judgments.

On May 21, 2010 Chapter 9 “Extradition of a person” is added to the Code of Criminal Procedure containing, among other, clauses on detention, on court ruling for temporary arrest, extradition arrest, certain rules of the procedure for the consideration of submission for arrest and other guarantees for a person detained in connection with the extradition inquiry.

Also Article 11 of the Law “On the Police” after making amendments on May 11, 2010 allows detention of “aliens and persons without citizenship wanted by law enforcement authorities of other countries as suspects, accused of committing a crime or as the convicted evading criminal punish-

⁶ <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.21.Add4.pdf>

⁷ *Soldatenko* (№ 2440/07, 23 October 2008), *Svetlorusov* (№ 2929/05, 12 March 2009), *Dubovik* (№№ 33210/07 and 41866/08, 15 October 2009), *Kaboulov* (№ 41015/04, 19 November 2009), *Koktysh* (№ 43707/07, 10 December 2009), *Kreydich* (№ 48495/07, 10 December 2009), *Puzan* (№ 51243/08, 18 February 2010), *Kamyshev* (№ 3990/06, 20 May 2010)

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ment — in the order and for period provided by legislation of Ukraine and international agreements of Ukraine”.

It is needed to mention that during 2004–2010 the Supreme Court of Ukraine and General Prosecutor’s Office of Ukraine attempted to regulate somehow the issue of detention and arrest for the purpose of extradition. Plenary session of the Supreme Court of Ukraine adopted a resolution № 4 dated April 25, 2003 “On some issues of legislation application regulating the order and terms of detention (arrest) of persons pending consideration of issue of their extradition”. The order of Prosecutor General of Ukraine dated May 23, 2007 № 8гН-1 approved the “Instruction on the order of consideration by the bodies of the prosecutor’s office of Ukraine the requests for extradition of offenders”

However, according to the conclusion of the European Court repeated many times in rulings concerning Ukraine this regulation lacked “quality” that attributed to the “law” in the meaning of Court case law.

Besides the fact that now the law provides automatic review of the reasons for detention pending extradition no less than once every two months, clause of the Article 463 of the Code of Criminal Procedure should be mentioned providing that “by claim of person being under extradition arrest or his/her lawyer or legal representative the judge having jurisdiction over place of person’s detention reviews the availability of the grounds for releasing a person not more often than one time a month”.

It is worth mentioning that to date this clause remains the unique provision in legislation of Ukraine implementing on national level requirements of Article 5 §4 of the Convention concerning the right of the detained to appeal against his/her detention (see for comparison chapter 1,8 above).

Although it is hard to make definite conclusions on quality of provisions under discussion, as far as short term of their action does not allow analyzing court and administrative practice of its application, however such a considerable contribution of the lawmaker to the fulfilment of European Convention of Human Rights should be welcomed.

Compliance of new legislation with the Article 5 of the Convention of Human Rights may be tested very soon in cases *Far Abolfazl Abbas Mokallal against Ukraine* (№ 19246/10), *Molochko against Ukraine* (№ 12275/10), *Dzhaksybergenov against Ukraine* (№ 12343/10) and *Dobrov against Ukraine* (№ 42409/09) communicated to the Government of Ukraine.

7. ATTEMPTS TO RENEW METHODS OF PUNITIVE PSYCHIATRY

Trade union and public activist Andriy Bondarenko had no mental diseases records. After the attempts to acknowledge him as mentally disable had started, he passed through three psychiatric examinations in order to prove his mental capacity, the last one — in October, 2010.

Among the reasons provided by Vinnytsia Region Prosecutor’s Office and Vinnytsia Region Mental Institution named after Yuschenko, demanding his placement to hospital there are “sharp awareness of his personal rights and aggressive persistent readiness to protect them inadequately to real situation (only in 2008 he filed 91 complaints to the prosecutor’s office)”.

In 2007, Prosecutor’s Office of Vinnytsia Region addressed local healthcare institutions twice to get an inquiry for forced psychiatric examination of Andriy Bondarenko. The judge denied first inquiry in July 2007 based upon the erroneous inquiry formulation by the hospital. Second inquiry was denied in August of the same year after Andriy Bondarenko went to the psychiatrist of Vinnytsia Regional Hospital and obtained a certificate that he was healthy.

In January 2009, he was detained at his house and accused of denial to show the ID. He was convicted to 10 days of administrative arrest and on the seventh day of the arrest was again taken to the court where the third inquiry to psychiatric examination was considered. The hospital declared that Andriy Bondarenko earlier addressed them for psychiatric help (although he denied it) and

presented a document authorizing the doctor to represent Andriy Bondarenko's interests on the court session. This third inquiry was overruled by the court.

In August 2010, after the fourth inquiry concerning his examination Andriy Bondarenko went to the city of Gaysyn in Vinnytsia region, where he went through psychiatric examination to prove his mental capacity. He obtained the certificate confirming his mental health. The court overruled the inquiry to forced psychiatric examination. The prosecutor's office appealed that decision and, besides opened a criminal file against Andriy Bondarenko accusing him of use of false documents during examination (later the file was closed).

The Court of Appeal cancelled the ruling of the first instance court and in spite of the availability of several medical certificates on complete mental health of Bondarenko ruled to send him for psychiatric examination to Yuschenko mental institution.

In present Bondarenko is under constant threat of detention and placement to mental institution.

The story reminds very much of application of punitive psychiatry methods widely used in soviet times for repressions against dissidents and public activists. Even formulations, provided by psychiatrists are almost word to word identical to well known psychiatric examinations of the Institute named after Serbskyy, that led to imprisonment in mental institutions of many people who dared to stand for their rights in a way "inadequate to real situation".

8. INDEPENDENT MECHANISMS OF CONTROL OVER POLICE ACTIONS

In August 2009, Ukraine provided additional information concerning fulfilment of recommendations by UN Human Rights Committee.⁸ In particular, Ukrainian government referred to the fact that for creation of independent mechanisms to file complaints on police officials' actions "in January 2008 within the MIA structure it was created the Direction for Monitoring Human Rights in the Activities of Internal Affairs Agencies. The aim of the Direction was to establish a system of institutional control over human rights protection in activities of agencies and divisions of internal affairs in compliance with international law standards.

The Direction included assistants to the Minister of Internal Affairs located in all regions of Ukraine, being completely independent from the direction of local internal affairs agencies. During 2008, the assistants to Minister consulted 2677 citizens, accepted 1827 applications of citizens concerning unlawful actions by police officials, 1233 internal inspections were initiated on the facts of possible human rights violations by police officials.

In five first months of 2009 assistants to the Minister of Internal Affairs on human rights received 2677 visitors, 1827 applications of citizens concerning unlawful actions by police officials, initiated 144 internal inspections".

In Commentaries of Ukraine on Concluding Observations of the UN Human Rights Committee⁹ it was also mentioned that "for the last years the Government of Ukraine took certain steps towards human rights encouragement in activities of internal affairs agencies including the following:

- in October 2004 a position of counsellor to the Minister of Internal Affairs on Human Rights and Gender Issues was created;
- in December 2005 a Civil Human Rights Council at Ministry of Justice was founded together with similar councils at the directions of the Ministry in the regions. Civil Councils were collegiate bodies, combining work of civil society representatives and institutions applying the law in order to find out the most acute problems connected with human rights

⁸ CCPR/C/UKR/CO/6/Add.2, 28 August 2009.

⁹ CCPR/C/UKR/CO/6/Add.1, 21 August 2008.

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- observance and work of internal affairs institutions and also in order to elaborate strategies to overcome them;
- in August 2006, in order to provide independent inspection of places of detention of the convicted and arrested persons, mobile groups to monitor observation of constitutional rights and liberties of citizens started to work; these groups represent a unique instrument of civil control over internal affairs agencies in Ukraine. It was considered that these mobile groups were the analogue to national preventing mechanisms provided by Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
 - in January 2008, the Direction on Monitoring of Human Rights in the Activities of Internal Affairs Agencies was organized. Its aim was to create the institutional monitoring system for human rights protection in the activities of internal affairs agencies according to international standards”.

In March 2010, after appointment of new Minister of Internal Affairs the apparatus of the Ministry of Internal Affairs was reorganized. The most notable consequence of the reorganization was reduction of the Direction on Monitoring of Human Rights and regional minister's assistants. Not once the public council at MIA in 2010 was gathered and mobile work groups' activity in almost all the regions was stopped.

9. RECOMMENDATIONS

1. Allow publication of CPT report according to the results of visit from September 9 to 21, 2009.
2. Intensify the adoption of the law “On Legal Aid” assuring a duty to provide free legal assistance:
 - to persons detained for violation of rules on stay of aliens and with the purpose of extradition;
 - to minors, detained by any reasons;
 - to persons who are under any procedure related to the determination of their mental health and consequences of such definition.
3. Intensify the adoption of the new Code of Criminal Procedure of Ukraine or introduce into the Code in force provisions fully implementing the requirements of Article 5 of the European Convention and preventing systematic violations established in judgments of the European Court of Human Rights. In particular:
 - a. to introduce amendments to legislation which would make detention without court warrant the exception, this being in compliance with the restrictions provided for by Article 29 §3 of the Constitution
 - b. to bring the time limit for bringing a person before the court, set down in Article 106 of the CPC, into line with Article 29 of the Constitution, taking into account the time necessary for the judicial examination and ruling;
 - c. to define the starting point for detention on suspicion of committing a crime or an administrative offence based on the actual circumstances of the case, not on the decision of a law enforcement officer;
 - d. to include in the subject matter of hearings where the question of remand in custody or release is to be decided all circumstances touching on whether detention is warranted, including the following:
 - grounds for the suspicion or charge, in connection with which the prosecution demands that the suspect (accused) be remanded in custody;
 - grounds for the period in which a person is held in custody by a law enforcement agency prior to being brought before a judge.

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- e) to establish a clear presumption in favor of a person's release and provide that the onus of providing proof of grounds for remand in custody be shifted to the prosecution;
 - f) to introduce provisions would exclude remand in custody or its extension based on purely hypothetical assumptions;
 - g) to formulate the risks in connection with which detention is allowed in such a way as to exclude remand in custody depending on the position of accused and tactics employed by the defense;
 - h) to introduce provisions that would exclude the practice of detaining a person after his/her release by a judge on the basis of "concealed" accusations;
 - i) to exclude from the legislation the institution of "extension of the detention" by the judge or at list to introduce required changes to the legislation in order to exclude the practice of taking back the person to the police body after the court ruling on detention prolongation.
 - j) to make amendments to the Part 4, Article 165-2 of the Criminal Procedural Code in order to exclude retaining in custody without control by the court for more than a period, established by Article 29 §3 of the Constitution;
 - k) to provide to persons in custody right for periodic review of grounds for their detaining in custody;
 - l) to establish strict and detailed rules of the procedure for the consideration of the issue of detention or release, in particular to provide:
 - obligatory participation of a detainee in any hearing considering an issue of his/her detention or release;
 - obligatory provision of the person deprived of liberty and his/her lawyer with the copy of submission by investigator (prosecutor) on his/her detention or prolongation of retaining in custody;
 - right of a person deprived of liberty and his/her lawyer to study the materials justifying the submission on his/her detention or extension of his/her retaining in custody;
 - m) to elaborate procedures that would contribute to bail application instead of detention;
 - n) to determine in a more precise way powers of judge concerning the detention, in particular to establish more strict criteria to determine those extraordinary cases, when the judge may apply the detention beyond his regular powers;
 - o) to reduce the final term of detention during the pre-trial investigation and establish total final term of staying in custody;
 - p) to adjust regulations on administrative detention in compliance with the requirements of the Article 29 of the Constitution;
 - q) to introduce the amendments to legislation excluding administrative detention application for the purposes of criminal prosecution, for example, providing obligatory release of the suspect of administrative offence commitment prior the trial;
 - r) to introduce the amendments to the Code of Ukraine on Administrative Offence (in particular to Article 263 of the Code) and to other legislative acts that would exclude retaining a person in custody without court decree for more than 72 hours;
4. Introduce national prevention mechanisms in compliance with the Optional Protocol to the UN Convention against Torture.

IV. RIGHT TO FAIR TRIAL¹

1. OVERVIEW

The judicial system reform implemented in May-July 2010 became the most significant event over the last years. At the same time judicial system became more politicized and judges — more dependent on politicians. The reform has been anticipated for years; at the end, however, it failed in many aspects.

Past years were marked by serious violations of the right to fair trial. The major problems in this area can be described as follows:

- Violation of reasonable time limits established for consideration of cases and mass non-execution of court decisions;
- Deviation of general courts system, types and stages in administration of justice from requirement of the Constitution;
- Incomplete reform of procedural law; criminal procedure and proceedings on administrative offence, adopted at the soviet times, their concept and provisions contradict many human rights' standards;
- Courts' overload and lack of operation transparency;
- Lack of financial and administrative independence of the judges: the judges' appointment is not a transparent process; the judges' remuneration is not defined by clear system; heads of courts perform a lot of functions, inappropriate for their status (i. e. administrative and managerial functions, cases assignments, professional growth and social benefits for the judges (vacations, awards etc.), widely exercised pressure on behalf of the authorities;
- Insufficient funding for judicial branch;
- Low professional qualifications of a large number of judges and low efficiency of the professional responsibility system;
- High corruption rate among judges.

Judiciary reform was launched as early as in 2006 by President Yushchenko and National Commission for the strengthening of democracy and rule of law, set by him. This Commission developed a draft reform concept, which was approved by the Presidential Decree № 361/2006 of May 10, 2006. Later several laws, needed for reform implementation, were prepared. Due to various political hindrances, however, these draft laws were blocked at the second hearing at Parliament.

In March 2010 President Yanukovych made public his plan of reforming the judicial system. All the earlier drafts were revoked and the Parliament repealed the majority of draft laws accepted at the first parliamentary hearing.

¹ Prepared by Ardadiy Buschchenko, attorney, Head of UHHRU Board, Volodymyr Yavorsky, UHHRU Executive Director, Gennady Tokarev, attorney, expert of the Free legal assistance offices in Ukraine.

In fact, the working group, set up under the Presidential Administration, used earlier drafts to develop a draft law “On Judicial System and Status of Judges”. The draft included about 70% of provisions, developed earlier.

The draft law “On Judicial System and Status of Judges” contained a new version of two earlier laws as well as numerous amendments to the procedural codes.

On May 31, 2010 the President submitted the draft law “On Judicial System and Status of Judges” to the Parliament.² It was adopted at the first hearing immediately, on June 3, without any public or parliamentary discussion. On July 6 the draft law, ready for the second hearing, was made public. The new version did not differ substantially from the first one. The next day, July 7, the Parliament adopted the law as a whole. Human rights groups and other NGO’s as well as individual activists (132 persons in total) approached the President asking him to veto the law in question³; the President, notwithstanding, signed the law and it came in force on July 27, 2010.

Despite most varied opinions of the reform, the majority tends to argue that, although having some positive aspects, the reform in general aggravated the situation, unbalancing the judicial system and making the judges even more dependent on politicians. A number of other amendments, introduced by the reform, can also be classified as violations of the right to fair trial.⁴

The final setting up of specialized courts (i. e. administrative, civil, criminal and commercial (former arbitration) courts as well as elimination of court martial can be regarded as achievements of the reform. The function of Supreme Court, however, remains rather unclear, as under the current procedure, no cases ever reach it. Under the circumstances each branch of specialized courts carries out its own jurisdiction, independently of each other. In fact, no efficient system aimed at harmonizing their operation, is in place. Meanwhile, the Supreme Court has no jurisdiction to influence the judicial practice of the specialized courts.

The procedure for judges’ selection and their social and material remuneration, clearly defined by the law, is another positive development, although with its own shortcomings.

In general terms, the following faults of judicial reforms can be listed:

1. The broadening of competences of the High Council of Justice in appointing, dismissing and disciplining the judges. Besides, the law stipulates that all the heads of the courts and their deputies, with the exception of the Supreme Court, are appointed to their office and dismissed by the High Council of Justice on the motion by the respective judges’ council. The High Council of Justice remains a political body, set up primarily by other bodies of authority. Besides, p. 1, article 131 of the Constitution exhaustively covers the competences of the High Council of Justice, and these competences are not there.
2. The setting up and liquidation of courts on the motion made by the Minister of Justice and the President of a High Specialized Court (article 19 of the Law), remain the presidential prerogative, in violation of p. 1, article 6 of the European Convention on Human Rights, which requires the court to be set up by the law. It means that “legal proceedings in a democratic society shall not depend on executive power decisions, but must be regulated by law, the source of which is parliament”.
3. Article 86 of the Law “On Judicial System and Status of Judges”, notwithstanding a formal clause on adversary proceedings (part 11), still retains an inquisitorial (and not adversarial) procedure for holding judges disciplinary liable. A member of the High Judicial Qualifications Commission of Ukraine or the High Council of Justice in the same time conducts inquiry in respect of a judge in question, prepares his opinion based on the inquiry, and participates in adjudicating disciplinary sanction. In other words, a member of a disciplinary body wears the hats of investigator, prosecutor and judge in regard to another judge.

² Available here: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=37806.

³ See text here: <http://helsinki.org.ua/index.php?id=1279436602>.

⁴ See, e. g. *The new law on judicial system: quick and unfair justice, administered by smart but dependent judges* <http://www.pravo.org.ua/?w=r&i=&d=861>; *Law on judicial system and status of judges: pros and cons*, Radio “Liberty” <http://www.radiosvoboda.org/content/article/2119835.html>.

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- This is a breach of both adversary and impartiality principles. Under the European standards, the disciplinary procedure shall be similar to the one, spelled out in Article 6 §1 of the European Convention on Human Rights and fully guarantee the right to defense⁵.
4. Participation in the Congress of Ukrainian Judges and the Council of the Ukrainian Judges stipulates equal representation from each court jurisdiction. As a result, the judges of common law courts are under-represented. This order of forming the most representative body of judges leads to the situation, when over 6 thousand judges of the common law courts are less represented than 2.5 thousand of the administrative, commercial and administrative courts judges taken together. The Judges' Congress has the authority to elect judges for the Supreme Judicial Qualification Commission and High Council of Justice. These bodies both have broad competences in addressing the issues of selection, career advancement and responsibility of the judges. Therefore, they must meet the requirements of an "independent body with significant representation of the judges, elected democratically by other judges"⁶.
 5. Article 80 of the Law "On Judicial System and Status of Judges" stipulates that a judge is elected to the superior court or court of a given specialization for life. This procedure, however, does not envisage competition or provide criteria, under which the judges are elected to the superior court. The provisions stipulate only that the contenders submit an application, undergo an interview at the Supreme Judicial Qualification Commission and have required term of professional service (seniority) as judges. However, under p. 4.1 of the European Charter on the Statute for Judges, p. 29, conclusion № 1 (2001) of Consultative Council of European Judges Standards concerning the Independence of the Judiciary and Irremovability of Judges, the term of professional operation must not be a leading criterion for judge's promotion; professional experience and term in office shall be taken into account only as additional basis for a judge's independence.
 6. Article 66 and 69 of the Law "On Judicial System and Status of Judges" stipulate that candidates for the judge's office must undergo a specialized 6-months training in a specialized law school of the 4th accreditation level, followed by National School for Judges training. The requirement for future judges' training in a law school of the 4th accreditation level (Institute for professional judges' upgrading in Odessa and similar department of Yaroslav the Wise National Law Academy in Kharkiv), under the Ministry of Education and Science, is at variance with recommendation p. 66, Conclusion № 10 (2007) of the Consultative Council of European Judges Standards concerning the Independence of the Judiciary and Irremovability of Judges, "Judicial council serving society". Obviously, the judges cannot receive the training, based on European standards, in the education institutions under the Ministry of education, especially as far as the accreditation goes. A special autonomous institution, controlled by the judges, should be set up to that end.
 7. The limits of action terms and procedural terms for appeal were reduced; the possibility of appeal in certain administrative offences cases was banned, thus potentially restricting the right to the court access or the right to appeal. The terms for court proceedings were also shortened, which will have an adverse effect on the quality of adjudication in complicated cases, considering the huge caseload of judges.
 8. Curtailing material and social benefits for the judges. In particular, the judge's right to resign on health reasons is revoked; the amount of severance pay for the resigned

⁵ P. 3 Principle VI Recommendation № (94) 12 "Independence, efficiency and role of the judges", p. 60 b conclusion № 1 (2001) of the Consultative Council of European Judges Standards concerning the Independence of the Judiciary and irremovability of Judges, p. 69 conclusion № 3 (2002) of the Consultative Council of European Judges principles and rules, regulating judges' behavior, in particular, ethical norms and behavior, incompatible with the office and impartiality.

⁶ P. 45 conclusion № 1 (2001) of the Consultative Council of European Judges Standards concerning the Independence of the Judiciary and irremovability of Judges.

judges is reduced; the list of offices, service in which is added to judge's seniority, is cut down; the provision, allowing the judges to use only corporate housing to improve their living standards; free medical care in public health care system is granted only to retired judges and their family members; the social security for judges is changed and a number of other material and social benefits are revoked. Under the pretext of introducing higher wages starting 2015, the current law is cutting down actual deductions for the judges.

Mass resignation of judges with highest seniority became one of the first consequences of the reform.⁷ By the end of the year their number exceeded 700, i. e. about 10% of all judges. The reasoning behind the resignations included the down cuts in wages and pensions and increased pressure on judges.

On October 15–16 the Council of Europe Venice Commission adopted a joint opinion on the Law “On Judicial System and Status of Judges”⁸. The opinion draws on positive changes in guaranteeing judges' independence in certain areas and in introducing the random assignment of cases in courts, putting State judicial administration under control of judicial power and liquidating martial-law courts.

On the other hand, commission expressed its concern regarding the increased role of High Council of Justice (as long as it's set up by political bodies) and decrease of the Supreme Court status. In general, 30 serious reprimands and recommendations on amendments to this Law counterbalance the four positive characteristics. This disproportion demonstrates that actual changes are rather of negative instead of positive nature.

The passing of the Law “On Amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal”⁹ can be also considered in the framework of judicial reform. The law stipulates that elections or all-Ukrainian referendum results, established by the Central Election Commission, as well as the appeal cases on (in)activities of the Parliament of Ukraine, President of Ukraine or High Council of Justice are within the jurisdiction of the Highest Administrative Court as a trial court with any possibility to appeal against its decision. Besides, the law grants very broad competences to the High Council of Justice in bringing disciplinary action against judges. Thus, a judge or another subject on first demand shall deliver any documents, including the copies of the documents of cases, which had been or still are under consideration, to the High Council of Justice. The competences of the Council in the matters of judges' discharge, especially, for the breach of the oath, have also been broadened. In fact, it allows for the dismissal of any disliked judge.

The Council of Europe Venice Commission was very critical with regards to this law.¹⁰ It argued that while the High Council of Justice is formed by the political bodies, its authority should decrease instead of increasing. Also it expressed its concern with politicization of the disciplinary actions against judges.

Despite active criticism voiced by many experts,¹¹ the law has been actively implemented over the year.

Refusal of Constitution Court to allow the petition on constitutionality of this law came as no surprise.¹²

⁷ See, in particular, here: “What cadres really decide”, “Dzerkalo tyzhnya”, № 36 (816) October 2-8 2010, <http://www.dt.ua/1000/1050/70505>.

⁸ Available in English: [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)026-e.asp](http://www.venice.coe.int/docs/2010/CDL-AD(2010)026-e.asp).

⁹ Available here: <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2181-17>.

¹⁰ See in English here: <http://www.venice.coe.int/docs/2010/CDL-AD%282010%29029-e.asp>. Unofficial translation: <http://www.pravda.com.ua/rus/articles/2010/10/19/5492776/>.

¹¹ See, e. g. *Serhiy Holovaty: Supreme Judicial Council is “Gestapo”* <http://helsinki.org.ua/index.php?id=1276257459>; *Expert Supreme Judicial Council became an instrument of judges' punishment* “Dzerkalo tyzhnya” <http://www.dt.ua/issue/69839/>; *Hungry Moloch*, “Dzerkalo tyzhnya” <http://www.dt.ua/1000/1050/69814/>.

¹² See Constitutional Court Resolution of October, 12, 2010, <http://www.nau.ua/druk.php?name=342478-12102010-0.txt>.

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Simultaneously with legislative changes, judges' political dependence has been increased by replacements of heads of courts and judges of high courts. The people susceptible to political pressure were appointed to the new offices.

Thus, Leonid Fesenko, former Member of Parliament from the Party of Regions, was appointed a President of the High Specialized Court for Civil and Criminal Cases. Under the law "On Judicial System and Status of Judges", the motion for the appointment of the Head of the High Specialized Court for Civil and Criminal Cases is submitted by the Council of Judges of general jurisdiction courts, while the final decision is made by the High Council of Justice. However, Fesenko himself revealed that the proposal to become the head of the Court came directly from the President of Ukraine.¹³ Fesenko's biography shows that he has been Member of Parliament for two convocations and for 10 years has headed Luhansk court of appeals. This gives grounds for prejudice, both in regard to independence and autonomy of the appointing bodies and the judge himself.

In December, Mykola Pshonka, the Prosecutor General's sibling, was appointed Fesenko's deputy.

In September 2010 Oleksandr Pasenyuk was approved as a President of the High Administrative Court. He occupied this position since 2005 and was lobbied by one of group in Presidential Administration that was in charge of developing judicial system reform.

In September Viktor Tat'kov, the former Head of Donetsk Commercial Court of Appeals, was appointed a new President of the High Commercial Court.

Four judges of the Constitutional Court were also replaced in September. Unexpectedly, the four judges sent in their resignations. They have been known for their determined stand, disagreeable to the President position in a number of cases. They were immediately replaced, thus ensuring pro-presidential majority in this court.¹⁴

Therefore, the President and ruling Party of Regions, thanks to presidential and parliamentary functions and High Council of Justice, have all the necessary levers to exert pressure on judges, thus ensuring the decisions they want. The judges' operation is monitored more closely and court hierarchy and discipline are enhanced, thus guaranteeing handling of the judges. It is also clear that increase in pressure exerted on judges and diminishing of the role of the Supreme Court as the only institution, controlled by the opposition party, were the main goals of the judicial system reform.

2. COURTS' AND JUDGES' INDEPENDENCE

As stated above, the High Council of Justice became the main instrument of political pressure on judges. This body has usurped most important functions, i. e.

- Key role in appointment and dismissal of judges;
- The right of its members to initiate disciplinary action against a judge and broad competences in demanding any documents, including the files of the cases under judge's consideration;
- Appointment of the chief justices.

At the same time this entity itself remains extremely politicized. Under the Constitution, the High Council of Justice is composed of 12 members. The Parliament of Ukraine, the President of Ukraine, Congress of Ukrainian Judges, Congress of the Ukrainian Attorneys, Congress of Higher Law Schools and Research Institutions appoint three members each, all-Ukrainian Congress of the Prosecutor's Office Employees — two members. By virtue of their office the President of the

¹³ *The sublime call*, Kommersant <http://www.kommersant.ua/doc.html?docId=1507918>; *3MI: highest specialized court on civil and criminal cases will be headed by the "regional" Leonid Fesenko*, <http://www.newsru.ua/ukraine/21sep2010/fesenko.html>.

¹⁴ See more here: Insatiable judges at Viktor Yanukovich's service. "Ukrainska Pravda". <http://www.pravda.com.ua/articles/2010/09/14/5382062/>;

Supreme Court of Ukraine, the Minister of Justice of Ukraine, and Prosecutor General of Ukraine are also members to the Council.

Therefore, in Ukraine, where the parliamentary majority and the President belong to the same political force, and this force appoints senior executives (principals of high law schools, ministers, prosecutor general etc.), only 7(or less) members of the High Council of Justice can remain independent.

Appointing the Head of the Security Service of Ukraine V. Khoroshkovsky a member of the High Council looked rather bizarre. He was dismissed from this position only in December 2010. The membership of two prosecutor's office representatives in the Council is also questionable. Taking into account that they represent prosecution in court and have authority to launch a disciplinary action against judges, the conflict of interests and partiality of these representatives becomes evident.

That's why the change in the procedure of this body formation or elimination of operative control over the judiciary became one of the major requirements formulated by the Council of Europe Venice Commission.

The functions of heads of courts remained practically unchanged, which is another instrument of influencing judges. Although they no longer have the authority to allocate cases to judges, they exercise their influence by means of other levers (establishing the vacation period, distributing bonuses, career advancement etc.)

The judicial reform failed to provide the instruments ensuring financial independence of the judiciary. Despite the fact that State court administration was transferred under control of judicial branch and courts began monitoring the use of funds, they never managed to get the guarantees of appropriate funding.

The courts funding has substantially increased over the past 5 years; nevertheless, it still meets only about 50% of needs. And even available funds are not allocated regularly — often the funding arrives at the end of the year, thus making it impossible to use it for needed renovations or construction.

The judicial reform postponed the issues of better funding for courts and judges for the unforeseeable future. For example, when budget was adopted in December 2010, the introduction of certain budget lines concerning courts funding was once again postponed for one year.

3. DECISIONS OF THE “FIFTH CHAMBER” OF THE HIGH ADMINISTRATIVE COURT AS A BAROMETER OF JUDICIAL REFORM SUCCESS¹⁵

In my opinion, the practice of so-called “Fifth Chamber” of the High Administrative Court, set up under the law “On Amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal” of May 13, 2010, for consideration law-suits against the President, the Parliament, High Council of Justice, and, eventually, against the High Judicial Qualifications Commission, is one of the most suggestive indicators of the judicial reform “success”. Probably, the authors of the idea assumed that it will make the control over most important decision-making much easier.

The decisions of the Chamber are very important for two reasons.

First, they demonstrate the rate of readiness to safeguard the people's rights against the violations, committed by power bodies, and especially, their higher echelons. In other words, the analysis of the High Administrative Court decisions can provide evidence as to whether it is a real instrument for defending people's rights against arbitrariness of power, or, the other way round — an instrument to safeguard arbitrariness against the “common mortals” claims.

¹⁵ Prepared by Roman Kuibida, candidate of Law, deputy Head of the Board, Center for political and legal reform.

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Second, some of the High Administrative Court decisions reveal the real motives of the High Council of Justice, hardened in its omnipotent competences. Somehow it is afraid of making its decisions public and does not publish them on its site in full scope. Under the reform, the High Council of Justice acquired serious levers for influencing the judges' corps, in particular in the matters of judges' dismissal. In fact, it became the center of personnel-related decisions. That's why the quality of these decisions and level of their politicization are crucial in assessing the rate of judges' independence.

3.1. INTERESTING FIGURES

According to the data from the Unified State Registry of Court Decisions (hereinafter — Registry), within 5 months of its operation the fifth chamber of the High Administrative Court¹⁶, passed disposition decisions on 15 law-suits against the President, 19 — against the Parliament and 12 — against the High Council of Justice. Only one suit against the President was satisfied fully or partially, namely, the suit concerning the illegality of President Kuchma's decree of 2002 on a judge's dismissal, 4 suits against the Parliament (all filed by former judges) and 4 suits against the High Council of Justice (only one of those, concerning neglect of a petition, was not filed by a judge. Probably, the real statistics is somewhat different, as some of the decisions, in defiance of the provisions of the law "On accessibility of court decisions", might not have been entered into the Registry.

Figures look good enough — about 10% of claims are satisfied, fully or partially, despite political pressure, implemented even indirectly. However, the fact that all, but one, complaints were filed by former judges is telltale in itself.

So far, only the current President is blameless as far as the courts go. However, the impression lingers that this "blamelessness" is a result of "diligence" of the High Administrative Court and not of either the President himself or his administration. Here are some examples of judicial activity leading to such conclusion.

3.2. IMMUNITY FROM COMPENSATORY DAMAGES

Administrative Proceedings Code (article 21) guarantees the right to appeal the illegality of any acts or actions of authorities, alongside with demanding compensatory damages for the harm done by them.

However, the High Administrative Court exempted certain entities from the damages: *"Taking into account that article 171-1 of Administrative Proceedings Code of Ukraine establishes special procedure for appealing the decisions, actions or inaction of the Parliament of Ukraine, the President of Ukraine or High Council of Justice and does not spell out the right of the claimant to approach the High Administrative Court of Ukraine as primary jurisdiction body demanding the compensatory damages, the court will not admit the claims on compensatory damages"*¹⁷.

It is natural to assume that the legislator wanted to covertly deprive an individual of the right to demand compensatory damages in administrative claim against the President, the Parliament and two other entities (although the law does not contain direct rules on that). However, the common sense prompts that a specific Code article 171-1 does not deny the possibility of applying the general provisions, when they are not in contradiction with the essence of the dispute. What special merits does the President, the Parliament, the High Council of Justice or the High Judicial Qualification Commission have to grant them the immunity?

¹⁶ See. <http://www.reyestr.court.gov.ua>.

¹⁷ Resolution of the Highest administrative court of June 17, 2010. //Unified State Registry of Court Decisions. — № 10227672.

3.3. PRESIDENT IS NOT A STATE POWER ENTITY WITH ALL RESPECTIVE CONSEQUENCES

There is another High Administrative Court invention, which can be developed ad absurdum. Look at these, seemingly innocent, considerations:

«Under the Constitution of Ukraine, the state power in Ukraine is exercised on the principle of its division into legislative, executive and judicial. The President of Ukraine does not belong to any branch of the state power. The Institute of President is based on the body of norms, spelled out in section 5 of the Constitution of Ukraine, under which the President of Ukraine, defined as the Head of State, represents it, is the guarantor of its national sovereignty, territorial integrity, adherence to the Constitution of Ukraine, human rights and freedoms of the citizens. In view of that, the President of Ukraine enjoys a special legal status»¹⁸.

This provision, however, led the court to the conclusion, that the President is not a state power entity, and, therefore, is not covered by Article 10 of the Constitution, which according to the Constitutional Court interpretation makes the use of national language as the official language in the authorities operation, mandatory.

Following, probably, the same logic in resolving other issues, the High Administrative Court arrived at the conclusion, that the President is exempt from the duty to consider individual or corporate claims and to provide well-grounded response within the time limits, stipulated by the law (Article 40 of the Constitution). Looks like these functions are beyond the presidential competences and belong among the functions of Presidential Administration.¹⁹

Thus, a journalist was accredited to attend an event, where the President was present. However, he was denied the entrance to the event. The journalist appealed to President against the Presidential Administration, but, in defiance of the law, the response was given by the body appealed against. Next, the journalist submitted a claim on the President's inaction to the High Administrative Court, which did not allow the appeal, referring to the provisions on Presidential Administration, namely, that this latter is in charge of arranging for consideration of the claims, analyzing them and, after that, submitting draft decisions to the President. Nota bene: "arranging for consideration" and "submitting draft decisions to the President". In fact, when a claim to the President is submitted, relations are established with him and not with his administration. Even the President of the United States does not neglect the responsibility to deal with public claims, and sometimes respond to them personally²⁰.

Unfortunately, the High Administrative Court attitude found its reflection in a number of judgments, so that the President was exempt from liability for failure to consider or delayed consideration of public claims, or for refusal to provide information etc., because, allegedly, these issues were within the terms of reference of his administration.

Admitting the thesis that the President is not a state authority, we can consequently arrive at even more "advanced" conclusions: that the constitutional requirement of exercising authority on the basis, in the mode and procedure, defined by the Constitution (article 19), does not apply to the President or that decisions, actions or inaction of the President cannot be appealed in court under Article 55 of the Constitution.

3.4. INVALID ACTS BEYOND JUDICIAL CONTROL

The situation can arise, when a person's rights are violated by a certain normative act, which eventually becomes invalid. While the violation terminated, the person still has been entitled to compensation of damages, caused by the act. However, the damages can be recompensed only after

¹⁸ Resolution of the Highest administrative court of July 27, 2010 // Unified State Registry of Court Decisions — № 10678995.

¹⁹ See, e. g., Resolution of the Highest administrative court of September 28 2010. // Unified State Registry of Court Decisions. — № 11678126.

²⁰ See, e. g., <http://www.bbc.co.uk/news/world-us-canada-11676403>.

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the illegality of the act and the damages incurred are proven. That's why the administrative courts usually do not consider invalidating or nullifying of an act as obstacles to decide on its illegality.

Meanwhile, the High Administrative Court took an exotic stand, when dealing with a claim against the President:

*"The High Administrative Court of Ukraine jurisdiction, under p. 2, article 171-1 and p. 4 article 18 of the Administrative Proceedings Code of Ukraine, which defines the rules of exclusive subject-matter jurisdiction, covers normative/legal acts in force. The appealed Presidential Decree... which lost its validity...cannot be the object of judicial control"*²¹.

The Constitutional Court in its decision № 15-rp/2001 of November 14, 2001, concerning a residence registration case, ventured to take the same stand: *"The Constitutional Court jurisdiction covers normative/legal acts in force"*. This statement, however, was prompted by article 152 of the Constitution: *"Laws and other legal acts or their provisions, which are recognized as unconstitutional, lose validity since the date of the Constitutional Court's decision on their unconstitutionality"*. Hence, logical deduction, that only an act, which was in force at the time of legal investigation, can lose its validity.

However, the Code articles, quoted by the High Administrative Court, as well as other legal provisions do not give grounds to contend that the administrative courts' jurisdiction covers only valid acts. The High Administrative Court attitude creates a very dangerous precedent for the future, depriving a person of a possibility to defend his/her rights, violated by illegal acts, despite the fact that the acts had lost their validity.

3.5. DOUBLE STANDARDS?

As far as the claims against the Parliament go, only few judges dismissed through undue procedure, were lucky enough to win their cases. They won mainly due to the fact that at the time of hearing the judge was absent undergoing medical treatment, so *"an important procedural guarantee as to the judge's right to be present at the Verkhovna Rada of Ukraine plenary meeting and to present her position was not observed"*.²²

In another case, however, when a judge from Odessa was notified about the specialized committee meeting a day before the event (instead of three days ahead, as required by the law), and about the plenary meeting — on the same day, the High Administrative Court did not classify it as violation of the judge's right to be heard in court before his/her dismissal.²³

Another interesting situation arose at the time of local elections. According to the Constitutional Court interpretation, the deputies to village, settlement, city or oblast' councils and the heads of the said councils, elected at regular and off-year elections, will be in office for respectively five and four years. That's why there were no local elections in Kiev in 2010. In some other areas situation was the same, so the mayors and the deputies of local councils, elected at off-year elections a couple of years ago, submitted a claim on illegality of the Verkhovna Rada Decree on local elections in the part concerning their specific localities.

The High Administrative Court, offering various interpretations of its motives and totally ignoring the Constitutional Court decisions (it was quoted, but not interpreted in its motivation), rejected these claims, on the grounds that, purportedly, *"the scheduling of regular elections does not violate rights or interests of the claimant, as he is not denied the possibility to participate in them as*

²¹ Resolution of the Highest administrative court of August 18, 2010. // Unified State Registry of Court Decisions. — № 10931333.

²² Resolution of the Highest administrative court of September 9, 2010. // Unified State Registry of Court Decisions. — № 11572268.

²³ Resolution of the Highest administrative court of September 9, 2010 // Unified State Registry of Court Decisions... — № 11274243.

a candidate”²⁴. The court ruling made these elections possible, despite the fact that the term of office for local councils and mayors, elected at off-year elections, had not expired yet.

3.6. THE APPEALED DECISION IS ILLEGAL, BUT CLAIM IS COMPLETELY DENIED

The High Administrative Court is very cautious in its dealings with the High Council of Justice. No wonder — one step aside, and the motion on a High Court judge’s dismissal will be considered by the Parliament. For the sake of justice, we should mention that some claims to the High Council of Justice were satisfied, although it did not always end by the reinstatement of a judge in his/her office. For example, a claim concerning the dismissal of the Supreme Court judge O. Volkov, was classified as illegal, while the motion on the judge’s dismissal remained unchanged.

The High Administrative Court also dismissed the majority of charges brought by the High Council of Justice against the former chief justice of the Kiev Circuit Administrative Court O. Bachun, on the grounds that the High Council of Justice used the retroactivity of the law²⁵. At the same time, the High Council of Justice decision was not judged as illegal even in this part — the claim was denied completely. The breach of oath was proven only in two instances. However, the High Administrative Court’s motivation, which can be found in a number of its decisions (№№ 11572542, 11572268) is not convincing enough: the judge is charged with allegation that “*the rulings on interim measures in fact satisfied the claimant’s requirements without judging the merits of the case*”. However, *any interim measure is a temporary protection measure, before the case per se is considered. Requirement to cancel an authority’s decision can be secured by provisional suspending of decision in issue. So, the interim measure in many cases is a temporary solution to satisfy the plaintiff’s claim before the case is resolved.*

The High Council of Justice decisions show that often it resorts to assessment of courts’ rulings, even if these latter were not revoked by superior courts. The tendency of removing judges for passing exonerating verdicts or too mild penalties can also be traced in the High Council of Justice decisions (see, e.g. the High Administrative Court resolutions №№ 11659732, 11942386). No wonder, then, that the rate of acquittals in Ukraine for many years has not exceeded 0.5% of all rulings. This rate is even lower than it used to be under the soviet regime! This interference into the judges’ activities caused serious concern among the members of Venice Commission evaluating the new Law “On Judicial System and Status of Judges”.

Unfortunately, the High Administrative Court resolution, classifying the decision on dismissal of Kiev Circuit Administrative Court judge M. Kyshynsky as illegal, was not found in the Registry. It is also unusual that immediately after his reinstatement in office the President transferred him to Ivano-Frankivsk Circuit Administrative Court. By the way, the return of the High Administrative Court fifth chamber judge R. Khanova to Donetsk Administrative Court of Appeals came also as a surprise. Such rotations cannot take place without a written request from a judge, but what would force a judge to write it, remains a mystery.

3.6.1. Safeguarding power or individual interests?

The power, vested in the President and the Parliament could not but yield to temptation of using reforms as mechanism to exert further pressure on judges. The reform of this year brought into being potent levers of political pressure. The very availability of these levers, if not their direct use, forces the judges to become their own censors and act against their conscience.

²⁴ Resolution of the Highest administrative court of September 14, 2010 // Unified State Registry of Court Decisions. — № 11380260.

²⁵ See Resolution of the Highest administrative court of August 13, 2010. // Unified State Registry of Court Decisions. — № 10958598, 11382825.

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The analysis of court rulings shows a persistent tendency of inventing artificial obstacles, which would prevent to satisfy the plaintiffs' appeals to the highest authorities, both current, and the ones which would be filed in the future.

The High Administrative Court, however, gives the removed judges a chance to win their case. It is most laudable. It proves, although not very convincingly, that certain judicial control over the highest authorities' powers, which can be used as a means of pressure on judges, is still in place. It is desirable, though, that not only judges, but average citizens as well would have access to courts in their disputes with the President and the Parliament. It is especially important in view of the fact that the main goal of administrative justice is safeguarding rights and interests of an individual against arbitrariness of power, and not vice versa.

4. ACCESS TO COURTS

The principle of free access to justice envisages, among other provisions, the judges' duty not to deny consideration of cases of relevant jurisdiction, convenient (accessible) location of courts, sufficient number of courts and judges and a lot of other factors, which allow the citizen to approach a court without excessive hindrances.

Defining courts' jurisdiction is still a serious problem. A lot of jurisdiction-related disputes arise, in particular, between administrative, commercial and civil courts. For example, disputes arise around the appeals against decisions, made by penitentiary institutions, National Expert Board for Protection of Public Morality and many other bodies of authority, when administrative courts for unclear reasons refuse to recognize them as agencies holding state power.

Physical accessibility of circuit administrative courts also remains a problem. They administer justice for several oblast's and are located too far from many populated areas.

Judiciary reform brought to life two more problems concerning courts' accessibility:

1) ***Shortening in limitation of action.***

The general limitation of action in administrative process has been reduced from one year to 6 months, with broadened use of a special 1-month term. Thus, one-month period of time is established for appealing the decision of the subject of authority, which can become the basis for condemnation money claim. This applies, for example, to all cases concerning social benefits etc. Obviously, this is a very short term to file a petition with court, taking into account the need for the fact-finding.

At the same time no transitory period was allowed, so that the courts started to apply the shortened limitation period immediately starting July 27.

2) ***Impossibility to appeal local courts' decisions in certain cases concerning administrative offences.***

The new version of article 171-2 of the Administrative Code of Ukraine, adopted within the frame of judiciary reform, reads as follows: "*Ruling of the local court of general jurisdiction as an administrative court in cases concerning decisions, actions or inaction of authority on bringing [him] to administrative accountability is final, with no right to appeal*". It means that if a body of power at its own discretion imposes a fine, the ruling of the local court in the matter is final. Obviously, if a case concerns an administrative offence, considered criminal under Article 6 of the European Convention on human rights, denial of appeal will be interpreted as violation of the right to appeal and access to court in the broad sense of this concept.

5. RIGHT TO LEGAL ASSISTANCE AND RIGHT TO DEFENSE

Numerous problems related to the right to defense are still waiting to be resolved. They are caused, on the one hand, by an obsolete procedural legislation, and by virtual non-existence of pro bono legal services system, on the other.

The European Court of Human Rights pays more and more attention to this issue. Alongside with decisions of the European Court (see below, part 10 of this section), which established some violations of the right to defense, the cases, transferred to the Ukrainian Government for communication, confirm the seriousness of the problem.

Here are some typical examples of right to defense violations.

5.1. MANIPULATING CHARGE TO DENY THE RIGHT TO MANDATORY DEFENSE

Balystky v. Ukraine, application № 12793/03. On May 15, 1998 the applicant was charged with homicide (Article 94, Criminal Code) and questioned as a defendant without attorney present. The case was transferred to the prosecutor's office in Kharkiv. On July 27, 1998, several days before the end of pre-trial investigation, the defendant was charged of committing a aggravating murder under pp. "a" and "e", Article 93, Criminal Code, and also with robbery, under part 3, article 142, Criminal Code.

Bortnik v. Ukraine, application № 39582/04²⁶. The applicant was detained on October 1, 2002, on suspicion of causing serious body injuries, which led to the death of the victim. He was interrogated on suspicion of committing this crime without attorney present. He stated several times, that he did not need legal assistance. On November 13, 2002 the psychiatric expertise established that he suffered from chronic alcoholism. The attorney was designated for him only on January 28, 2003, in the course of trial. After the case was remitted for additional investigation, the crime was reclassified as premeditated murder, for which he was sentenced to 13 years in prison.

5.2. INACCESSIBILITY OF DEFENSE ATTORNEYS AT THE BEGINNING OF INVESTIGATION

Bondarenko v. Ukraine, application № 27892/05. The applicant was convicted for murder. On September 6, 2002 he was detained on murder suspicion. The applicant contained that he was tortured, and thus forced to confess. He was also coerced into signing a waiver of defense. Several days later he signed the waiver again in exchange for the promise to see his parents.

He saw his parents only on September 19, 2002. Soon parents found an attorney. However, on September, 23, when the attorney requested a meeting with her client, investigator did not allow it, referring to the waiver of defense. The investigator promised to find out, whether the defendant had a change of mind, but denied the attorney the right to be present at the meeting. The next day investigator advised the attorney that the defendant rejected her assistance again. Only on October 28, 2002 the applicant was for the first time questioned with his attorney present. The court brought up a question, whether the fact of absence of attorney at the preliminary interrogation was in line with article 6 §3(c) of the Convention.

Bandaletov v. Ukraine, application № 23180/06. The applicant confessed in having committed murder of the victims, although he disagreed with the motives of murder, under which the crime was classified. Eventually he was sentenced to life term in prison. The applicant was of the opinion that the court based its verdict on the motives he gave in his confession, while the attorney was not present (the applicant did not have one at the beginning of the investigation) and also disregarded the fact of aggressive and provocative behaviour of the victims.

Zadorozhny v. Ukraine, application № 37949/05. On the evening of July 18, 2005 militia arrested the applicant on suspicion of murder and robbery. The applicant testified that he had been beaten by militiamen, who wanted to break him and make him plead guilty of the felony. His requests to provide a defense attorney were ignored. At night he wrote a confession.

The next day an attorney was appointed. With the attorney present the applicant once again confessed, and the same day the investigator reconstructed the events of the crime with attorney

²⁶ The European Court delivered its judgment in this case on 27 January 2011 and held that there was violation of Article 6 §3(c) of the Convention.

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present. At the time of arraignment (July 22, 2005) the applicant confessed once more. At the court hearing, however, he pled not guilty and claimed that his confession was obtained through torture. He was sentenced to 15 years in prison.

The European Court brought up the issue of the applicant's right to defense at the primary questioning, when he confessed.

Nechyporuk and Yonkalo v. Ukraine, application № 42310/04. The applicant was sentenced to 15 years in prison on murder conviction. He stated that no attorney represented him between May 20 and 24, while he stayed in militia custody for an administrative offence. The investigator provided an attorney on unknown day. On May 24, 2004 the applicant's parents signed a contract with a private attorney so that he would represent their son during the pre-trial investigation and trial. On May 25, 2004 the aforementioned attorney was allowed by the investigator to meet with the applicant in Khmelnytsky temporary detention center, where the applicant was held in custody. However, on June 2, 2004 the attorney was denied the visit on the grounds that the permit was not properly prepared. There have been other instances when the attorney was banned from participating in the investigation.

The following examples describe similar situations, when at the beginning of the investigation, the defendants were denied the right to use legal assistance:

Pascal v. Ukraine, application № 24652/04 and *Todorov v. Ukraine*, application № 16717/05. The applicants were sentenced to 14.5 years and 7 years in prison respectively.

Tarasov v. Ukraine, application № 17416/03. The applicant was sentenced to 5 years in prison.

Panasyuk v. Ukraine, application № 19906/04. The applicant was sentenced to life imprisonment.

Karpyuk and Lyakhovich v. Ukraine, application № 30582/04, *Mazur and others v. Ukraine*, application № 32152/04, *Zaychenko v. Ukraine*, application № 7188/02. In these three cases the applicants were sentenced to various terms of imprisonment. The cases were filed in connection to the applicant's participation in a protest action "Ukraine without Kuchma", held at T. Shevchenko monument on March 9, 2001.

Dzhulay v. Ukraine, application № 24439/06. The applicant was sentenced to 9 years in prison.

Yerokhina v. Ukraine, application № 12167/04. The applicant was sentenced to 10 years in prison for murder.

5.3. ABSENCE OF LEGAL DEFENSE AND RIGHT TO PUBLIC ATTORNEY

Ireneusz Mojszak v. Ukraine, application № 38071/06. The applicant, a Polish citizen, was detained by the Ukrainian customs officials while crossing the border. His request to provide interpreter and attorney was ignored. A protocol was compiled, and, later submitted to the court. In the court, the applicant was served the documents in Ukrainian only. On his return to Poland the applicant had them translated and found out that he was charged with smuggling, and, consequently, that his car and cigarettes which he brought to Ukraine, had been confiscated.

Przhevalskyy v. Ukraine, application № 12203/04. The applicant was arrested on suspicion of several robberies. He claimed that he had pled guilty under duress. No attorney represented him in the course of pre-trial investigation. That's why the verdict was nullified by the court of appeals and the case was remitted for additional investigation to rectify the violation committed with regards to the applicant's right to defense. The court ruled that the interests of justice require legal defense, as the defendant suffered from mental disease. Eventually the applicant was sentenced up to 5 years in prison. The court brought up a question, whether the fact of absence of attorney at the pre-trial investigation was in line with article 6 §3(c) of the Convention.

Vasylenko v. Ukraine, application № 36136/05. On January 15, 2000 the applicant was arrested on suspicion of fraud. Between January 18, 2000 and November 8, 2001 he was in custody; after that he was set free on bail. On August 2, 2002 the applicant filed a petition requesting a defense attorney. The petition was ignored, and, according to the applicant, he had no representation for the whole duration of pre-trial investigation.

The court brought up a question, whether the interests of justice did not require an attorney's representation.

5.4. RIGHT TO CHOOSE AN ATTORNEY

Zagorodniy v. Ukraine, application № 27004/06. The applicant was charged with a traffic violation. He invited a legal expert with appropriate qualifications to act as his defense lawyer. The lawyer represented him during pre-trial investigation. The trial court, however, denied him the right to act as defense lawyer, as he was not a member of the Bar. Moreover, the court remitted the case for additional investigation due to the violation of the applicant's right to defense.

The applicant in vain appealed the court's decision, requesting his lawyer's participation in the case. At the next preliminary hearing it was the applicant who requested the case to be returned for additional investigation, claiming that his right to defense had been violated by appointing a defense attorney, whom he did not choose, instead of the one he did. He further claimed that the appointed attorney did not act on his behalf, and that he had seen him only once, at the time of the assignment. The motion was rejected.

Later the trial court allowed the applicant's rejection of an appointed attorney, and assigned him another defense attorney. Eventually the applicant rejected this attorney as well, and requested to have his spouse assigned as his attorney. The court did not allow his rejection, but assigned his spouse as his defense attorney. Later the applicant rejected assistance from assigned attorney, claiming that both assigned him attorneys did not defend him properly. He stated, however, that he was in need of legal assistance. His rejection was denied by the court. Finally, the applicant was found guilty.

The court brought up a question for the parties: could the applicant defend himself with the help of his chosen defense lawyer, and was the removal of this lawyer done in line with the national legislation?

5.5. ABSENCE OF DEFENSE ATTORNEYS AT THE SUPREME COURT HEARING

Iglin v. Ukraine, application № 39908/05 and *Dovzhenko v. Ukraine*, application № 36650/03. In both cases the applicants were sentenced to life imprisonment. The appeal was considered by the Supreme Court while the convict was present, but his attorney was not.

5.6. PROMOTION OF RIGHT TO LEGAL AID IN UKRAINE

In view of the European Court of Human Rights' judgments, that revealed a systemic problem, i.e. violation of right to defense in criminal proceedings, and also in anticipating the decisions on the cases submitted to the Government for communication (see above), the promotion of right to defense remains first priority at the national level.

The draft Law "On Free Legal Aid" was passed in the first Parliamentary hearing. It has a lot of faults, identified by the Council of Europe experts.²⁷ The Parliament, however, seems to take no heed of international and Ukrainian experts' opinion.

On September 30, 2009 the Constitutional Court of Ukraine passed an important decision on constitutional motion, submitted by Ihor Holovan'.²⁸ This decision put every citizen's right to legal assistance into the new context, namely, whether this right, guaranteed by article 59 of the Constitution, is applicable in all situations when an individual needs legal assistance, or is restricted by a special status of an individual.

²⁷ See at the Ministry of Justice site: <http://minjust.gov.ua/0/19278>

²⁸ Complete version see here: <http://www.ccu.gov.ua/doccatalog/document?id=73758>

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The Constitutional Court ruled as follows:

«1. The provisions of part one, article 59 of the Constitution of Ukraine, i.e. “each individual has a right to legal assistance” shall be interpreted as a state-guaranteed opportunity for each person, irrespective of his/her legal relations with state bodies, local authorities, public associations, legal entities or physical persons, to obtain, free and without illegitimate restrictions, legal assistance in the scope and ways he/she needs.

2. The provisions of part two, article 59 of the Constitution of Ukraine “Bar in Ukraine exists... to provide legal assistance in the proceedings of the court and other official bodies”, in the scope of constitutional motion, shall be interpreted as a right of a person to have, during interrogation as a witness at inquiry or investigation body, or interviewing in his/her legal relationship with these and other state bodies, legal (juridical) assistance by person from the Bar, chosen by an individual in question that does not preclude him/her from using another person’s assistance, unless otherwise specified by Ukrainian Law.”

Justifying its decision, the Constitutional Court made reference to the fact that “each person, especially a witness interrogated at inquiry or investigation bodies, shall be guaranteed the right to **effective legal assistance** to protect him/her against possible violations of his/her right to refrain from testifying against himself/herself, the family members or close relatives, which can be used in criminal proceedings to prove the guilt of the aforementioned persons”.

The Constitutional Court also specified that “choice of the form and subject of this assistance depends on the desire of the person wishing to get the assistance”.

Kharkiv human rights group submitted to the Constitutional Court a petition, containing specific proposals,²⁹ namely, “to define integral characteristic of legal assistance, which under no circumstances or legislative regulations of this rights, can be nullified or limited. The most important among these characteristics are the following:

1. Right to direct communication with an attorney, including the possibility to freely meet with attorney for legal counselling, when a person, in his/her opinion, needs it;
2. Right to confidential communication with an attorney, including the right to communicate out of the reach of other persons’ hearing, as well as confidentiality of all communication means and their material manifestations (letters, written advise, e-mails etc);
3. Right to attorney’s presence in any events attended by the person;
4. Right for attorney to act on behalf of a person, to whom the legal assistance is given in any procedures aimed at protecting the person’s rights”.

Unfortunately, the Constitutional Court, having, possibly, serious reasons, failed to spell out minimum requirements towards legal assistance, without which it cannot be classified as legal assistance *stricto sensu*.

The Verkhovna Rada availed itself of the situation, introducing the changes to the Criminal Proceedings Code. Allegedly with the aim to implement the Constitutional Court’s decision, they, in fact, distorted both the essence of the decision and the very concept of legal assistance.³⁰

Contrary to the Constitutional Court’s decision, the lawmaker introduces restrictions for legal aid in the form of investigator’s “permission”.³¹

Next, the lawmaker makes the efficient legal aid virtually impossible. Let’s have a look, for example, at the provision, under which the witness’s defense attorney

“has the right to...provide consultations for the witness with investigator present, if the material evidence in the case can be used for criminal prosecution of the witness or members of his/her family and close relatives”.

²⁹ See here: <http://hr-lawyers.org/index.php?id=1254812726>

³⁰ Law of Ukraine “On amending Criminal Proceedings Code of Ukraine concerning witnesses rights to defense attorney and other legal assistance” of July 1, 2010, № 2395-VI (<http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2395-17>).

³¹ “Attorney has access to the trial in accordance with p.5 of this article”.

Here the fundamental principle of the legal aid, i.e. its confidentiality, is flagrantly violated. Besides, either deliberately, or due to inept language, the assumption is made that if the investigator does not find that “material evidence can be used for criminal prosecution”, the witness is not even entitled to such consultation.

Therefore, the lawmaker deprived the Constitutional Court’s decision, met with applause by the legal community, of any meaning, and, actually, refused to comply with it, at least, within the context of the criminal proceedings.

Besides, the witness’s right to an attorney is not protected by criminal liability, the same way as defendant’s or convict’s right. It means that obstructing attorney’s participation in witness’s interrogation is not classified as offence.³²

6. REASONABLE TIME OF JUDICIAL PROCEEDINGS

The judicial red-tape and non-compliance with reasonable time in legal proceedings remains a serious problem. Among other consequences, it affects the fate of tens of thousands detainees, for decades waiting in the overcrowded remand prisons for the completion of the legal procedures.

The judges’ excessive workload is one of the reasons contributing to their failure to meet the required time limits. In 2009, however, this load was somewhat reduced for the administrative judges.

In 2009 the trial courts of general jurisdiction considered 5,9 million cases, petitions, claims and motions, which is 40,7% less than in 2008. First of all, this reduction is due to the fact, that under the Law № 586-VI of September, 24, 2008 “On amending some laws of Ukraine regulating legal relations aimed at enhancing road traffic safety” the number of administrative law-suits decreased by 5 million.

The other reason is the persistent practice of remitting cases for additional investigation, or multiple revisions of a case in local courts, as well as traditional courts’ red-tape, caused by laxity and incompetence of the judges.

Effectiveness of cases’ consideration by the general courts³³

Indicators	2007	2008	2009
Criminal cases			
Number of ruled cases, total	186 244	182 100	182 498
Cases, assigned for consideration with violation of time limits stipulated by article 241, Criminal Proceedings Code of Ukraine	1 425	1 202	1 620
Proportion to the ruled cases, %	0,77	0,66	0,89
Cases, assigned for consideration with violation of time limits stipulated by article 256, Criminal Proceedings Code of Ukraine	3 867	3 609	4 133
Proportion to the ruled cases, %	2,08	1,98	2,26
Pending cases by the end of the reporting period	40 348	44 891	49 298

³² See, e. g., <http://www.reyestr.court.gov.ua/Review/4807787>

³³ Statistics data for 2008–2009; 2010 data were not available when report was being prepared.

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Proportion to the ruled cases, %	17,81	19,78	21,27
Including the cases, not ruled within the term of over 6 months (dropped law-suits not included)	5 363	7 642	9 100
Proportion to the pending cases, minus suspended cases, %	18,60	22,67	23,16
Number of ruled cases total	126 035	148 972	1 010 974
Including cases investigated with violation of time limits, stipulated by Administrative Code of Ukraine	14 439	13 912	115 348
Proportion to the ruled cases, %	11,46	9,34	11,41
Pending cases by the end of the reporting period	19 970	65 069	159 281
Proportion to the cases under consideration, %	13,68	30,40	13,61
Pending cases (dropped law-suits not included)	18 557	63 844	157 556
Proportion to the cases under consideration, %	12,71	29,83	13,46
Cases not resolved within the term of over 2 months (dropped law-suits not included)	5 299	10 000	34 048
Proportion to the pending cases (suspended cases not taken into account) %	28,56	15,66	21,61
Number of ruled cases, total	1 240 758	1 257 092	1 153 857
Legal investigation of cases completed later than stipulated by the Civil Code of Ukraine	123 484	138 696	157 296
Proportion to the ruled cases, %	9,95	11,03	13,63
Pending cases by the end of the reporting period	207 892	252 686	321 743
Proportion to the cases under consideration, %	14,35	16,74	21,80
Pending cases (dropped law-suits not included)	183 805	230 882	300 687
Proportion to the cases under consideration, %	12,69	15,29	20,38
Cases not resolved within the term of over 3 months (dropped law-suits not included)	40 846	60 184	78 129
Proportion to the cases under consideration, minus dropped law-suits, %	22,22	26,07	25,98

7. PRESUMPTION OF INNOCENCE

The rights to not incriminate oneself is a component of the presumption of innocence. However, the instances, when a person is first questioned as a witness, and, then charged with offence on the basis of his/her testimony, are still common.

The following proceedings can be also classified as violations of the presumption of innocence:

- 1) Remitting criminal cases for additional investigation;
- 2) Opening the case against particular person and not concerning the criminal event.

The number of criminal cases, remitted by trial courts³⁴

№	Indicator	2007	2008	2009
1.	Number of solved criminal cases (with cases remitted to prosecutors under article 232 Criminal Proceedings Code of Ukraine, and without cases filed on victim's motion)	185 773	181 415	86 094
2.	Cases, remitted by trial courts for additional investigation (articles 246, 281, Criminal Proceedings Code of Ukraine) (without cases filed on victim's motion)	6 858	5 751	2 245
	<i>Proportion to the criminal cases of public prosecution solved, %</i>	3,69	3,17	2,61
3.	Number of cases remitted to prosecutors under article 2491 Criminal Proceedings Code of Ukraine,	1 444	1 250	462
	<i>Proportion to the criminal cases of public prosecution solved, %</i>	0,78	0,69	0,54
4.	Revoked from criminal courts by prosecutors under article 232 Criminal Proceedings Code of Ukraine	2 873	1 826	730
	<i>Proportion to the criminal cases of public prosecution solved, %</i>	1,55	1,01	0,85
5.	Number of cases remitted by courts and revoked by prosecutors (without cases filed on victim's motion)	11 175	8 827	3 437
	<i>Proportion to the criminal cases of public prosecution solved, %</i>	6,02	4,87	3,99
6.	Number of persons, in regards to whom the rulings on case remitted for additional investigation, were cancelled by appeal	2 029	1 959	1 801
7.	Decisions concerning the violation of legislation in the process of investigation or pre-judicial inquiry	2 348	2 452	1 000

³⁴ According to State Statistic Department, in 2008–2009; 2010 data were not available. See official site. Cases under consideration in local general and appellate courts or remanded for further investigation, or revoked by the prosecutor. (the law-suits brought on the victim's complaint not included). The Supreme Court operation is not reflected in the data.

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Extremely low number of acquittals testifies to the fact, that presumption of innocence is not properly addressed. A very low percentage of acquittals has been characteristic of the judiciary system since soviet times, may be, due to persistent soviet traditions of inquisition-like criminal process, lack of adversary features, especially, at pre-trial stage, the mechanism of additional investigation (in view of insufficient material evidence courts often remand the case for “additional investigation”, and there the case is closed without acquittal). Judges are still blamed for passing acquittals; sometimes such verdicts trigger the prosecutor’s investigation.

Meanwhile, the number of acquittals is decreasing on yearly basis, remaining at the rate of no more than 0,5% of total number of criminal verdicts over the last five years.

Number of acquittals³⁵

Year	Number of persons, acquitted by local courts	Number of persons, with regards to whom a new verdict (instead of earlier unjustified acquittal) was passed by appeal courts
2008	672	12
2008	539	8
2009	579	13

Proportion of the acquitted and convicted persons³⁶

	Convicted, (thousand/%)	Acquitted, (thousand/%)
2005	196,6 / 99,5%	0,9 / 0,5%
2006	177,6 / 99,5%	0,9 / 0,5%
2007	165,5 / 99,5%	0,7 / 0,5%
2008	167,7 / 99,7%	0,5 / 0,3%
2009	162,6 / 99,6%	0,6 / 0,4

In 2009 the number of acquittals increased to 579, 13 of which were repealed by appellation court with the new verdict, while 52 — nullified by case remitting for additional investigation.

8. SOME GUARANTEES OF FAIR CRIMINAL PROCESS

8.1. THE RIGHT OF ARRAIGNMENT AND RIGHT TO SUFFICIENT TIME AND OPPORTUNITY TO PREPARE DEFENSE

On October 21, 2010 the European Court of Human Rights passed decision on *Kornev and Karpenko v. Ukraine* case, contending that Ms. Karpenko had no way of preparing her defense, as the hearing on administrative offence she was charged with took place one hour after arraignment.

Zhupnik v. Ukraine case (9 December 2010, application № 20792/05) drew attention to another issue, i.e. re-classification of crime from one Criminal Code clause to another. Till now the preroga-

³⁵ State courts administration of Ukraine (<http://www.court.gov.ua/home/>). The figures reflect both the verdicts which came in force and those which did not.

³⁶ Ibid.

tive of re-qualifying a crime has been considered an unalienable component of court's competences. However, the European Convention shed new light on it as far as adherence to the rights stipulated by Article 6 §3(a) and (b) of the Convention.

The applicant complained that Primorsky court (Odessa) qualified actions committed by him as crime, defined by article 165, Criminal Code of 1960 (abuse of power or office), while formerly he was charged under article 84 of the said Code (embezzlement of public or corporate property by way of appropriation, peculation or abuse of office).

The European Court stated that "the applicant was unaware of the fact that Primorsky court had the authority to re-qualify his actions as punishable under article 165 §1 of the Criminal Code, which was in force at the time of offence. These developments deprived him of possibility to defend himself in trial court against crime, for which he was ultimately convicted".

In the aforementioned case no violation of rights was found, but only due to the further Court of Appeal's proceedings, which resulted in granting the applicant the opportunity to defend himself against new charges.

Article 277 of the Criminal Proceedings Code stipulates more appropriate procedure for changing charges, thus providing better guarantees for the rights spelled out in Article 6 §3(a) and (b) of the Convention.

Nevertheless, many articles of the Criminal Proceedings Code implicitly provide for the courts' authority to change the crime classification. For example, article 373 of the said Code grants court of appeals authority to re-qualify a felony and apply the criminal law for less grave offence. Keeping in mind an essential restriction, contained in this article, one should conclude, however, that even re-classification to less grave offence can lead to the violation of defense rights, if new classification entails significant differences in the crime elements.

8.2. RIGHT TO QUESTION WITNESSES

On November 19, 2009 the European Court passed a decision in the case *Oleg Kolesnik v. Ukraine*. Kolesnik was convicted for murder and other crimes. The court sustained that "the key witnesses for the prosecution were not examined by the court and the applicant had no opportunity to confront them either at the investigation stage or during the trial". Meanwhile, these witnesses' testimony was an important part of material evidence, which led to the applicant's conviction.

The right to witnesses' questioning is violated even more often in "drug" cases". On October 21, 2010 the European Court, in its decision on *Kornev and Karpenko v. Ukraine* case (see above) considered such situation. The court sustained that the main witness for prosecution was put under the program of witness protection and never made appearance in court. Neither applicant, nor her attorney had an opportunity to set up witness's cross-examination, while national courts based their rulings on her statements.

8.3. USE OF PROVOCATION IN CRIMINAL JUDICIAL PROCEEDINGS

Another important problem, i. e. entrapment, was tackled upon in the case *Lyubchenko v. Ukraine* (application № 34640/05), which in March was submitted for communication to the Government of Ukraine, in the context of bribery conviction. An operation against the applicant, which resulted in his arrest, was carried out within the framework of this case. Dzhankoy District Court did not classify the operation results as acceptable evidence and acquitted the applicant. The Appeal Court of the Autonomous Republic of Crimea, however, quashed the acquittal and sentenced the applicant to three years in prison. The European Court raised the issue of entrapment perpetrated by militia officials.

Entrapment is especially popular in cases concerning the drug dealing.

Analysis of relevant law reveals the factors contributing to this violation.

Under p. 5, part 1, article 8 of the Law "On state secret", information on means, contents, plans, organization, funding, material and technical support, ways, methods and results of the field-

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investigation activity; on persons who confidentially collaborate or used to collaborate with the bodies, engaged in such activity, *can be treated* as state secret. Part 2 of the same article stipulates general restrictions as to confidential information — specific data can be classified as state secret with various rates of secrecy, i. e. “extremely important”, “top secret” and “secret” — only if they fall under the categories, specified in part 1 of the article and if their disclosure *is damaging for the interests of Ukraine’s national security*.

Under these provisions the Corpus of Data Constituting State Secret should be compiled.³⁷ Under pp. 4.2.2 and 4.4.4 of the Corpus, the results of the field-investigation activity, an investigation operation or a set of the operations are classified as state secret if their disclosure creates *a threat for the national interests and security*. Obviously, the disclosure of the results of field operations which revealed the facts of drug dealings and sales of, let’s say several grams of narcotic substance, cannot present such a threat, and, respectively, should be added as due protocols of field operation to the case files.

At the same time, the information concerning confidential collaboration of a person with operative divisions, which makes possible the identification of the said person, under p. 4.2.1. of the Corpus, is classified as secret. Naturally, when a field operation is organized to uncover minor drug dealings, the disclosure of information concerning confidential collaboration of a person with operative divisions cannot present a threat for the national interests and security. Therefore, this information should not be treated as state secret or classified as such.

The operative investigation divisions, under p. 15 part 1, article 8 of the law “On operative investigation activity”, are authorized to establish confidential collaboration with individuals only on voluntary basis. The controlled purchase of goods, merchandise or substances, stipulated by p. 2 part 1, article 8 of this law, is carried out in accordance with the procedure, established by the “Instruction on controlled purchase and controlled supply of goods, articles and substances, including those banned from circulation, from physical and legal entities, irrespective of form of property”.³⁸ Under the Instruction’s provision, the written agreement from the aforementioned entities is required for the purchase of the goods banned from circulation. The Instruction also reads that “the documents disguising a person” can be used “if need arises”, and in practical operation fabricated personal data are used.

In the course of further investigation, which included the controlled purchase, the results of which could be used as material evidence in the case, according to the provisions of the law “On ensuring safety of the individuals participating in criminal proceedings” and article 52-1 of the Criminal Proceedings Code, the means of protection are used with regards to this individual. Under p. 1, article 52-1 of the Criminal Proceedings Code and p. 1 article 20 of the aforementioned law, these persons are entitled to protection only if a real threat to their life, health, dwelling or property is established. In p. 2, article 20 of the aforementioned law the following reasons for protection are established:

- a) Petition from the participant to criminal proceedings, his/her family member or close relative;
- b) Motion from the chief executive of the respective state body;
- c) Operational or other information concerning existing threat to life, health, dwelling or property of the aforementioned persons.

In the majority of cases protective actions are taken on the motion from the respective officials and with regards to the individuals who participate in the controlled purchase as “buyers”.

Most commonly, the seller in the controlled purchase knows the “buyer”, i. e. there are no reasons to “hide” the buyer from the seller, with regards to whose criminal activity the controlled purchase is organized, if there is no threat life, health, dwelling or property of the former. Therefore, the buyer, in fact, is disguised not from the defendant or his defense, but from the court, which fact,

³⁷ Approved by Security Forces of Ukraine Decree № 440, of August, 12, 2005.

³⁸ Approved by joint MIA / Security Forces / DPA of Ukraine Decree № 1065/307/482 of November 30, 11.2010.

naturally, creates serious obstacles for the court in implementing the principle of comprehensive and complete examination of criminal case circumstances in the courts' proceedings.

After protective action for the benefit of the "drug buyer" is taken, the defense has no way of directly questioning him. In the course of pre-trial investigation the confrontation of the suspect/defendant with this individual are not set up.

Under the best scenario, the defense acquires the right to question the witness with the help of technical equipment from other premises, including outside of the court, on the prosecutor's motion, or court's (judge's) discretion, in accordance with p. 6, article 303, the Criminal Proceedings Code. Usually, the operatives who participated in the controlled purchase are present alongside with the witness at the questioning, and it is impossible to restrict their influence on witness, i.e. prompts to witness's answers.

In practical operation when there is technical possibility of questioning from another premises, the courts are bound to use the provisions of p. 2, article 292 of the Criminal Proceedings Code, according to which the witness under protective action is exempt from court appearance, if there is written confirmation of his/her earlier testimony. Consequently, neither prosecutor, nor judge can see the witness, while his written deposition is taken, once again, by the operatives.

After that the provision of p. 3 part 1, article 306 of the Criminal Proceedings Code is used, and court examines the statement, given by the witness in the course of inquiry and pre-trial investigation.

Practically, the majority of cases, including the controlled purchase of banned goods, is not about the drug dealers' sales of substantial quantities of drugs, but about limited sales between the drug users themselves. Besides, the "seller" usually has known the "buyer" before the operation was set up.

Therefore, hiding the person who collaborates with operative divisions, results, in fact, not in the protection of the said person, who collaborates with operative divisions (the protective action is usually taken in the form of ensuring confidentiality of personal data), but in making it very difficult, if not impossible, to investigate and check all the circumstances of controlled purchase and respective testimony in court proceedings.

As a result of such arbitrary and groundless use of protective action with regards to "buyers" participating in the controlled purchase, many abuses are perpetrated by the operatives and the rights of the suspects to defense are grossly violated by the breach of their right to submitting evidence, questioning witnesses etc. The use of measures, aimed at codifying the "buyers" in controlled purchases practically makes it impossible to establish the fact of permanent participation of the same persons as "buyers" in multiple purchases; their involvement becomes not voluntarily, but forced by militiamen, thus transforming these individuals into undercover agents and enabling provocations and fabrication of crimes. The "classifying" of crimes is not only contrary to the law "On democratic civil control over military organization and law enforcement bodies of the state", but also creates an obstacle for obtaining information on unlawful activities of state authorities, local self-governments and their officials, which under p. 5, article 8 of the Law "On state secret" cannot be classified as state secret.

In view of potential abuses in protective action with regards to individuals involved in controlled purchases, the practices of the European Court of Human Rights seem relevant. Thus, in its recent decision on October 21, 2010, on *Kornev and Karpenko v. Ukraine* case, the court established the violation of Article 6 §3(d) of the European Convention on Human Rights (right to protection against criminal charges) in a criminal case on drug dealings, when a controlled purchase was used, the main witness for prosecution ("buyer") was had been placed under the witness protection program and never appeared in the national courts. It ruled that her testimony was "were essential for the proceedings in question, given that she was the only person who had directly participated in buying drugs...and could testify that he sold the drugs to her..." The European Court also stated that "the applicant and his lawyer had been given no opportunity to cross-examine this witness at any stage of the proceedings, even as an anonymous witness, and the domestic courts themselves based their conclusions in the case on her written statements given at the pre-trial investigation stage. Moreover, it has not been claimed by the authorities that there was a need to balance the interests of various persons concerned..."

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To clearly understand the popularity of these methods one should refer to Korniyenko's testimony, published on Internet³⁹, where he claims that he had participated in hundreds of so-called "controlled purchases" in Poltava oblast'. Till now an independent investigation has not been carried out by law enforcement entities. The questions concerning legality of operations, raised in Korniyenko's testimony, so far remain unanswered.

The statistics on number of controlled purchases of drugs and psychedelic substances, carried out in the years 2005–2008 also testifies to the unjustified use of this technique in Poltava oblast'.

Administrative/territorial unit	Total number of registered crimes	Total number of controlled purchases
Poltava oblast'	59 968	1 267
Kharkiv oblast'	107 021	1 051
City of Kiev	111 312	1 130

It seems strange that in Poltava oblast', with population, registered crimes' and drug users' indicators are much lower than in other administrative and territorial units, shown in the table, the number of controlled purchases carried out by law enforcement subdivisions is much higher.

It is noteworthy, that the Supreme Court in its summary concerning the investigation of cases related to drugs, psychedelic substances, their analogues or precursors tackled the practice of crime provocation and noted that "the use of evidence, obtained by militia operatives through encouraging criminal activity, cannot be justified by public interests. Taking into account this consideration and mandatory nature of the European Court of Human Rights' requirements to pre-judicial inquiry, it is always necessary to check, whether militia staff or their representatives have not used abetting or organized sales and purchases of narcotic substances".⁴⁰

8.4. CRIMINAL PROSECUTION OF CHILDREN

In cases, when children are criminally prosecuted in pre-trial investigation, the violations of the legal provisions for additional inquiries with regards to the minor in question (i. e. living conditions, his/her upbringing, circumstances that had adverse effects on his/her personality, means of subsistence, etc), as well as total neglect of children, or their treatment as usual criminals are often registered. The operation of state bodies, investigating cases involving minors, needs dramatic improvement in view of the fact that the main goal of society and state in criminal prosecution of children, who, in their majority, are deprived of parental care, consists not in penalizing them for the committed offence, but in bringing them back to full-fledge social life, rehabilitating and educating them.

9. EXECUTION OF NATIONAL COURTS' DECISIONS

The decisions passed by national courts are not properly executed.

According to the Ministry of Justice, by December 1, 2009, 7 979 251 executive documents for the total cost of 97 392 913 578 UAH had to be served by the state executive bodies. This is 477 676 documents and 39 809 759 430 UAH more as compared to 2008.

³⁹ Video-clip with his testimony see here: <http://www.youtube.com/watch?v=NbYL2NRrNto>

⁴⁰ <http://www.scourt.gov.ua/clients/vs.nsf/0/0AD9FB2100C7353AC22574F600554A1C?OpenDocument&Collapse-View&RestrictToCategory=0AD9FB2100C7353AC22574F600554A1C&Count=500&>

Government executors in 2009 completed 4 429 195 executive documents, which makes up 55,5% of total number of documents to be served, for the sum total of 26 083 154 691 UAH or 26,8%, which is 97 298 documents and 10 346 274 082 UAH more as compared to the similar period of 2008.

In 2009 2 262 923 executive documents were served (28,4%) and 6 871 777 236 UAH (7,1%) recovered, which is 149 719 documents less, but 1 878 827 740 UAH more, than in 2008. The number of remaining documents by the end of reporting period constitutes 3 550 057 with the total cost of 70 999 398 586 UAH, which is 380 650 documents and 29 265 353 710 UAH more as compared to the similar period of 2008.

As of December 1, 2009, 182 216 executive documents (5,1% of the documents remaining by the end of reporting period) still were not served, thus violating the execution time limits. Within the same time period in 2008 781 executive documents were not served on time (10,5%).

This data show that the number of non-executed court decisions is growing on the annual basis. The rate of executed decisions, notwithstanding, has increased to 55% as compared to the past years, when it constituted about 40%. The difference between the number of completed executive proceedings and actually served decisions is also substantial, with respective ratio approximating 50:50. For example, the proceedings can be terminated due to the lack of state budget funds. It means that **in 2009 only 28,4% out of all executive decisions have been really executed, while 71,6% of all the documents respectively have not been executed.**

Over 11 months of 2010 the governmental executors terminated 4 912 071 executive documents, which is even less than in 2009. At that time, 8 814 661 executive documents (more than for the whole 2009) have been waiting for service. The rate of terminated executive proceedings has not changed significantly in 2010 and remains at the level of 55%. However, the amount of recovered sums showed the tendency towards decrease: in 2006 — 5 742 462 037 UAH, in 2007 — 5 580 330 958 UAH, in 2008 — 6 036 963 509 UAH, in 2009 — 8 341 475 579 UAH, and— 7 342 350 662 UAH over 11 months of 2010.

Therefore, the judiciary reform by no means affected the service of courts' decisions. On the average, about 70% of courts' decisions have not been executed over the recent years. This figure is hidden behind the data on completed executive proceedings, which are very misleading: often the terminated cases are reopened or termination is repealed, or, as shown above, in 50% of the cases the termination does not reflect the decision service, but marks only the formal closure of executive proceedings for various reasons.

In January 2010 a pilot ruling of the European Court of Human Rights on the case *Ivanov v. Ukraine* came in force. This ruling addressed a systemic problem — mass failure to execute court decisions in which either the state or governmental agencies or institutions are the debtors. The state does not comply with court decisions due to the lack of funds in the state budget. There is no current mechanism to have these decisions executed, so Ukrainians can only appeal to the European Court of Human Rights. No wonder Ukraine loses more and more cases concerning this issue. (About 70% of all decisions are made in relation to this matter).

The pilot decision obliged the state to eliminate the systemic problem within one year by implementing appropriate measures; the state, however, did nothing to comply with this decision.⁴¹

10. COMPLIANCE WITH THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON VIOLATION OF FAIR TRIAL RIGHTS

In 2008–2010 the European Court of Human Rights passed a number of rulings regarding the violation of the right to fair trial in criminal proceedings, requesting the review of decisions, made by Ukrainian courts (naturally, if the parties concerned submitted respective motions):

⁴¹ See more on failure to execute court decisions in the section on property rights.

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Yaremenko v. Ukraine, 12 June 2008, application № 32092/02, came in force on 12 September 2008 — conviction based on testimony obtained in violation of right to remain silent and right to defense.

Lutsenko v. Ukraine, 18 December 2008, application № 30663/04, came in force on 18 March 2009 — conviction based on co-defendant's testimony obtained in violation of right to remain silent.

Shabelnik vs. Ukraine, 19 February 2009, application № 16404/03, came in force on 19 May 2009 — conviction based on testimony obtained in violation of right to remain silent and right to defense.

Shagin v. Ukraine, December 10, 2009, application № 20437/05, came in force on 10 March 2010 — no public hearing.

Oleg Kolesnik v. Ukraine, 19 November 2009, application № 17551/02, came in force on 19 February 2010 — conviction based on testimony obtained in violation of right to remain silent and right to defense, and in violation of the right to question important witnesses.

Myronenko and Martenko v. Ukraine, 10 December 2009, application № 4785/02, came in force on March 10, 2010 — conviction by a biased court.

Feldman v. Ukraine, 8 April 2010, applications №№ 76556/01 and 38779/04, came in force on 4 October 2010 — conviction by a biased court.

Gurepka v. Ukraine (№ 2), 8 April 2010, application № 38789/04, came in force on 8 July 2010 — lack of appeal review of the resolution on administrative liability.

Pelevin v. Ukraine, 20 May 2010, application № 24402/02, came in force on 20 August 2010 — lack of access to cassation review.

Zhuk v. Ukraine, 21 October 2010, application № 45783/05, came in force on 21 January 2011 — absence of applicant at the time of the Supreme Court hearing.

Kornev and Karpenko vs. Ukraine, 21 October 2010, application № № 17444/04, came in force on 21 January 2011 — conviction based on testimony of a witness, whom defendant could not question in court (first applicant), conviction without providing enough time and opportunity to prepare defense (second applicant).

Leonid Lazarenko vs. Ukraine, 28 October 2010, application № 22313/04, came in force on 21 January 2011 — conviction based on testimony obtained in violation of right to defense.

Borotyuk v. Ukraine, 16 December 2010, application № 33579/04, have not came in force yet — conviction based on testimony obtained in violation of right to remain silent and right to defense.

These rulings bring to light the systemic problems of Ukrainian justice. Certain comprehensive measures should be taken in order to prevent similar violations in the future.

The examples of two cases (Yaremenko's and Shabelnik's) manifest, however, that the Ukrainian justice is not ready to implement the European Court of Human Rights' judgments.

In Yaremenko's case, the Supreme Court, having reviewed earlier decisions at extraordinary review, removed the references to two of Yaremenko's testimonies from the verdict. The European Court of Human Rights maintained that they were *decisive* in Yaremenko's conviction. The verdict, nevertheless, remained in force. Trying to nullify the European Court's ruling, the Supreme Court of Ukraine even exceeded its competences, which, alongside with other violations committed by the Supreme Court, became the grounds for another Yaremenko's complaint to the European Court of Human Rights⁴², which currently has been communicated to the Ukrainian Government.

After the first public campaign regarding the actions of the Supreme Court in Yaremenko's case, the Supreme Court changed its position in Shabelnik's case. It annulled the cassation resolution of the Supreme Court, which supported Shabelnik's guilty verdict and submitted the case for new cassation review. The verdict, however, remained unchanged, thus repeating the Yaremenko's case scenario.

⁴² Application № 66338/09

Stanislav Lutsenko's motion for the extraordinary review was totally ignored by the Supreme Court of Ukraine, as the court did not find grounds for the review. On repeated motion the case was once again assigned to the Supreme Court, but no decision has been passed since March 2010.

Besides, in 2009–2010 the European Court communicated a few similar cases to the Ukrainian Government.

It is safe to argue, that the number of cases, ruled by the European Court, as well as the cases transferred for communication, do not represent even the tip of the iceberg of violations regarding the right to fair trial. They are nothing, but a small signal flag on its tip. Therefore, the systemic reform of criminal justice, rules and principles of court proceedings, as well as establishing the court practices, which will prevent these violations to occur in the future, are a must.

In view of this, certain changes introduced by the Law of Ukraine “On Judicial System and Status of Judges” as well certain amendments to the Criminal Proceedings Code of Ukraine are rather disconcerting.

The only positive amendment with regards to compliance with the European Court of Human Rights' rulings is the law provision that stipulates the review of a case if an international court “establishes violation of international obligations...in resolving a case” (article 38, Law of Ukraine “On Judicial System and Status of Judges”).

The same Law, however, narrows the competences of the Supreme Court. According to part 2, article 38 of the law, the Supreme Court of Ukraine:

“1) reviews the cases on the grounds of unequal use of the same norm of material law in similar legal situations by courts of cassation, in order stipulated by the procedural law;

2) reviews the cases, if an international court, whose jurisdiction is recognized by Ukraine, establishes violation of international obligations in resolving a case in court”.⁴³

The language of the Law does not provide for the right of the Supreme Court to interfere with the use of procedural law by Ukrainian courts; it is entitled only to spectate as violations of fair procedure are being committed by them, until an international court institution establishes such violations. If that's the case, the Supreme Court, deprived of any levers of influence to ensure fair trial, can hardly be called “the highest judicial body within the system of general jurisdiction courts”. In fact, the Supreme Court looks like a purely ornamental body, whose only task is to interpret the decisions of an international body into the language comprehensible for the national judicial system.

Besides, even if an international body establishes the violation of a right, stipulated by an international treaty, the Supreme Court has no authority to institute the proceedings, but has to wait till one of the highest courts recognizes the motion for review admissible.

And even in cases of “unequal use” of law the intervention power remains very limited. It is obvious that the lawmaker meant that the Supreme Court of Ukraine is supposed to monitor the uniformity of the judicial practice. But if this is the case, the lawmaker demonstrates a very limited understanding of “non-uniformity”. The uniformity can be disregarded in many aspects. Alongside with unequal use of the same legal norm in similar legal situations, other violations can also take place, i. e.:

- The same use of the legal clause in different legal situations;
- Use of different legal norms in similar legal situations;
- The use of one legal norm in one case, and non-use of the same norm in another case in similar legal situations;
- Non-use of a legal norm in relations which call for its use etc.

All the case of “diversity” in judicial practice can hardly be predicted, and it is difficult to establish the only type of “diversity” which requires the Supreme Court's intervention as opposed to others.

Moreover, the Criminal Proceedings Code no longer contains the provisions, which defined (although not precisely enough) the extraordinary review procedure. The new provisions, in their turn, with lack of implementation procedure, fail to meet the requirements of legal certainty.

⁴³ The Supreme Court has two other competences, unrelated to the issue under discussion.

11. RECOMMENDATIONS

1. Changing the mechanism for setting up the High Council of Justice; in particular, all its members must be elected by the judges' Congress; this institution can also be disbanded with the transference of its functions to the entities which meet the criteria independently formed body of judicial power.
2. Broadening the Supreme Court of Ukraine competences; in particular, ensuring the opportunity for all the parties in the proceedings to approach it in the case of conflict of competences, unequal use of material or procedural law norms. Granting to the Supreme Court competences of passing its own decisions on cases review, independently of the highest specialized courts.
3. Regarding the right to legal assistance:
 - Implementing the Concept of reforms in the system of free legal aid, approved by Presidential Decree № 509/2000 of 9 June 2006.⁴⁴
 - Finalizing the law "On free legal aid", taking into account the expertise of free legal assistance offices, set up under the Presidential Decree № 509/2000 of 9 June 2006 and accelerating its passing.
 - Supporting the system of free legal assistance with necessary funding;
 - Harmonizing the law provisions concerning the right to legal assistance with the decision № 1-23/2009 of 30 September 2009 of the Constitutional Court of Ukraine; in particular, removing all the provisions restricting or complicating the access to the legal assistance.
4. Launching the implementation of criminal justice reform, approved by the Presidential Decree № 311/2008 of 8 April 2008⁴⁵, specifically, through criminal and procedural law reform and adoption of the new Criminal Proceedings Code of Ukraine⁴⁶.
5. Improving the procedure for administrative offence cases' consideration, by ensuring fair trial rights defined in Article 6 of the European Convention on Human Rights.
6. Ensuring the following guarantees of exercising the right to fair trial for the persons convicted of criminal or administrative offences:
 - To exclude from evidence any out-of-court testimony given by a suspect, a defendant or a convict, if they are not confirmed by him/her in an open trial.
 - Broadening the scope of requirements for mandatory legal representation; establishing the presumption of mandatory legal representation in dubious cases.
 - Removing the requirement of mandatory investigator's permit for the meeting between an attorney and a client and stipulating that a suspect's, a defendant's or a convict's petition is a decisive ground for granting the meeting by a person in whose custody the client is.
 - Destroying any waive of legal assistance, claimed in the absence of an attorney.
 - Ensuring the suspect's, defendant's and convict's right to defense, specifically through banning the court practice of changing the criminal conviction, if a person was not defended in the course of proceedings (re-qualification of a crime).
 - Providing for procedural provisions which would forbid the use of out-of-court statements in the court proceedings, except in extraordinary cases, and attach them less evidentiary weight than statements given in court.

⁴⁴ Available here: <http://www.president.gov.ua/documents/4549.html>.

⁴⁵ Available here: <http://www.president.gov.ua/documents/7703.html>.

⁴⁶ It is noteworthy, that we are not talking about the draft Criminal Proceedings Code, which has been sitting in the Parliaments for many years, as it does not establish procedures for safeguarding the rights and freedoms, formulated by international standards, in the course of criminal investigation. We refer to the draft law, developed by the working group and approved by the National Commission for strengthening of democracy and supremacy of law.

- Granting actual opportunity to question witnesses under protection program.
 - Enabling courts to verify the legality and expediency of witness protection measures in line with the right to question witnesses, and to change or remove such measures to ensure the defendant's rights.
 - Amending the entrapment concept, taking into consideration the practice of the European Court of Human Rights.
7. Checking up legality of "operative purchases" of drugs in oblast's, where the use of such measure looks most suspicious.
 8. Finding out the factual data on a child's living conditions, i.e. physical existence of a child: availability of dwelling, permanent sleeping place and its quality, availability and quality of food (in case when parents or guardians are absent — availability of means of subsistence) in the process of investigation and pre-judicial inquiry.
 9. If in criminal cases involving minors (non-violent crimes, property thefts) the absence of money to buy food is established in the course of pre-trial investigation, the following steps should be taken:
 - adding materials proving the child's circumstances to the case;
 - demanding that the territorial bodies responsible for children welfare provide without fail all the information concerning the living conditions of these children, so that it can be used as mitigating circumstances in the case, in line with the requirements of article 22 of the Criminal Proceedings Code (i.e thorough, complete and impartial investigation of all the evidence in cases, involving criminal liability of a child deprived of parental care). If such information is not provided, respective complaints on actions (or inaction) of these bodies shall be filed and prosecutor's office will be informed about such cases;
 - safeguarding the rights of a child to life and health care, as well as the right to appropriate living conditions, stipulated by a special Law "On childhood protection" (articles 6 and 8), recommending the courts to investigate all the circumstances of a case in order to establish whether the prerequisite of *extreme need (which, under article 39, Criminal Code, is a circumstance which excludes criminal liability*, caused by lack of money to buy food, which creates a serious threat for a child's life and health, was present in the crime, committed by a minor, and, if *such condition existed, to drop criminal charges at the absence of corpus delicti in the child's actions*.
 10. In compliance with p. 12 of the national Program for fighting children's homelessness and neglect for the years 2006–2010, improving the sharing of information concerning children's vagrancy, truancy, criminality, offences, detentions, drug and alcohol use and mendicancy between militia criminal departments dealing with juvenile delinquency and children's care services, establishing collaboration between them in order to prevent juvenile delinquency. In particular, if a parentless minor is detained on suspicion of having committed a crime, informing the children's care services in order defined by p. 5 article 106, Criminal Proceedings Code.
 11. Introducing public control over the operation of militia criminal departments dealing with juvenile delinquency to check, how they perform their duties with regards to uncovering and eliminating the causes of juvenile delinquency in their respective territorial units and how they prevent the criminality among minors.
 12. Introducing the necessary amendments to the procedural legislation and to the law on executive proceedings, which would enforce the entry of all the court decisions to the Unified State Registry of Court Decisions.
 13. The President, Cabinet of Ministers and Parliament must quit the practice of awarding the acting judges as well as the practice of engaging them in various executive power bodies.

IV. RIGHT TO FAIR TRIAL

14. Making legal provisions for the operation of independent experts and expert bureaus.
15. Developing and passing the necessary legal norms establishing reasonable time frames for the consideration of cases in court. Envisaging the possibility of indemnities for the persons whose rights have been violated by exceeding the reasonable time limits in legal investigation.
16. Strictly defining the place of state executive agencies within the framework of state authority system. Persons running for offices, related to the service of court decisions, must without fail take a qualification test and on-hand training. Eventual de-monopolizing of governmental operation in serving court decisions and its potential transference to non-governmental executors or executive agencies under active control on behalf of the Ministry of Justice of Ukraine is expedient.
17. Enhancing the debtors' liability for failure to comply with court decision and for deliberate creation of circumstances under which its execution is not possible; introducing incentives for voluntary execution of court decision.
18. Allocating funds in the State Annual Budget of Ukraine for executing the court decisions, in cases, where the state, state administrations, public institutions and agencies are debtors.

V. RIGHT TO PRIVACY¹

The Constitution of Ukraine guarantees privacy: “No one shall be subject to interference in his or her personal and family life, except in cases envisaged by the Constitution of Ukraine” (article 32 of Constitution). At the same time the Constitution provides for protection of separate aspects of privacy. So, the article 30 protects immunity of residence (territorial privacy), article 31 — privacy of correspondence, telephone conversations, telegraph and other correspondence (communication privacy), the article 32 prohibits collection, storage, use and distribution of confidential information about a person without his/her consent (information privacy), and the article 28 prohibits to put a person without his/her free consent to medical, scientific or other experiments (protecting certain elements of physical privacy).

The constitutional provisions give the complete list of legal grounds to invade on privacy and conditions for such break-in. However, both legislation and law enforcement contain many contradictions to the requirements of Constitution. For example, the legislation in part of right to privacy does not meet international standards, is contradictory and does not correspond with a concept “according to the law” practiced by the European court on human rights. In its turn, the law enforcement, in particular, law enforcement authorities largely disrespect the right to privacy.

On January 16, 2009 the circuit administrative court of Kyiv made a separate adjudication informing the prime minister of Ukraine about the necessity of drafting and submitting to Verkhovna Rada of Ukraine of a bill on the Procedure of getting court permit sanctioning measures that temporally limit human rights and use the obtained information². In fact, although according to the Constitution of Ukraine the limitation of privacy of correspondence, telephone conversations, telegraph and other correspondence is possible only in the cases stipulated by law, the procedure of obtainment of the leave of court is regulated by subordinate legislation: the Cabinet Decision № 1169 from 26.09.2007 approving “The procedure of obtainment of the leave of court for measures temporally limiting human rights and use of obtained information”. In 2009–2010 such procedure was not fixed by law.

No wonder there were procrastinations of amendments to the legislation noted by the European court on human rights in the case *Volochy vs. Ukraine* (2006). Until now there is no proper protection from illegal interference of public authorities with the right to private life and correspondence. In fact, the legislation still does not list persons covered by this procedure, relevant situations, and mandatory validity. The legislation contains no requirement of intermediate revision of decision about interference with a right to private life and correspondence in the reasonable time or any terms for such interference, no provisions for judicial review of law enforcement authorities during realization of their exercise of authority to interfere with private life. Moreover, the public authorities are not compelled to inform a person about surveillance executed, which limits the possibility to lodge a complaint against the legality of decision about state infringement of privacy.

¹ Prepared by R. Topolevsky, Center for legal and political studies SIM.

² <http://www.helsinki.org.ua/index.php?id=1233228499>

So, we can conclude that guarantees of legality in the case of information pickup from interconnections and mail intercept are obviously insufficient, and the legislation of Ukraine does not determine with sufficient clearness limits and terms of realization by government agencies of the discretionary authority in this area.

In March 2009 the representatives of the Block of Yuliya Tymoshenko directed the lists of telephones belonging to the higher public officers allegedly tapped by the Security Service of Ukraine to all Ukrainian appellate courts having jurisdiction to sanction phone tapping. The similar lists the deputies also sent to Chairman of the Supreme Court Vasyl Onopenko, Prosecutor General Olexandr Medvedko and oblast public prosecutors.

As Sviatoslav Oliynyk (BYT faction) said: “At our own discretion we made a list of key persons and those, who, maybe, are already tapped. We did it in order that courts, public prosecutors and investigative agencies could once more check issued sanctions against names used in materials of their search actions. We have listed concrete phone numbers to attract attention of right persons involved in issuing sanctions to the fact that these telephones belong to public politicians, and not to persons involved in criminal cases.”

According to the publication, the deputies directed to the Prosecutor General’s Office the list containing 11 numbers, and to the appellate court the broadened list of 30 phone numbers. Oliynyk said: “I do not intend to breach confidentiality and I will not name those on the list.” According to the *Komersant Weekly*, the deputy’s inquiries included mobile phones numbers of Prime Minister Yuliya Tymoshenko, first vice-premier Olexandr Turchynov, deputy heads of BYT faction Andriy Kozhemyakin and Andriy Pornov, Prosecutor General Olexandr Medvedko, deputies of Prosecutor General Mykola Holomsha and Renat Kuzmin, and also first President Leonid Kravchuk. In addition, a source in the faction informed that the short list includes the name of one of the “chiefs of security, defense and law enforcement agencies”³.

In November 2010 journalist V. Boiko (“ORD”) said that it became known to him that in submission for tapping of three telephones of Luhansk smuggler sanctioned by Chairman of the Luhansk Oblast Appellate Court Anatoliy Mykhailovych Vizir the phone numbers belong to such journalists as V. Boiko (“ORD”), S. Rechynsky («ORD») and S. Leshchenko (“Ukrayinska Pravda”). He maintained that usually, when the “phones of journalists and politicians are tapped by the SSU according to a standard practice, during the investigation of a real criminal case they illicitly add phones to the list to be illegally tapped”⁴. The SSU spokeswoman denied these allegations⁵.

On December 1, 2010 the deputy chief of the department of Lviv Oblast State Automobile Inspectorate S. Kharabra said in his televised interview to the journalists of the program “Who lives here?” (TV channel “ZIK”) that he have records of conversations of journalists of this TV channel, which, if he is invited to the studio, he may openly broadcast, however he refused to dwell on the sources of such information⁶.

There remains a problem of the procedure of search and seizure conducted not at home or other estate of the person, as contrary to international standards such actions need no court approval. Separate problems arise when they search apartments of advocates, because the advocates may keep information entrusted to them by a person under investigation, which needs special protection. However, in practice there is no such protection.

In August 2010 BYT deputy Andriy Senchenko said that during the illegal search of his office on August 11, 2010 the SSU agents bugged the premises. He believed that the absence of court decision about the search testifies to its illegality⁷.

³ <http://tsn.ua/ua/ukrayina/byut-sklav-spisok-posadovtsiv-kandidativ-na-nezakonne-prosluhovuvannya.html>

⁴ <http://ord-ua.com/2010/11/08/zhurnalisti-kontrabandisti/>

⁵ <http://www.telekritika.ua/news/2010-11-09/57369>

⁶ <http://zik.com.ua/ua/news/2010/12/03/259965>

⁷ <http://www.pravda.com.ua/news/2010/08/16/5305574/>

Combating the so-called cyberterrorism the SSU monitors the Internet users and regulates the Ukrainian segment of the network. Without any legislative authorization the SSU goes on using new tools to tap into the users' lines.

For example, on September 1, 2010 they searched the premises of the mobile operator Intertelecom Ltd. under the pretext of looking for the smuggled stuff. However, the Intertelecom CEO said the real cause was their refusal to install automatic tapping required by SSU⁸. The analysts maintain that the requirements of the SSU are not grounded well enough⁹.

On June 1, 2010 the Law of Ukraine was passed "On protection of personal data"¹⁰ regulating relations related to personal data protection in the course of data processing.

This Law covers the compilation of personal DBs and personal DB processing except for personal DBs created by a physical entity for non-pro or domestic needs; by a journalist for discharge of his/her official or professional duties; by a professional creative worker for his/her creative activity.

By this Law all personal data, except for the depersonalized personal data, are classified as limited access information, except for the cases when the law forbids classifying personal data of certain categories of citizens or their full list as restricted information.

In particular, this rule does not cover personal data of a physical person that either aspires to hold or already holds an elected office (in representative bodies) or position of public officer of the first category, except for information classified as restricted under the law.

By law, the processing of personal data must be a pre-targeted process; should the target be reset the consent of the subject of personal data will be needed to reprocess data, and these personal data should be correlated with the targeted processing.

There should be no processing of data about a physical person without his/her consent, except for the cases regulated by law, and only in the interests of national security, economic welfare and human rights. Upon completion of preset term of use these personal data must be depersonalized.

There are shortcomings in the law, though. In particular, the unseparated common (last name, name, patronymic, citizenship, place and date of birth) and vulnerable personal data can yield negative results. For example, the requirement about the necessity of personal data processing with scientific, statistical and historical aims in the depersonalized form only can result in an absurd situation, when the use of the last name, name, and patronymic in scientific and historical works will be considered a breach of this law. Another problem is the necessity of development of subordinate legislation by the Cabinet of Ministers of Ukraine, without which the law is inapplicable. However, it is obvious that the law enforcement procedure will depend on the organ authorized to protect personal data and what procedure it will form. It should also be noted that the law establishes no transitional period during which the persons responsible for DB registration can gradually pass over to such system of registration.

In April and June 2010 the MIA brought up the return to booking nominal railroad tickets¹¹. Until now, however, the Ukrzaliznytsia has failed to agree with such suggestion.

Today an identification number issued by the State Tax Administration is the basic electronic classifier used to collect and process personal data of the citizens of Ukraine. Its application field constantly expands and goes far beyond the legitimate target of tax bookkeeping. Without the ID code there is no legal employment, access to the pension system, realization of right to education, receipt of grants and unemployment benefits, registration of subsidies, establishing of bank accounts, registration of entrepreneurial activity, receipt of state credentials etc. Actually, the

⁸ <http://www.interfax.com.ua/rus/main/47231/>, <http://biz.liga.net/news/E1008823.html>

⁹ <http://focus.ua/politics/141581>

¹⁰ <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2297-17>

¹¹ <http://mvs.gov.ua/mvs/control/main/uk/publish/article/319925;jsessionid=D21660ABCE4C3D46B98A6AD0828786C8>, <http://www.24tv.com.ua/news/1/1/31894>, <http://gazeta.ua/index.php?id=344400>

administration of government bodies leads to conscious breach of Law of Ukraine on the single register of physical persons-taxpayers — and the use of ID number for the purposes unspecified by this Law.

On May 18, 2010 the Verkhovna Rada of Ukraine passed the Law “On amendments to the Law of Ukraine “On prevention of legalization (washing) of profits obtained in a criminal way” that substantially expands the authority of Derzhfinmonitoring. The law goes beyond the scope of legislations about an professional legal and auditor’s privilege, secrecy of notary and makes these persons to disclose information about a person using vague reservations that in certain cases such secret can be disclosed.

In July 2010 the regional state administrations of Lviv Oblast were ordered to prepare the “social passport of the territory”. The filled-in questionnaires included all regional top administrators: deputies of all levels and chairmen of cities and settlements, militia, office of public prosecutor, courts, businesspersons, and company CEOs; among the questions, which could be explained by such aim, were such questions as “party membership of the leader, his/her political orientation, leverage of electorate, for whom s/he voted during 2010 presidential elections.” They also collected data on clergy¹². Later such information came from other oblasts, e. g. Chernivtsi Oblast¹³. The analysts believed that these data were collected by the Administration of the President of Ukraine to be used in the local elections in the fall of 2010¹⁴.

According to E-in-C of Sumy City Rada *Sumy I sumchany* Mykola Chernotytsky, in September 2010 the chief editors of Sumy Oblast municipal media received a letter requiring them to sign a typical agreement containing urgent request to inform proprietors of their media about their membership in political parties and also to inform owners about changes of their political views. The oblast state administration explains that it fulfilled the assignment of the Cabinet of Ministers of Ukraine¹⁵.

There was one problem of privacy developing in 2009–2010: installation of surveillance cameras in public places, i. e. in kindergartens¹⁶ and schools¹⁷ that triggered different opinions.

In accordance with European standards, the video surveillance can take place: however it must meet the following requirements: the areas under surveillance should be systematically marked, the independent national surveillance agency should be set up to independently control the installation of cameras, storage and use of information about a person¹⁸.

The coercive medical procedures were in the limelight of media: for example, the centralized vaccinations of children. In the absence of vaccinations, a child could not go to school or kindergarten. Meanwhile the very procedure of vaccinations is doubtful. The opponents of vaccination quote the legislation maintaining that vaccination can be done by consent of a person or by consent of his/her parents, if a person is under 15 years. They also maintain that the prohibition to attend child welfare institutions contradicts the constitutional right to education¹⁹.

¹² <http://www.wz.lviv.ua/pages.php?ac=arch&atid=84201>

¹³ <http://www.pravda.com.ua/news/2010/07/26/5251041>

¹⁴ <http://www.helsinki.org.ua/index.php?id=1283967350>

¹⁵ <http://obkom.net.ua/news/2010-09-13/1454.shtml>

¹⁶ <http://gazeta.ua/index.php?id=336003>

¹⁷ <http://daily.lviv.ua/news/20167>, <http://ukraine2012.gov.ua/publication/comments/559.html>, <http://www.zaxid.net/article/52893/>

¹⁸ European commission for democracy through law (Venice commission), Opinion “On video surveillance in public places by public authorities and the protection of human rights”, Adopted by the Venice commission at its 70th plenary session (Venice, 16–17 March 2007), [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)014-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)014-e.asp).

¹⁹ <http://www.radiosvoboda.org/content/article/1813129.html>, <http://vechirka.ck.ua/dodatok/zdorov%E2%80%99ya/shheplennya-robiti-budem>

In July 2009 the Luhansk Oblast Office of Public Prosecutor brought an action against 4 employees, including chief doctor, of one of Luhansk dispensaries on suspicion of experiments on people²⁰.

RECOMMENDATIONS

1. To amend the Law of Ukraine “On protection of personal data” promoting the following principles:
 - to distinguish the common (last name, name, patronymic, citizenship, date and birth-place) and vulnerable personal data with different access mode;
 - different IDs (DBs of various public agencies) must be used separately, so that a single code should not cover all personal information;
 - the interagency data exchange should be clearly regulated and be subject to court sanction with timely information of the person and possibility to refer to the court about these actions.
2. The administrative practice of unlawful use on the taxpayer’s identification number (code) for other purposes not envisaged by legislation should be stopped. The use of the concept “personal number”, the use of which is not envisaged by any law should also be stopped.
3. Revoke Cabinet of Ministers Resolution №1169 from 26 September 2007 “On approving the Procedure for obtaining a court order to carry out measures which temporarily restrict human rights and the use of the information obtained”. In implementation of the Separate Judgment of the District Administrative Court from 16 January 2009, the Cabinet of Ministers should draw up and submit to parliament a draft law reflecting the following principles:
 - Procedure for court warrants for such activities and the time limits they are valid for;
 - Restriction in the cases where the grounds for suspecting a person of having committed a serious crime have already been established by other means;
 - Procedure for periodic review by the court of the warrant issued;
 - Information to the person about communications having been intercepted after the procedure is over and a decision has been taken not to institute or to terminate criminal proceedings;
 - The right of an individual to appeal against these actions and demand compensation if the actions of the authorities were unwarranted;
4. Change legislation with aim to allow for independent monitoring of the activities of the State Service for Special Communications and Protection of Information, MIA, SBU and other law enforcement agencies, in intercepting communications, publishing an annual report with depersonalized information regarding the interception of communications in the course of investigative operations and criminal investigations.
5. Establish procedure in criminal proceedings making it possible to appeal against the actions of law enforcement agencies in searching a person, his/her home or workplace, as well as providing the possibility of seeking redress if this procedure is infringed.
6. Introduce a norm envisaging annual publication by the law enforcement agencies of the total number of court warrants for interception of information from communications channels and permits for interception of correspondence and secret searches.

²⁰ <http://ua.glavred.info/archive/2009/07/04/152329-7.html>

V. RIGHT TO PRIVACY

7. The Ministry of Internal Affairs must stop the unwarranted collection of sensitive personal information about individuals (information regarding their political views, religious beliefs, sexual orientation, etc).
8. Change legislation on keeping adoption information secret even from the child involved. Exceptions should be made to the provisions of legislation which establish absolute confidentiality of adoption (Articles 226, 229 and 230 of the Family Code; Article 168 of the Criminal Code).
9. Pass a law and other normative legal acts protecting the rights of patients, in particular as regards compulsory medical procedure and confidentiality of information about a patient's condition.
10. Amendments should be made to legislation and legal practice to eliminate the discrepancy between the compulsory nature of vaccinations in order that a child may attend children's institutions and the right to education for children whose parents have consciously refused to allow such vaccinations, especially where the vaccinations are contra-indicated for the child and could harm him or her.
11. Regulate at legislative level video surveillance in public places, the procedure for storage, access to and wiping of such video footage, marking places where there is such surveillance, and ways of control over such activities.

VI. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION¹

1. OVERVIEW

Churches and religious organizations enjoy public confidence (70–80%) in the society, despite the fact that one third of the population does not confess any religion. This confidence is manifested in many consequences. The church and religious organizations have always played significant role in the social and political life; that's why politicians tackle this issue with caution, which explains the stability in church-state relations over the last 20 years.

On the other hand, different confessions and religious organizations traditionally coexist in this country, competing between themselves and preventing any single religion or church from monopolizing influential position in the country and society. This rivalry, in its turn, results in situation, when consensus between various religions on major issues cannot be achieved. Due to the lack of consensus many legal issues, e. g. restitution of church property, adoption of new law on religious organizations, principles of relations between the state and religious organizations, remain unresolved.

With this background in mind, Ukraine looks much better than other post-Soviet countries, providing basic religious freedom for its citizens. Although the law on freedom of conscience and religious organizations is rigid and obsolete, in practice its faults are counterbalanced with predominantly liberal administrative governance exercised by the authorities. However, in the absence of clearly defined legal guarantees for religious freedom, the situation remains unstable and unpredictable, depending largely on the state policy in every given moment.

In general, legislation adequately defends this freedom and establishes many guarantees for safeguarding it. There are no provisions regarding compulsory support for religious organizations, forced membership in organizations or obstacles placed in the way of changing one's religion. There are provisions enabling people not to work on religious festivals, etc.

There is no state religion or provision of traditional and nontraditional religions, but also permitted the existence of religious communities without state registration, and even without statement on existence.

That's why it seems absolutely logical that over the years 2009–2010 the theory and practices concerning freedom of thought, conscience and religion had undergone no significant changes, although such changes were anticipated due to the open partiality manifested by President Yanukovich and new government with regard to the Russian Orthodox Church. The religious relations, however, were not in the focus of their activity during the first year, but for the public funding of several Ukrainian Orthodox churches under the auspices of Moscow Patriarchate. Thus, all-Ukrainian Council of churches and religious organizations — an advisory body under the President — hasn't convened even once, although last year it carried out 5 meetings. And the new head of the State

¹ Prepared by Volodymyr Yavorsky, UHHRU Executive Director.

Committee for Nationalities and Religions was appointed only on July 5, 2010, although all the other officials were rotated immediately after new government started its operation in March–April.

Ukraine has done virtually nothing to implement the judgment handed down by the European Court of Human Rights in the Case of *Svyato-Mykhaylivska Parafiya v. Ukraine*². It should be noted that the Supreme Court passed the case for new court proceeding. In this case the Court found a number of specific failings in Ukrainian legislation and administrative practice; infringements by the State of the principle of neutrality; violations of the right to religious association; unpredictability, inconsistency and lack of clarity of legislative acts, etc. No action to eliminate the causes of rights violations, which pointed to the European Court was made, although national courts were regarded with greater caution in such cases, citing the decision.

The working group under Ministry of Justice kept working on draft laws on freedom of conscience and religious organizations and on restitution of religious property. This work has been going on for years, and still is not accomplished. President Yanukovich ordered to complete this work by December 1, 2010, which caused a protest from all-Ukrainian Council of churches and religious organizations.

“The confessional leaders stressed that Parliament should consider the amendments to the acting Law of Ukraine “On freedom of conscience and religious organizations” only if all the subjects of law-making process come to a fundamental consensus on the importance of religious freedom in Ukraine as one of the major achievements of our state in ensuring human rights and freedoms”— reads the Council declaration. — “it is important to involve the representatives from the all-Ukrainian Council of churches and religious organizations at all stages of the process, as the stakeholders whose opinion should be taken into account”.³

Over the last two years several legislative initiatives, aimed at restricting religious freedom, were voiced in Parliament; however, they were not supported even at the level of the parliamentary committees.⁴

As of January 1, 2010 religious network is represented by 55 confessions, 35 184 churches and religious organizations (719 more than in the last year), including 33 773 congregations, 85 centers, 265 departments, 439 convents, 347 missions, 76 fraternities, 199 religious schools, 12 758 Sunday schools. 30 516 members of clergy govern religious affairs in Ukraine. The publications of religious printed media are growing in number, presently reaching 377 titles. The religious organizations use 22 787 temples or houses of worship. The research on the rate of growth in number of churches and religious institutions shows that between the years 2000 and 2005 the spreading of religious network has become stable, constituting 4,1–4,7% a year. The results of the last three years show a decrease in this indicator: in 2007 it amounted to 2,3%, in 2008 — to 1,8% , in 2009 — to 2,04%.⁵

² Judgment of the European Court of Human Rights in the Case of *Svyato-Mykhaylivska Parafiya v. Ukraine* from 14 September 2007 In this case the Kyiv City State Administration had refused to register amendments to the articles of association of the *Svyato-Mykhaylivska Parafiya* which envisaged changing canonical subordination from the Moscow Patriarchate to the Kyiv Patriarchate. We should also add that the Head of this *Parafiya* in parallel stated that unlawful actions against him by the authorities had been started again, cf. “The Head of the *Parafiya* Council which won its case in the European Court is being persecuted by the Kyiv Tax Police // Religious Information Service of Ukraine www.risu.org.ua.”

³ See more on Institute for religious freedom site: http://www.irs.in.ua/index.php?option=com_content&view=article&id=740%3A1&catid=34%3Aua&Itemid=61&lang=uk.

⁴ See e. g. draft law prepared by members of parliament Ihor Rybakov (non- factional) and Vladyslav Lukyanov (Party of the Regions) “On Introducing changes and amendments to the Law of Ukraine “On freedom of conscience and religious organizations” re banning the totalitarian religious sects (register No 5473 of December, 24 2009), which a month later was rejected by the authors after criticism. Later a new draft law on banning religious sects was proposed ((№ 6493 of June 7, 2010, member of parliament L. Biryuk (BYUT faction); more on this draft can be found on http://www.irs.in.ua/index.php?option=com_content&view=article&id=676%3A1&catid=34%3Aua&Itemid=61&lang=uk.

⁵ Information report of the State Committee on Nationalities and religions “on status and tendencies in religious situation and state-confessional relations in Ukraine (Short version), March, 24 2010, Committee press service <http://www.scnm.gov.ua/control/>.

The largest number of religious organizations is to be found in the Western part of the country and the smallest — in the Eastern part.

However according to figures from the State Committee of Statistics in the Single State Register of Enterprises, Organizations and Institutions there is information about 22,343 religious organizations on 1 January 2010 .

This difference is very easy to explain. From when double register was introduced for religious organizations several years ago organizations which were at that time already registered had to go through additional registration with the State Registrar and receive a certificate of State registration. These statistics show that 12,841 religious organizations have still not gone through this double registration.

2. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION: THE RIGHT TO BELIEVE

There is just one fundamental area where this freedom could potentially encounter unwarranted interference. This is in connection with alternative military service where the following infringements of international standards are observed:

- This right is granted only on the basis of religious views and not where a person is guided by moral or political convictions, for example, pacifist views;
- The right is granted only by members of officially registered religious organizations, although the Law does not oblige religious organizations to register;
- The right is granted solely to members of religious organizations stipulated in the Cabinet of Ministers Resolution which is of an overtly discriminatory nature;
- During the procedure required to establish this right, a person must provide documents certifying that he belongs to a particular religious organization (involving the need to provide evidence of ones religious convictions and the possibility of these convictions being “checked”);
- The period for alternative service is twice as long as the usual period for military service which is also overtly discriminatory.

There is also a problem with choice of places for doing alternative service which is much too limited if one considers the positive experience of other European countries.

3. FREEDOM TO PRACTISE ONES RELIGION OR BELIEFS

3.1. FORMATION AND ACTIVITIES OF RELIGIOUS ORGANIZATIONS

Any collective practice of religious beliefs in Ukraine without the creation of a legal entity (religious organization) is extremely difficult. This is required for virtually any “religious activities”, for leasing premises, for holding public services or inviting representatives of foreign religious figures; printing or circulating literature. At the same time, in order to do alternative military service, a person must demonstrate that he belongs to a registered organization included in the list of “organizations whose teachings do not permit the use of arms”

Although the legislators allowed for religious communities to exist without registration and without legal entity status, in practice registration is needed for any group of believers who wish to publicly exercise their faith in any way. Unregistered communities enjoy virtually no rights.

According to international standards, the right to create a religious organization is an inalienable part of the general right of association, and therefore a different system for registering civic and religious organizations, as is in place at present, can hardly be deemed necessary in a democratic society.

VI. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

The following infringements to freedom of religion are to be noted when registering religious organizations

1. Legislation sets out an exhaustive list of legal forms for religious organizations with a system of management established by law in advance.
This is a clear violation both of the rights of individuals to determine their own form of religious associations, as well as of the right to autonomy of the religious group itself, with the opportunity to independently determine its structure and run it being intrinsically linked with this right. Ukrainian legislation, for example, effectively prevents the formation of charismatic religious organizations since according to the law the highest body of any religious organization is the general assembly of believers, with this running counter to the view of many religions and faiths. The Church can also not be registered as a legal entity, but only as the executive body of an association of religious communities.
2. Double registration: the first involves a meticulous check of the faith's compliance with legislation (the articles of association of the religious organization), and the second — gaining legal entity status in the general procedure for all enterprises, institutions and organizations.
3. The time frame for registration is discriminatory with relation to other associations and clearly unwarranted. The law states that this is one month and in some cases can be extended to three months. However, in practice, the average period required for registration is, at best, 3–9 months.
4. Legislation does not set down clear grounds for turning down registration or liquidating a religious organization. It also fails to stipulate how detailed a refusal must be, although there should be clear indication of what the infringement is. Nor does legislation state how admissible inconsistencies between the articles of association of the religious organization and Ukrainian legislation are, whether they are simply textual discrepancies, or whether there is a significant inconsistency in the aims and activities of the organization which in practice will lead to infringements of legislation.
5. Legislation does not permit foreign nationals, even where they are permanently resident in the country, to found religious organizations. This is a particularly pertinent issue for national minorities.

Overall, as noted by the European Court of Human Rights in the case of *Svyato-Mykhaylivska Parafiya v. Ukraine* mentioned above, the law on freedom of conscience and religious organizations lacks consistency and foreseeability⁶. In this judgment, the Court also pointed out the first and fourth of the problems we have outlined here.

In 2009 the State Committee for Nationalities and Religions received 90 petitions for the registration of religious organizations' statutes, or introducing changes and amendments into them. 44 statutes and 44 amendments and additions to the existing statutes of religious organizations were registered.⁷ Official data on refusal of registration for religious organizations usually is not publicized, although such cases are known.

The leaders of organizations, to which registration is refused, usually get no explanation on the grounds for refusal, while the authorized body only refers to the respective law, which does not give the slightest idea as to the real cause of refusal. In fact, this procedure is contrary to the law, but that's the actual practice. Rather often refusals are not justified at all, being based only on personal perceptions of the officials and not on the law. Besides, the authorities regularly go beyond the time-limits for the consideration of registration applications.

⁶ See paragraphs 130–131 of the judgment of the European Court of Human Rights in the case of *Svyato-Mykhaylivska Parafiya v. Ukraine* from 14 September 2007.

⁷ Information report of the State Committee on Nationalities and religions “on status and tendencies in religious situation and state-confessional relations in Ukraine (Short version), March, 24 2010, Committee press service <http://www.scnm.gov.ua/control/>

The circuit administrative court of the Autonomous Republic of Crimea on June 11, 2010 classified the refusal of ARC Committee on religion to register the statutory documents of an independent Muslim religious community “Salachyk” as illegal. After considering the submitted documents for a prolonged period of time, the government body ordered to introduce some changes into the statute, although it was not required by the law. Finally, it refused the registration, because, allegedly, “The statute of the Muslim religious community “Salachyk” does not comply with the Law of Ukraine “On freedom of conscience and religious organizations”; namely, the statute does not contain the information on community denomination — a trend or a religious belief”. The Court ruled that statutory language, specifying that the community professes “Islam in accordance with Qur’an and Sunnah” is sufficient to define its religious affiliation. It looks, like it was nothing but formal grounds for rejection.

A lot of problems related to registration of the new religious organizations or amendments to the existing statutes arise in Kiev, where city state administration has repeatedly neglected time-limits envisaged for the consideration of the submitted documents, and also, in many instances, groundlessly refused registration.

For many years the Church of Scientology is refused registration in Kiev. The most recent petition was submitted on May 28, 2009 by the residents of Dnipro district in Kiev. Instead of either registering or refusing to register the organization, Kiev city state administration on August 3 issued a letter, stating that there is no cause to consider the submitted documents, as on September 23, 2004, a KCSA Ordinance No 1774 with the refusal to register this organization, was issued. This response is not in line with the law, but this fact never stopped KCSA. On the appeal of the organization founders the circuit administrative court of Kiev classified KCSA actions as unlawful and ordered to consider the documents submitted for the registration of the religious organization⁸. In response, KCSA demanded that the organization founders submit all the documents anew. Obviously the actions of KCSA, due to which the community has not been able to register for over 17 months, have no legal justification. It looks like the authorities are trying to prevent the organization from registering at any cost due to some unofficial ban.

Here is another typical example.

In December 2009 the circuit administrative court of Kiev ordered KCSA to consider the application and relevant documents, submitted on March 27 2009 by the founders of a religious community “Holy Spirit Association for the Unification of World Christianity” and to pass due decision in accordance with terms and procedures established by the Law of Ukraine “On freedom of conscience and religious organizations”. Earlier, in 2007 believers wanted to register a similar community in Obolon’ district, city of Kiev, but were refused. The decision read that the operation of the said community is not in line with the requirements of articles 3 and 4 of the Law of Ukraine “On freedom of conscience and religious organizations”. The specific reason for rejection, however, was not given, which is contrary to the law in force. Proceeding from this old decision, the Chief Directorate on nationalities and religions under the executive body of Kiev city council KCSA of April 30, 2009, informed the community founders that the documents they submitted on February 24, 2009 would not be considered.

3.2. THE STATE’S POSITIVE DUTIES WITH REGARD TO PROTECTING THE PEACEFUL PRACTICE OF RELIGION FROM INCURSIONS BY OTHERS AND PROTECTION OF RELIGIOUS MINORITIES

The state has the obligation of not only non-interference into the freedom of conscience without good reason, but also certain duties to guarantee this freedom. The state should implement legal and administrative measures to restrain representatives of other religions from incursion or other ways of interfering with peaceful exercising of one’s religion or beliefs.

⁸ See decision here: <http://www.reyestr.court.gov.ua/Review/8029123>.

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Inadequate actions of law enforcement bodies concerning the protection of cult property are especially crucial in this context. Specifically, the acts of vandalism are gaining momentum. Churches, synagogues, cemeteries and memorials have been vandalized more than once.

A Kharkiv case is of special interest, as the vandalism was sanctioned by the local court:

On November 16, 2010 in Kharkiv a memorial plaque was dismantled from the building of former transit jail of Kharkiv ("Jail Castle", at the address: Kharkiv, Malinovsky str. 5. Presently militia department is located there), where arch-pastor and martyr of blessed memory Patriarch of Ukrainian Greek-Catholic Church Yosyp Slipy, who spent 18 years in jail, was held, before being sent in 1961 to exile in Mordovian camps. The plaque was dismantled by members of "Velika Rus" NGO. Allegedly they were carrying out the order of Dzerzhinsky district court, where this organization filed a complaint on illegality of placement of the plaque. However, the organization, which put the plaque there in 2005, insists that all the required permits were in order. Dismantling was performed despite the protest from the members of Ukrainian Greek-Catholic Church. On December, 14 Lviv City council informed that it would cover the costs of re-establishing the plaque. This agreement was achieved between the Head of Kharkiv Oblast' State Administration and Lviv Mayor.⁹ The NGO representatives, however, went unpunished. Clearly, they had no right to destroy the plaque on their own, even in line with the court's decision, as it was the prerogative of the executive body. These and similar actions doubtless stir up interreligious animosity.

Absence of official legislative or administrative actions mechanisms aimed at mitigating intolerant and untruthful media publications on religious minorities and at counteracting the rousing of interreligious animosity also aggravates the situation.

3.3. THE ORGANIZATION AND HOLDING OF RELIGIOUS PEACEFUL GATHERINGS

The Law on Freedom of Conscience and Religious Organizations runs counter to Article 39 of the Ukrainian Constitution in imposing a permission-based procedure for holding religious peaceful gatherings. In practice, holding public religious peaceful events is fraught with an even greater number of problems based on discrimination, intolerance and arbitrary interpretation of legislation.

In May–July 2010 Parliament considered the draft law on peaceful gatherings (№ 2450). For unclear reasons the draft authors excluded the peaceful gatherings held out by religious organizations from the law. This led to protest from human rights' activists and all-Ukrainian Council of churches and religious organizations¹⁰. Finally the consideration was continued till the fall of 2010, so that recommendations of the Council of Europe Venetian Commission could be taken into account before the second reading.

3.4. THE RIGHTS OF FOREIGN NATIONALS AND STATELESS PERSONS

Ukrainian legislation continues to substantially restrict freedom of worship for foreign nationals and stateless persons. This is reflected in their not being able to found religious organizations, or engage in preaching work or other religious activities. These restrictions even apply in the case of people permanently resident in Ukraine. Furthermore foreign nationals may engage in preaching activities only at the official invitation of a registered religious organization (although their registration is not compulsory) and permission from the State authorities on religious affairs.

The lack of a permit entails administrative liability for foreign nationals (a fine), and for religious organizations — a warning, then in future possible forced closure.

⁹ See more: *Vandalism in Kharkiv* <http://kharkiv.dyvy.info/reports/814-2010-11-16-11-17-53>; *Kharkiv court supports the vandals*, <http://www.glavnoe.ua/news/n62802>; Sadovy and Dobkin agreed upon re-establishing of the plaque in memory of Y.Slipy /n64811.

¹⁰ See more here: http://risu.org.ua/ua/index/all_news/confessional/auccro/36227/.

8070 foreigners came to Ukraine in 2009 on religious visa, which were 225 persons more than in 2008. The State Committee on Nationalities and Religions officially approved religious and canonical activity for 3607 foreign nationals. Structural branches of oblast' and city state administrations issued respective permits for 4464 foreigners, including 2542 Americans, 1705 Israelites, 935 Poles, 403 natives of Asian countries, 292 natives of African countries, 298 Germans, 155 Turks, 1055 — other countries' nationals. There is no available official information on the number of refusals. 7 violations of the law on freedom of conscience committed by foreign nationals during their stay in Ukraine were registered (4 in Vinnytsa oblast Vinnytsa and 3 in Lviv oblast').¹¹

4. THE STATE AND RELIGIOUS ORGANIZATIONS: THE PRINCIPLE OF INVOLABILITY AND IMPARTIALITY

The constitutional principle of separation is based on the principle of pluralism of thought and entails the impossibility of merging the State and religion¹².

The principle of neutrality demands that the State show no bias towards existing religions or faiths. This principle is closely linked with the above principle and follows from the separation of State and religious organizations. One of the key approaches when assessing the actions of the authorities from this point of view is adherence to the principles of non-discriminatory, unbiased and equal attitudes to all religious organizations.

State support for certain churches is not a violation of these principles unless it establishes universal rules binding all to provide such support or look favorably on these religious organizations.

Adherence to these principles is one of the greatest problems in the authorities' administrative practice.

This is in the first instance linked with the fact that the authorities, fighting for the support of the electorate, always show a favorable attitude to the dominant religion. Clearly this patronage gives the informal message that these dominant religious organizations have more rights.

This is graphically reflected in situations involving property issues, for example, allocation of sites of land to construct places of worship or the return of religious property confiscated under Soviet rule. In such situations, this favorable attitude assumes a practical dimension. Positive decisions on these issues, with few exceptions, are received only by the dominant religious organizations. It should be noted that in this context it is religious organizations which are most widespread in a given area (region) that are dominant. Different religious organizations, usually the Ukrainian Orthodox Church under the Moscow Patriarchate or under the Kyiv Patriarchate (UOC KP), are dominant in different areas

According to the data, collected by the State Committee on Nationalities and Religions, between 1992 and 2009 5672 houses of worship were built with the help of local executive power, local self-governments and by attracting off-budget funds. 251, i. e. 4,4% of those were built in 2009. Principal religious organizations respectively constructed:

- Ukrainian Orthodox Church under Moscow Patriarchate — 127,
- Ukrainian Greek-Catholic Church — 63,
- Ukrainian Orthodox Church under Kiev Patriarchate— 54,
- Union of Evangelical Christian-Baptists — 8,
- Union of Pentecostal Churches — 10,
- Ukrainian Autocephalous Orthodox Church — 3,

¹¹ Information report of the State Committee on Nationalities and religions "on status and tendencies in religious situation and state-confessional relations in Ukraine (Short version), March, 24 2010, Committee press service, <http://www.scnm.gov.ua/control/>

¹² More on this can be found, for example, in "Court defense of human rights: Case law of the European Court of Human Rights in the context of western legal tradition" — Kyiv: Referat, 2006, pp. 392–393.

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Roman Catholic Church — 2 church premises. 2398 premises are still under construction.¹³ Apart from the fact that this financial support seems dubious in view of the legislation in force, it is obvious that all the support is given to the religious organizations prevalent in the given areas.

For example, in early December, 2010 Kiev city council members allocated 11 million UAH for the construction of the Holy Ascension cathedral (Ukrainian Orthodox Church under Moscow Patriarchate). The building, 22 thousand square meters big, will house not only cathedral for 5 thousand parishioners, but also a metropolitan's residence, numerous offices, school, spiritual/educational center, pilgrims' hotel, TV studio, conference hall with one thousand seats, fitness center and underground parking garage for 126 cars. Earlier the Ukrainian Orthodox Church speakers declared that it would be the highest cathedral in Europe 120 m high.¹⁴

Meanwhile, on September 8, 2010 the Cabinet of Ministers passed an ordinance under which the budget funds in total of 13 million 400 thousand UAH are allocated for archeological digs and "musefication" of the ruins of Tithe Church fundaments". "When archeological team leaders tried to figure out what "musefication" stands for, they found out that it meant laying down the foundations for a Moscow patriarchate church: concrete pillars and a concrete platform on them" — stated the archeologists' task force.¹⁵ In fact the money was allocated for the construction of the temple belonging to Ukrainian Orthodox Church under Moscow Patriarchate at the historic site, which meant ultimate ruination of this latter.

Before that the Cabinet of Ministers of Ukraine by its Decree of June, 14, 2010, allocated 1.4 million UAH from the stabilization fund for the completion of Saint Andrew Cathedral in Nova Kakhovka parish (Ukrainian Orthodox Church under Moscow Patriarchate) and 3 million UAH for the construction of Mother of God's Cathedral (Ukrainian Orthodox Church) in the town of Kurakhovo, Donetsk oblast' The journalists' investigation, however, proved that this latter was built and consecrated as long ago as 2005.¹⁶

Here are some examples of allotting land plots for the construction of religious premises or resolving the property issues:

- Sumy city council in December 2009 refused a permit to develop a plot of land for construction of a Ukrainian Greek-Catholic Church building. According to the draft decision, 1.19 ha of land in Krasnozvezdinsky st. (KRZ park). However, only five council members voted "for" the decision. According to UGCC information department, the issue of land allotment for Greek-Catholic believers could not be resolved for a number of years. In the meantime, two other churches in Sumy were granted permanent use of land on which they are standing. The statement also contains the information on Evangelical Christian-Baptists Church "The Evangelic Light", which received 0,23 ha in Pokrovska st.5, and on Saint Trinity parish of Sumy eparchy(Ukrainian Orthodox Church under Moscow Patriarchate) — 0,60 ha for Saint Trinity cathedral.¹⁷
- At the meeting on September, 23 2010 the members of Simferopol city council passed a decision refusing to allot a land plot for the construction of a cathedral (Ukrainian Orthodox Church under Kiev Patriarchate). Earlier the church members approached city council asking for a 0,49 ha land plot in Kievskaya street, close to the Ukrainian

¹³ Information report of the State Committee on Nationalities and religions "on status and tendencies in religious situation and state-confessional relations in Ukraine (Short version), March, 24 2010, Committee press service, <http://www.scnm.gov.ua/control/>

¹⁴ See more: http://risu.org.ua/ua/index/all_news/state/church_state_relations/39461/ ra http://www.ukrvideo.com/ukraine/n/kiyivska_vlada_vidilila_11 mln_grn_na_budivnitstvo_hramu/.

¹⁵ See archeologists' statement here: http://risu.org.ua/ua/index/all_news/community/protests/38919/.

¹⁶ See Cabinet of Ministers Decree of June 14, 2010 here: <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=472-2010-%EF&p=1292343051628427>, also on journalists investigation: http://risu.org.ua/ua/index/all_news/state/church_state_relations/37654/.

¹⁷ See [http://www.ugcc.org.ua/news_single.0.html?&tx_ttnews\[pS\]=1255249199&tx_ttnews\[tt_news\]=1970&tx_ttnews\[backPid\]=1&cHash=ff9c3e9852](http://www.ugcc.org.ua/news_single.0.html?&tx_ttnews[pS]=1255249199&tx_ttnews[tt_news]=1970&tx_ttnews[backPid]=1&cHash=ff9c3e9852)

high school. In the course of negotiations the deputies from Yanukovych's and Natalia Vitrenko's blocks insisted on refusing this request, arguing that "Kiev patriarchate is culpable of supporting Banderivtsy and disseminating dissent in the Orthodoxy". Before the voting, city mayor addressed the deputies with the following words: "If a church, a mosque, a cathedral or a temple are functioning, it means that there are people who come there to worship. We have the Seventh day Adventists, the Mormons and other denominations as well. Even those banned in other countries, were granted land plots to build their premises. Let's decide by voting". The mayor himself, however, did not participate in it. At the same meeting the deputies rejected a request from the congregation of the Apostolic Christian Church of Ukraine "Word of Life" concerning construction of religious premises in Peremoha prospect, based on the earlier decision in this case.¹⁸

- Dispute arose around potential construction of Ukrainian Greek-Catholic Church premises in Odessa. The local congregation has been struggling to get it built for many years. After a number of refusals and red-tape the authorities requested that public hearings on the town-planning substantiation of the church construction in Staroportofrankivska street (Prokhorivsky park) in Odessa be held. The public hearing was set up for September, 4. However, on the request of Odessa and Crimea Ukrainian Greek-Catholic Church Exarchate, the public hearing was continued indefinitely. The town-planning substantiation for the church construction was devised following relevant decision of Odessa city council of June 24, 2009. The document was approved by land resources department, environmental protection, fire department and sanitary/epidemiological inspection. On July 22, 2010 positive expert opinion, prepared by architecture and town-planning department of Odessa oblast' state administration, was issued. There is no need, under the law, to hold a public hearing in the matter of church construction. So, on the request of Odessa and Ismail Metropolitan Agafangel (Savin) representing Ukrainian Orthodox Church under Moscow Patriarchate, the executive committee of Odessa city council issued a construction permit to build a church in the center of the city without any public hearings. In its turn, the new Saint Lukas church 12x12 m is to be built at the territory of the city hospital № 3, in Lidersovsky boulevard, 11. And on August 30, 2010 on the motion, filed by Odessa and Ismail Metropolitan Agafangel, who represents Party of Regions as a member of the Odessa oblast' council, the board meeting of Odessa oblast' council passed a decision, granting the ownership of a number of buildings in Academician Vorobyov's street, 2 to Odessa eparchy of Ukrainian Orthodox Church under Moscow Patriarchate, which plans to build there a church dedicated to the holy righteous Ioann of Kronshtadt.¹⁹ Odessa eparchy of Ukrainian Orthodox Church under Moscow Patriarchate on September, 1 published an opinion on possible construction of a Greek-Catholic church in Odessa. "Odessa, where predominant number of residents belong to the Ukrainian Orthodox Church, has such insignificant Greek-Catholic congregation, that there is no need to build not only a church but even a prayer house for the Uniate Church-goers", — stated Odessa and Ismail Metropolitan Agafangel (Savin). The declaration stressed that the Metropolitan and Odessa eparchy clergy regard the building of a Uniate house of worship inexpedient and very dangerous "for the capital of our region".
- The congregation of Ukrainian Greek-Catholic Church in Yalta for 18 years has been trying in vain to get a plot of land for the construction of their church, despite the fact that all the required papers are in order.
- The Roman-Catholic parishioners of Saint Joseph Church in Dnipropetrovs'k won the right to have their own place of worship only by court's ruling. On October 12, 2010 the congregation finally received the title of ownership and technical passport for the church premises. It marked the end of 12-years' long struggle for the church, built by their predecessors in the second half of the 19th century. In 1998 Dnipropetrovs'k oblast' council passed a decision giving Saint Joseph Church into private hands. The "Dugsbery, Inc. " corporation had its claims to the property since 2006. In the meantime, according to the parishioners and mass media, it was systematically destroying the building.

¹⁸ RISU information: http://risu.org.ua/article_blog_code.php?id=38057&name=land_and_property_problems&lang=ua&.

¹⁹ See here: http://risu.org.ua/ua/index/all_news/state/church_state_relations/37722/.

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Only in November 2009 the decision of high administrative court of Ukraine confirmed the congregation property rights, with its coming in force one year later due to various legal obstacles.²⁰

The list of examples is endless. In fact, due to existing practices, non-orthodox believers stand no chance of obtaining a plot of land to build their temples in the areas with orthodox confessions' predominance.

Another set of problems arises when local state administration starts to take sides in religious conflict. These conflicts often come into being when a congregation switches from one church to another. In some cases, the parishioners make the decision themselves, and sometimes it is initiated by spiritual leaders, rejected by their congregation for idleness, to give just one example. Then they would try to switch the congregation to another Church to retain their power. The situation is usually aggravated if the congregation has its own religious building. The official bodies' stand is very important here, as it is up to them to register or reject the registration of statutory amendments and changes in the church leadership. They are also the ones that issue the title of ownership for the church. Here is a typical example:

On April 6, 2010 Kiev Court of Appeals classified decision of Cherkassy oblast' administration as illegal. The decision concerned the cancellation of registration for the congregation of God's Ascension in Kanev (Kostyanets) and transfer of the church premises, built by Ukrainian Autocephalous Orthodox Church, into the ownership of newly created parish of Ukrainian Orthodox Church under Kiev Patriarchate. The litigation lasted for two years. The conflict around the premises started when the parishioners fired their prior Father Volodymyr Tsyhanets for his idleness and financial abuse. In response the priest organized the registration of alternative parish of Ukrainian Orthodox Church under Kiev Patriarchate and seizure of the building. At that time he was accepted to the body of clergy in Cherkassy eparchy of Ukrainian Orthodox Church under Kiev Patriarchate. The officials of Kharkiv-Poltava eparchy of Ukrainian Autocephalous Orthodox Church maintained that the congregation statute was re-registered in early 2008 by the head of Cherkassy oblast' department for nationalities and religions Yevhen Savits'ko, who earlier held the office of the Bishop's secretary in Ukrainian Orthodox Church under Kiev Patriarchate. Soon after that the court reinstated the Ukrainian Autocephalous Orthodox Church congregation in its rights to the premises' ownership.²¹

The impartial position of the authorities is also very important when sharing of the religious premises is set up. However, the conflicts related to such arrangements are less and less frequent.

The problem of restitution of religious property, nationalized by the soviet power, still remains unresolved.

5. PARENTS' RIGHT TO RELIGIOUS EDUCATION OF THEIR CHILDREN AND STATE OBJECTIVITY PRINCIPLE

Over the last two years the introduction of Christian religion lessons in the public secondary schools has been gaining momentum. It's being done ad hoc and with no legal support. The actions taken are justified by the necessity of spiritual and ethics-related education of young generation.

According to international standards, religious education in schools and higher educational institutions can be introduced however such courses should be the same and based on the principles of objectivity, non-discrimination and impartiality. They cannot therefore include only the views

²⁰ See more details here: <http://catholic-dp.org.ua>.

²¹ Capital Court of Appeals confirmed the legality of church return to the UAOC in Kanev, April 9, 2010, RISU http://risu.org.ua/article_blog_code.php?id=35156&name=temples_church_property&_lang=ua&.

of one religion or faith. The State must respect the right of parents to determine their children's religious upbringing²².

In various regions of the country courses of "Christian ethics", "Basic Christian Ethics", "Principles of Islamic culture", "Ethics: The Spiritual Principles", "Christian Ethics in Ukrainian culture" and other subjects of a moral and religious direction are being introduced with varying degrees of interest from parents, students and the public, depth and quality of teaching and preparation of teachers.

At present these subjects are optional and studied at the wish of parents, which is in keeping with international standards. However this is not the case in all cities.

In the West of the country there is a clear trend towards compulsory studies of only Christian denominations. Virtually all textbooks in this are one-sided and do not comply with the principle of impartiality. Furthermore, throughout virtually the entire country there is a shortage of teachers of this subject.

It should be noted that the President's Decree from 2005 on introducing into the State school curriculum a course on "Ethics of faith" did not have any significant result.

In 2008 a Public Council for Cooperation with the Churches and Religious Organizations attached to the Ministry of Education and Science was created²³. In Y 2009 the Public Council initiated introduction of subjects, addressing spirituality and ethics, into the agenda of competitions and contests. Namely, a contest "Teacher of the Year" for the teachers of Christian ethics and competition "Young Bible Scholars" were carried out.²⁴ And on February 24, 2010 the Public Council approved the curriculum for spiritual and ethical education for preschool children, which will be offered with parents' consent.

The Public Council in 2010 also considered the possibility of broader introduction of spiritual and ethics-related subjects, i. e. "Introduction to Christian Ethics", supported by oblast' and city education departments. The meeting participants noted, that presently this subject is taught only in 30% of all Ukrainian schools. The lowest indicators were registered in Luhansk, Kharkiv, Poltava, Sumy and some other oblast's.²⁵

Since 2005, the Committee developing the concept for the optional courses in the ethics of faith, religion studies and other spiritual and ethics-related courses, has been operating under the Ministry of Education and Science. On September 6, 2010 the Ministry of Education and Science of Ukraine decided to recommend the curriculum on "Introduction to Christian Ethics" for the use in grades 1-4 and 7-11 of secondary schools.²⁶ This course does not contain the details of religious rituals, but neither does it meet the international standards. It teaches nothing, but the sources of Christianity and Christianity exclusively. It fails to mention other religions or alternative opinions concerning religion. One of the main incentives for the students in these lessons is *evaluation*, i.e. facts and knowledge, mastered by the students during the lesson, are evaluated. The descriptive evaluation, as well as points (based on 12-points' system), are used. In other schools, where the subject of Christian Ethics is optional for the students, they are evaluated in terms of "passed" or "failed".

At the same time the Ministry of Education and Science set up an experiment on "Teaching spirituality and national awareness on the principles of Christianity and national Ukrainian values" in the educational institutions.

²² More detail can be found in the Toledo guiding principles on teaching about religions and beliefs in public schools, prepared by the ODIHR advisory council of experts on freedom of religion or belief, OSCE 2007.

²³ Ministry of Education Order of October 20, 2008 № 941

²⁴ See more on Public Council here: http://risu.org.ua/article_blog_code.php?id=33417&name=church_and_school&_lang=ua&.

²⁵ See more re this meeting: http://risu.org.ua/article_blog_code.php?id=34541&name=church_and_school&_lang=ua&.

²⁶ Complete curriculum is here : http://www.irs.in.ua/index.php?option=com_content&view=article&id=713%3A1&catid=38%3Apub&Itemid=65&lang=uk.

VI. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

For example, the experiment has been carried out between the years 2006 and 2008 in Rohatyn Volodymyr the Great high school (Ivano–Frankivs'k oblast'). Within the experiment framework the students' handbook was devised. It contains, among other things, the following topics:

- “Prayers before and after school”;
- A Thanksgiving prayer;
- Prescription from sin;
- How to say “No” to temptation;
- Seven ways to attract other people...

Besides, within the experiment framework the teachers went on pilgrimage to Univ Lavra of Holy Dormition, the students published a newspaper “Study yourself through Christian values” etc.

The main teaching methods, used for the experiment, included readings from the Holy Scripture, listening to the spiritual music; singing, painting, poetry writing; contests; quizzes, cross-words, debates, familiarizing students with iconography basics and school competitions.

Despite potential positive impacts of such experiments, it is obvious that they are not well coordinated with human rights' standards. Respect of human rights and fundamental freedoms should become an underlying principle for such experiments.

According to sociological survey carried out in 2010 public supports the introduction of the “Basics of [Russian] Orthodox culture and other religions” in educational establishments. 67% of respondents supported the idea of teaching the course at school, 16.4% were against it. Almost the same number provided no answer.²⁷

6. RECOMMENDATIONS

1. Ukrainian legislation should be brought into conformity with the demands of Articles 9 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the light of the court case law of the European Court of Human Rights, in particular, as regards ensuring the neutrality of the State, the possibility for a religious community to receive legal entity status and to freely practice their religion. For this it would be desirable to apply the “Guidelines for Review of Legislation Pertaining to Religion or Belief” prepared by the OSCE / ODIHR and the Venice Commission in 2004²⁸. In drawing up amendments to legislation the following changes are needed:
 - the focus should be moved away from checking out organizations at registration stage to monitoring their activity: accordingly shortening and simplifying the registration of religious organizations, making the procedure at least analogous with the registration of civic associations;

²⁷ Survey was held on April 13 to 22, 2010 by individual interviews in 24 oblast's of Ukraine and ARC. Respondents were selected by quota sampling, representative of adult population by place of residence (oblast'), gender and age. The survey covered 2076 persons. Anticipated mean error constitutes 2,2%. Lessons “Introduction to Russian Orthodox culture” are now implemented experimentally in Russian schools. http://risu.org.ua/article_blog_code.php?id=36029&name=social_questioning&_lang=ua&.

²⁸ In English: www.osce.org In Ukrainian: Freedom of Religious and Worship in Ukraine within the context of compliance with European standards / Edited by Volodymyr Yavorsky / Ukrainian Helsinki Human Rights Union and the Center for Legal and Political Studies “SIM”. Kharkiv: Folio, 2005. Available on the UHHRU website at: www.helsinki.org.ua.

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

- discrimination must be eliminated when registering the articles of association of religious communities and the grounds clearly defined for refusing to register or for cancelling the registration of such articles of association;
 - norms must be removed from legislation which impose a structure and system of management on religious organizations. These issues must be regulated exclusively by the articles of association of the organization;
 - the permission-based procedure for holding religious peaceful gatherings must be abolished;
 - restrictions on the religious activities of foreign nationals and stateless persons must be abolished, including allowing such people who are permanently resident in Ukraine to found religious organizations.
2. State bodies should not interfere in internal Church affairs, and should clearly observe the principle of neutrality, in particular, as regards the creation of a single Local Orthodox Church., nor should they defend one of the sides in internal Church conflicts.
 3. Effective mechanisms are needed for avoiding discrimination on religious grounds, particularly in the penal system, the social sphere and in the area of labor relations. It is also vital to make adjustments to legislation on taxation of religious organizations in order to remove discrimination against non-Christian organizations (for example, on taxing VAT, defining the term “religious services”, etc).
 4. Law enforcement agencies must continue to react swiftly and appropriately to cases of incitement to religious hostility and vandalism.
 5. In order to eliminate discriminatory administrative practice and conflict between churches, clear legal norms should be passed stipulating the grounds, procedure and time periods for returning church property. It would also be expedient to draw up a detailed plan for returning religious property with these procedures and the time taken for each object defined. Where it is impossible to return such property, provision of some compensation should be stipulated, in particular, for the construction of new buildings of worship or allocation of land sites.
 6. Local authorities should review legislative acts they have passed which establish discriminatory provisions, and also additional limitations, not foreseen by the law, on freedom of religion when holding peaceful gatherings, renting premises, allocating land and returning religious buildings. General principles should also be clearly outlined for the allocation of sites for building places of worship.
 7. Religious education in schools and higher education institutions may be introduced however the courses must be the same and built on the principles of objectivity, non-discrimination and impartiality. Such courses must not therefore only include the teachings of one religion or faith. The introduction of such education should meet OSCE and Council of Europe standards, and the judgments of the European Court of Human Rights.

VII. THE RIGHT OF ACCESS TO INFORMATION¹

In 2009–2010 long-awaited changes to information legislation were adopted. Center for Political and Legal Reform produced a bill on access to public information, which Andriy Shevchenko, the Member of the Parliament (BYuT), made for consideration on July 11, 2008, registration number 2763. The bill is devoted to the procedural aspects of access to information held by state and municipal authorities. On June 19, 2009 the bill was approved by the Parliament in the first reading.

Kharkiv Human Rights Protection Group produced a draft law on amendments to the law “On information”. The bill was agreed with the bill on access to public information. In fact, it is the bill of freedom of information law. Andriy Shevchenko registered this bill on 15 May, 2009, registration number 4485.

Both bills were produced on the basis of the Recommendations of the Committee of Ministers of the Council of Europe № R 19 (1981), REC 2 (2002), 13 (2000) of the UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention); as well as other international standards on freedom of information. Bills are corresponded to principles of legislation on freedom of information, produced by the Article 19.

However, after the presidential elections and restructuring Parliament approval of these bills was problematic. The draft law on amendments to the Law on information not considered at all. The bill on access to public information twice, on 7 July and 5 October 2010, was rejected and sent to repeated second reading. The parliamentary majority voted against the bill, despite pressure on its adoption by the Ukrainian public organizations, which supported by the Council of Europe and the European Union. These serious intergovernmental organization stated that the attitude of the Ukrainian Parliament to the bill will indicate a real, not declared, the Ukrainian state commitment to democracy.

On November 2, 2010 Olena Bondarenko and Volodymyr Landyk, deputies from the Party of Regions (later Yuri Stets from the “Nasha Ukraina” joined to them) unexpectedly brought to Parliament the draft Law on Amendments to Certain Legislative Acts of Ukraine (concerning access to public information), registration number 7321. It should be noted, that the parliamentary regulations prohibits making laws on the subject of another bill which is already registered more than two weeks. The bill № 7321 is borrowed from several designs of the KHPG bill, yet principled position on freedom of information have been removed.

Andriy Shevshenko initiated creation of the negotiation group for revising the drafts law. Negotiation group has to agree amendments to bills №№ 2763 and 7321 with accounting the bill № 4485.

The negotiation group includes representatives of the Parliamentary Committee on Freedom of Speech and Freedom of Information, Administration of the President, and the Cabinet Ministers as well as representatives of the initiative group of NGOs and journalists. On 23 November MPs Olena

¹ Prepared by Yevhen Zakharov, KHPG Co-Chair; member of the UHHRU Board.

Bondarenko, Yury Myroshnichenko and Andriy Shevchenko published a joint statement² and hold a press-conference where they told on the work of the negotiation group. The negotiation group agreed a final version of the bill on access to public information which will be tabled in parliament to be adopted in its second reading and in full. The statement reads that the group is beginning a revision of the Bondarenko-Landys draft law and will be guided by the following recommendations: that the new version of the Law on Information must take into account the recommendations of the Council of Europe with regard to freedom of speech and access to information, be coordinated with the agreed draft law on access to public information and must not reduce the scope for journalists' professional activities.

Finally, bills have been prepared and scheduled for second reading on 15 December, but they were considered at the session of parliament January 13, 2011. They were passed almost unanimously without amendments. The final versions of the texts have not yet been made public³ — at present we have only the texts that were considered at the parliamentary session.

The laws will come into effect from three months after their publication. What should we expect and will the conditions for exercising the right to information really improve? We will examine the laws passed with regard, firstly, to removal of the significant flaws in the Law on Information, and secondly, with how they meet international standards. For convenience, we will refer to them as the Law on Information and the Law on Access.

First a few comments on terminology. The legislators have finally understood that “information about an individual” and “personal data” are the same thing. This would seem a minor point, yet it is extremely important since it will make it possible to link norms of domestic and international legislation, rulings of domestic and international courts. Yet another such highly significant “trifle” is the appearance among types of information as per content (Article 10 of the Law on Information) of information about the state of the environment (environmental information). Once again, the merging of the terms “information about the state of the environment” and “environmental information” will make it possible to consider that the constitutional norm on openness of information about the state of the environment and the norms of the Law on the Protection of the Environment which uses the term “environmental information”, are talking about one and the same thing⁴.

The definition of environmental information in Article 16 entirely complies with the Aarhus Convention: this information cannot be classified as information on restricted access, aside from information about the location of military objects. One can only welcome this norm.

A negative feature of the laws is the narrowing of the circle of those seeking information — they are called enquirers, while a positive feature is that the circle of those whom the law obliges to provide information, those administering information, has been broadened.

According to Article 12 of the Law on Access, those seeking information are individuals, legal entities or civic associations without the status of a legal entity. The list does not include media outlets (including foreign outlets) since such outlets may not have legal entity status and therefore do not find a place in the list of those seeking information. We would also note that the list of those seeking information (Article 4 of the Law on Information) does not include civic associations without legal entity status and this discrepancy between the two laws needs to be removed. The list also leaves out State players as a whole, other States and international organizations which are engaged in information relations according to the current Law on Information. For example, the UN, Council of Europe, EU and OSCE according to the current law can request information in Ukraine, whereas according to the new laws, they cannot.

Holders of information, pursuant to Article 13 of the Law on Access, are those in power, legal entities financed from State or local budgets or the budget of the Autonomous Republic of the Crimea (regarding information about the use of public funding); individuals or bodies delegated the

² <http://www.telekritika.ua/news/2010-11-23/57772>

³ The President signed the Laws on Information and on Access to Public Information 3 February 2011.

⁴ We would add at least a note that in listing in Article 10 the types of information, the legislators once again forgot to mention archival information.

power of figures of authority according to the law or an agreement, including provision of educational, health, social or other State services (with respect of information linked with the fulfilment of their duties); economic subjects occupying a dominant position on the market or with special or exceptional rights, or natural monopolies (regarding information about conditions for delivery of goods or services, and prices for these).

In comparison with the current Law on Information, where only bodies of legislative, court or executive power can be the recipients of information requests, this is potentially a significant improvement in access to information. According to Yelizaveta Alekseyeva from the leading environmental organization Environment, People, Law, “with the entry into force of this law material assessing impact on the environment, reports itemizing emissions of pollutants, the results of monitoring of impact on the environment and any other environmental information produced by economic subjects will become public information and therefore open to the public. From the point of view of ensuring access to environmental information, these laws are a huge step forward”.

However the formulation of the right to information and its restrictions (Articles 5 and 6 of the Law on Information and Article 6 of the Law on Access) do not meet international standards, in particular, Article 10 of the European Convention. Article 10 §1 states that: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

Nowhere in the new laws do we find mention of the right to information being exercised regardless of frontiers although in the age of the Internet this is axiomatic. Then, according to Article 5 §2 of the Law on Information “The exercise of the right to information must not infringe the civil, political, economic, social, spiritual, environmental or other rights, freedoms and legitimate interests of other citizens, the rights and interests of legal entities”. This norm is impossible to implement: the exercise of the right to information, as a rule, infringes somebody’s interests. This norm effectively jeopardizes the exercising of the right to information and makes it possible for officials, when the wish arises, to refuse to meet the majority of information requests.

Article 10 §2 of the European Convention states that: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

Compare this with Article 6 §2 of the Law on Information which firstly restricts the very right to information, and not its exercise, and secondly, contains no presumption that the restrictions must be those needed in a democratic society. The question arises: who prevented the legislators from simply repeating in the law the provisions of Article 10 of the Convention, as was done in draft law № 4485.

The norms of Article 10 needed to be fixed in the new version of the Law on Information since the judgments of the European Court are a source of law in the domestic legal system in accordance with Article 17 of the Law on Implementation of the Judgments and Application of the Practice of the European Court of Human Rights.

An important issue is whether the three-tier test is used. This helps to balance the damage from the divulgence of publicly important information which serves a legitimate purpose and the damage from keeping this information secret. In Article 6 §2 of the Law on Access, this test is set out quite correctly. However in the Law on Information (Articles 29 and 30 §3) this is not the case. If one takes Article 30 §3 literally, then any publicly needed information with restricted access can be divulged regardless of the damage which it will cause.

There is another discrepancy between the two new laws. Furthermore the definition of publicly needed information in Article 29 §2 is too narrow. It states: “An object of public interest shall be deemed information which indicates a danger to Ukraine’s sovereignty and territorial integrity; ensures the exercise of constitutional rights, freedoms and duties; indicates the possibility of human

rights abuse, of the public's being misled; which indicates harmful environmental and other adverse consequences from the actions (inaction) of individuals or legal entities etc”.

Compare this with the definition in draft law № 4485: “Information of public interest is information which indicates a danger to Ukraine's sovereignty and territorial integrity; infringement of the rights of territorial communities and the property rights of the Ukrainian people; makes it possible to make a well-founded political choice; guarantees being informed about events and facts which directly impact upon the state and nature of human life; ensures the exercise of constitutional rights, fundamental freedoms and duties; prevents violations; the public's being misled, as well as harmful environmental and other adverse consequences from the actions (inaction) of economic subjects, etc”.

We would note that the definition of publicly needed information in the Law on Access was taken out.

Confidential, secret and official information are classified as information on restricted access. An undoubtedly positive feature of the new laws is the removal of the ambiguous construction “confidential information which is owned by the State” of the current Law on Information and its replacement by the category of official information with indication of what particular types of information can belong to this category (Article 9 §1 of the Law on Access). Now documents containing official information are stamped “For official use only” [DSK] and access to the lists of items of information constituting official information may not be restricted (Article 9 §3). This means that the authorities which concealed information using the stamp “For official use only” must divulge and publish these lists (and this is the Cabinet of Ministers and other bodies (see www.khpg.org for more information). The norms of the Law on Access regarding official information will begin working when a new law on this is passed. It would be desirable to draw this up and pass it as soon as possible. For the moment all authorities, bodies of local self-government, ministries, etc should review previously drawn up lists of confidential information which is owned by the State, in accordance with Article 9 of the Law on Access, and reveal that part of the documents stamped “For official use only”. The situation where the number of items in lists drawn up by regional State administrations has ranged from 18 (the Ivano-Frankivsk and Kyiv Regional State Administrations) to 136 (Kirovohrad RSA) is absolutely unacceptable.

Unfortunately the norm was removed from the final version of the Law on Access which had stated that official information contained in documents of those in authority and constituting internal official correspondence, reporting notes, recommendations were open from the day the decision was passed where they were linked with the drawing up of directions of activities of the institution, the process of decision-making and preceding public discussion and / or passing; or if the information was gathered in the course of the exercising of the authorities' controlling or supervisory functions. According to Oksana Nesterenko, specialist on information law for KHPG, this norm would have had a revolutionary effect on information openness in Ukraine. It would have meant that almost all official information after the passing of a decision was on open access to the public.

Article 6 §7 of the Law on Access states that it is the information, not the document, that is on restricted access. If a document contains information on restricted access, then the information where access is not restricted should be provided. This well-known principle of freedom of information should have been implemented in Ukraine a long time ago. However unclear formulations in the Law could render this norm meaningless. For example, Article 9 §3 of the Law envisages that documents containing information which constitutes official information, are stamped DSK (“For official use only”), and that already means that it is impossible to provide even part of the information from this document. What prevented the legislators from adding the proviso that access to documents with restricted access is provided in accordance with Article 6 §2 of this Law?

Furthermore, in order to apply Article 6 §7 of the Law on Access, they needed in the Final Provisions to revoke amendments to the Law on the Press passed by the Verkhovna Rada on 11 May 2004. Article 2 §1 of that Law, “*Freedom of activities of the printed press*” declares “*the right of each citizen to freely and independently look for, receive, record, retain, use and circulate any information on open access with the help of the printed press*”. The fundamental right of a journalist — to informa-

tion — was similarly reduced with the journalist now having “*the right to freely receive, use, circulate (publish) and retain information on open access*” (Article 26 §2.1 of the Law on the Press). These restrictions — the possibility of working only with information which is on open access (literally: open according to the regime of access) which were added in May 2004 should have been revoked. Unfortunately, however, there is no such norm in the Final Provisions of the Law on Access.

In Article 3 of the Law on Information, one of the main directions of State information policy is called “ensuring Ukraine’s information security”. However the term information security is not defined, although the basic information law should contain a definition of this important concept which is used in the Constitution. It is not clear why the legislators did not use the well-worded norm from draft law № 4485:

1. Information activities of subjects of information relations in Ukraine take place within a regime of information security;
2. Ukraine’s information security consists of ensuring (guaranteeing) freedom access by all to open information and of protecting and guarding State secrets and others envisaged by law;
3. Ensuring Ukraine’s information security is one of the most important functions of the State and the matter of the entire Ukrainian people.

We would also note that the norm in the current Law on Information banning censorship, both direct and indirect, is seriously spoiled in the new version of the Law. For example, Article 24 §2 of the Law in the new version declares that the prohibition of censorship “does not cover cases where the prior agreeing of information is carried out on the basis of the law”. At present there are no such laws, yet this time bomb could become a problem in the future. Especially if we consider the adoption as a base on 22 December 2010 of a draft Concept of State Information Policy” where one of the priority tasks is to “ensure Ukraine’s information sovereignty” This concept does not have any legal sense, the relevant article was removed from the old version of the Law on Information, yet it has again become relevant.

The Law on Access thoroughly sets out the duties of those holding information regarding its publication, determining the structural sections or those responsible for information requests and the procedure for reviewing these requests. Only 5 working days is given for a response, and not a month as previously. Furthermore, the Law establishes types of information which must be provided even quicker, within 48 hours. This is information needed to protect the life or freedom of a person; regarding the state of the environment, the quality of food products and everyday items; accidents, catastrophes, dangerous natural phenomena and other emergencies which have taken place or could happen and which endanger people’s safety.

However according to Article 20 §4 of the Law on Access, the time period for review of a request can be extended to 20 working days if the request pertains to a large amount of information or needs to be looked for in a considerable amount of data. Knowing the kind of responses received to requests at present, one can confidently predict that responses will at best come within 20 working days, and not five.

The well-known principle of freedom of information regarding protection of whistleblowers has not been implemented in the best way. Article 11 of the Law on Access states that “Public officials and civil servants shall not face legal liability, regardless of infringement of their duties, for divulging information about offences or information which pertains to a serious risk to citizens’ health or safety, to the environment, if the individuals were prompted by good intentions and had well-founded belief that the information was accurate, and also contains proof of an offence or concerns a significant threat to citizens’ health or safety or to the environment”. This effectively means that the burden of proving the offence or significant threat to citizens’ health or safety or to the environment falls on the public official who revealed the information.

It would have been better to use the analogous norm in draft law № 4485 which, unlike Article 11, implements this principle: “Public officials and civil servants and those in authority who, infringing their duty regarding non-divulgence of information on restricted access, reveal facts of unlawful behavior, corrupt activities committed by public officials or civil servants, State bodies, bodies of the Autonomous Republic or other bodies of local self-government, shall be free of legal

liability if they were prompted by good intentions and were convinced that the disclosure of such information was in accord with the public interest”.

that the information was accurate, and also contains proof of an offence or concerns a significant threat to citizens' health or safety or to the environment”

Unfortunately, Articles were removed from the Law on Access which specified the procedure for appealing to the Human Rights Ombudsperson against unlawful refusals to provide information. This is claimed to have been done at the request of the Ombudsperson herself. Thus, unfortunately, parliamentary control over exercise of the right to information implemented in all European laws on freedom of information is not in the Ukrainian law.

The definition of information about an individual and regulation of access to such information needs to be reviewed together with the Law on Personal Data Protection passed by parliament on 1 June 2010 which came into effect on 1 January 2011.

None of the three laws provides even a minimum list of items constituting personal data. In Article 15 §2 of the Law on Information, the constitutional norm is given on the prohibition of gathering, keeping, using and circulation of confidential information about a person without their consent, yet such confidential information about a person is seen as being information about their nationality, education, family position, religious beliefs, state of health, as well as address, date and place of birth.

In the Law on Personal Data Protection the list of personal data also appears in a prohibiting context. Article 7 §1 prohibits the processing of personal data about racial or ethnic origin; political, religious or worldview beliefs; membership in political parties and professional unions, as well as data concerning health or sexual life. Both these lists are clearly incomplete and do not coincide. Furthermore, address, date and place of birth cannot be treated as confidential information, with this running counter to generally accepted practice.

Unfortunately the legislators did not make use of the definition of personal data in draft law № 4485 which does comply with European standards. There personal data is divided into data of a general nature (first name, patronymic, last name, date and place of birth, citizenship, place of residence) and sensitive personal data (information about state of health, medical history, diagnosis, etc, ethnic origin, attitude to religion, identification codes or numbers, personal symbols, signature, fingerprints, voice print, photographs, data about pay or other legal income, about bank deposits and accounts, property, tax status, credit history, information about any criminal record or other forms of criminal, administrative or disciplinary liability, exam results, or results of professional or other tests, etc). Laws on information, access and personal data protection should prohibit collecting, retaining, using and circulating specifically sensitive personal data without the person's consent.

The lack of differentiation between personal data of a general nature and that which is sensitive leads to anecdotal consequences. For example, the circulation of any personal data, including even the surname and first name of person, can only be carried out with their written consent. Article 6 §9 of the Law on Personal Data Protection states that “the use of personal data for historical, statistical and scientific purposes can only be made in depersonalized form”. This means that one cannot give any personal data even first and last name in textbooks or any scientific works!

None of the three laws contains the concept of “public official” where the limits, in accordance with the position of the European Court of Human Rights, are broader than for the average person. One can, therefore, circulate more personal information about such a person without their consent if this is of public importance. The Law on Access makes an exception to the overall ban on circulation of personal data without the person's consent only with regard to people standing for or occupying electoral office in bodies of power, or holding the post of civil servant, official of a body of local self-government of the first or second category (Article 6 §6). This exception moreover only concerns data on income declarations for the people and members of their families (the previous version had had, among other things, biographical details, but this was removed).

VII. THE RIGHT OF ACCESS TO INFORMATION

Article 5 §4 of the Law on Personal Data Protection does not include as information on restricted access any personal data about a person standing for or holding an electoral position (in representative bodies) or first category public officials. These exceptions clearly do not coincide, and both are considerably narrower than the concept of “public official”. The Law on Personal Data Protection in general does not allow for the possibility of circulating personal data where there is a public need, and in this clashes with the Laws on Information and on Access.

There are other discrepancies as well between the Law on Access and Law on Personal Data Protection. Article 6 §5 of the Law on Access does not allow restriction of “access to information about the use of public funding, the use or distribution of State or communal property, including to copies of the relevant documents, the conditions for receiving this funding or property, the first and last names of individuals and names of legal entities which received that funding or property.”

According to the Law on Personal Data Protection, generally speaking access is not allowed to the given individuals on conditions for their receiving funding and property without their consent (Article 6 §6; Article 11 §1; Article 14 §1).

In order to remove this clash, the legislators should have added the relevant provisos to the Law on Access which was reviewed later than the Law on Personal Data Protection.

In conclusion, change is needed to all three laws — on information, access to information and on personal data protection, in order to agree them among themselves and bring them into line with international human rights agreements to which Ukraine is a signatory. The new laws will work if the public and journalists are active in looking for and circulating information.

RECOMMENDATIONS

1. Change the Law on Information, Law on Access to Public Information and Law on Personal Data protection with aim to agree these laws and to reach their correspondence with the international agreements on human rights.
2. Declassify all normative legal acts stamped “Not to be published” and scrutinize documents classified as “for official use only” in order to establish whether their classified status is well-founded...
3. Review the norms of Article 15 of the Law “On state secrets” so as to allow for only a specific text containing a state secret to be classified, and not the entire document.
4. Analyze the “List of items of information that constitute State secrets” in order to decide whether the classification is warranted, applying the three-tier test of the European Court of Human Rights for determining whether there is “damage” and “impact on public interests”, as well as Article 47-1 of the Law “On information”.
5. Revoke the Presidential Decree №493 from 21.05.1998. “On amendments to some Decrees of the President of Ukraine on the state registration of normative legal acts”.
6. Register all normative legal acts issued by the Prosecutor’s Office with the Ministry of Justice.
7. Create an open register of all normative acts of the Prosecutor’s Office and an open database of normative acts pertaining to citizens’ rights and duties
8. . Create the conditions enabling members of territorial communities to see all decisions passed by bodies of local self-government (depending on the conditions, in the most efficient manner). Thus, for example, where possible, to create websites of bodies of local self-government with mandatory posting of a full register as well as the actual texts of all decisions passed.
9. Ensure the publication and open access to all decisions passed by local administrations (at the level of regions, as well as the cities of Kyiv and Sevastopol).

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

10. Taking into consideration the case law of the European Court of Human Rights and principles of legislation on the freedom of information, develop an educational course on international standards of access to information and practice of their application in Ukraine, and carry out training for judges of local and appeal courts of all 27 regions of Ukraine and for public officials who work in press services and public relations departments of government bodies and bodies of local self-government;
11. Run training courses for state officials on the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.
12. Representatives of the mass media, human rights and other civic organizations should monitor the efficiency of active and passive access to information at central and local levels, as well as using the courts more actively against the inaction of state officials with regard to the providing of information and refusals to provide information.

VIII. THE FREEDOM OF EXPRESSION¹

1. OVERVIEW

After 2004 the pressure on mass media and journalists from the authorities reduced considerably. It provided substantial improvement of mass media freedom implementation and respect journalists rights. From 2006 the pressure started to grow, although the level of freedom of expression remained much higher than prior 2004.

In 2006–2009 the situation did not change much. In mass media variety of opinions was observed and a lot of critique concerning current authorities was made public, although several censorship cases were made public either. The main problems of the period were the following:

- the so-called “jeans” i. e. paid, ordered material in mass media not defined as advertisement;
- freedom of expression limitation in order to protect public morality;
- lack of transparency concerning the issue of mass media property, that did not allow to provide proper pluralism of mass-media;
- increase of administrative pressure on journalists from mass media owners; numerous dismissals, “envelope” salary, unofficial employment for the journalists and numerous violations of labor legislation concerning journalists applied by mass media owners in order to carry out controlled editorial policy, in particular on issues of political life.

Independence from the authorities did not become the guarantee of independence for mass media. There was still lack of editorial policy separation from mass media owners, it made mass media too dependent on the desires of its owners, who kept controlling the editorial policy more and more being most of them politicians themselves.

In that period the legislation on freedom of expression practically did not change. In particular, freedom of speech obtained by political methods was not secured in the legislation.

In 2010 the situation started to change rather radically in the direction of freedom of expression limitations. It was made applying various mechanisms.

In March, 2010 the Director General of National TV Company of Ukraine was replaced. Yegor Benkendorf became the new director (before he had worked on pro-authorities channel “Inter”), that provided controllability over nation-wide TV channel: the content and orientation of the news and political programs changed at once and the network of broadcasting was remodeled rather considerably.

On the same months the Parliament elected Valeriy Khoroshkovsky the Head of State Security Service, being him the major stock-holder of U.A. Inter Media Group Limited². One of the first issues Khoroshkovsky did in office was opening a criminal file concerning licensing for broadcasting

¹ Prepared by Volodymyr Yavorsky, the UHHRU Executive Director.

² See more about the company: <http://www.uaimg.com/ua/>. The group includes 7 TV channels including the biggest in rating and air coverage in the country “Inter” TV channel, “Ukrainian News” information agency and also advertisement, sponsorship and production companies.

by the National Council in February 2010. The SSS started active investigation, tender files and other materials of the National Council were withdrawn³, although before the General Prosecutor's Office had studied the case and denied opening a criminal file. As a result in October 2010 the General Prosecutor's Office also opened a criminal file against non defined officials of the National Council.⁴

Nevertheless it seems that such openings and closings of files indicate to current National Council members what may happen: current process looks more like intimidation than a search for truth in the case.

A little earlier the Holding of Khoroshkovsky initiated law proceeding on supposed procedural violation in determining winners of a tender by National Council on TV and Radio concerning licensing for broadcasting in February 2010. As a result the Court of First Instance and later the Court of Appeal revoked the tender results. The final judgment on the cases should be made by the Higher Administrative Court at the end of January, 2011. As a result of court rulings the TBI opposition TV channel has lost almost all its licenses for broadcasting. The court ruling is rather well founded, but the selective application of the law is obvious: all the violations providing the backgrounds for such decisions were the regular National Council practice and were applied in process of issuing practically all the licenses in previous years. Besides, why should the TV channels be accountable financially for violation of the Law by the National Council? In this situation the acknowledgement of licenses valid for almost a year as non valid ones is a rather strange measure. It is even more surprising that TV channels are not guilty of infringements by the National Council, but in practice they held responsibility for its actions — incurring considerable losses.⁵ Taking into consideration this fact the process looked like political one aiming at reduction of broadcasting by the opposition TV-channels.

In April-June 2010 practically all the members of The National Council on Television and Radio were substituted. It became totally controlled by one political party and pro-authorities media holdings. In particular the Head of the Council became a person who had been closely related to “Inter” TV-channel.

The National Council has wide powers to influence on TV channels and radio stations: it issues or extends licenses for broadcasting, has a right to carry out inspections on legislation compliance on different issues, may apply sanctions. In fact under existing legislation when there is no accuracy in license issuing, the TV-channel or radio station existence and development depends completely on this regulating body.

Therefore the policization of its work provided a pressure instrument in order to restrict freedom of speech.

For the last several years a process of large media holdings creation, including TV channels, radio stations, printed mass media and internet recourses took place. The process was even more intense in 2008 and 2009. Usually these media holdings were a property of richest businessmen involved in politics. There was a situation, when the majority of media assets belonged exclusively to Ukrainian business. Foreign companies not invested much to the sector because of lacking transparency. Especially it is related to TV channels and radio stations. For example, at the end of 2009 a well known foreign company CME sold its share of “1+1” TV channel.

Examples of such holdings are the following:

- 1) Already mentioned above U.A.Inter Media Group Limited;
- 2) The holding of Viktor Pinchuk EastOne Group (http://eastonegroup.com/rus/about_company.php) including some biggest TV channels “Novyy”, ICTV, STB, M1, M2, QTV and

³ See more detailed information here: <http://telekritika.ua/news/2010-03-22/51795>.

⁴ See more detailed information here: <http://telekritika.ua/news/2010-11-09/57368>.

⁵ See more detailed information on the trial: “The Frequency Trial” M. Zakusylo, August 31, 2010. Telekrytyka <http://telekritika.ua/nacrada/2010-08-31/55414>, and also the chronological order of the events here <http://imi.org.ua/content/blogcategory/66/62/>.

- also a newspaper “Facts and Comments”; “Ekonomika” Publishing House (Invest Paper Magazine, “DELO” (Business) newspaper, TOP-100 and others);
- 3) “System Capital Management” (<http://www.scm.com.ua/uk/index>), whose owner is R. Akhmetov (including Ukraina TV channel, “Football”, the biggest nation wide newspaper “Segodnya” (Today);
 - 4) Media Holding “Glavred” (owner — Igor Kolomoyskiy) including “UNIAN” Information Agency, the newspaper “Izvestiya in Ukraine”, magazines “Glavred”, “Profile”, “Telekrytyka”, “Gazeta po Kievski”; “1+1”, “2+2”, “TET” “Ciri” TV channels;
 - 5) Ukrainian Media Holding (<http://www.umh.com.ua/ukraine/ua/>): 7 radio stations, “Focus” magazine, newspapers “Argumenty I Fakty in Ukraine”, Komsomolskaya Pravda in Ukraine” and may other printed mass media;
 - 6) Concern “Ukrprominvest” (<http://www.upi.com.ua/>), controlled by P. Poroshenko: “5 channel” TV channel, “Radio 5” radio station.

Therefore creation of media holdings per se made it easier to control the mass media: it is much easier to influence on 4–5 owners then on several dozens. Besides, all these owners are not only businessmen but politicians too. It makes them even more depending on new power.

From the other point of view the administrative pressure on journalists by mass media owners was intensified even more than in last years. The owners, supporting the authorities as politicians or because of fear within self-censorship started to influence greatly on mass media content, especially on TV channels.

Taking into consideration all these processes the level of freedom of speech in mass media decreased in 2010.

Many facts of failure to mention or misrepresentation of socially important information, manipulations in the news, dissemination of political pro-authority order were registered. Opposition gained less access to the broadcasting, political programs amount decreased, especially of those broadcasted directly. Besides several TV channels changed their information policy, under this pretext they started to avoid demonstration of corruption among the higher authorities or other sharp issues, some journalists were fired. Also a pressure on journalists grew stronger, they were forbidden to shoot certain reports or the materials already prepared were not allowed on air. That is why the news on nation wide TV channels became lame and not interesting, avoiding sharp plots concerning the new power activities. Also the same coverage for the same events by different TV channels was noticed, confirming informal coordination of information by them. In much more information materials the balance of opinions was not observed while covering a situation, there were less independent experts attracted to evaluate certain events. Journalists in mass started to stand against censorship applied against them.⁶

Manipulative measures of “false authority”, “labeling”, “negative transference”, probably are among the most applied in political television talk shows. The same characters wander from one show to another — both politicians and experts — by definition they are incapable to be experts on all the issued considered. Per se it means that instead of essential conversation on burning issue there would be only a broadcast of biased “ready-mades”. Such speakers, usually, in contrast to those who pretend on expert opinions, in practice never leave the studio, bringing any agenda to attempts of multiple repeating of the thesis “assigned” to them. As a rule — to point out the main parties responsible for absolutely all problems — “former power”, “opposition”, “entrepreneurs — optimizers leading to sufferings of budget employees”, etc.⁷ It is evident that such manipulations became especially popular in 2010.

⁶ See in more detail the TV news monitoring prepared by the Telekryka paper <http://www.telekritika.kiev.ua/media-continent/monitoring/telenovini/>, and also monitoring of political programs: <http://www.telekritika.kiev.ua/media-continent/monitoring/politprogram/>.

⁷ Cynicism of power may be evaluated only by cynical viewers, <http://www.telekritika.kiev.ua/media-continent/monitoring/politprogram/2010-12-03/58084>.

Also it is worth mentioning that for the first time in many years there has been registered a case of journalist disappearing, the majority relating the case with his professional activity. The police did not provide proper, timely and effective investigation of the case.⁸

Also during 2010 the amount of cases connected with beating or attacks on journalists and prevention them from their activity gradually increased⁹.

The police in cases of attacks against journalists or of prevention them from journalistic activity did not usually carry out fast and effective investigation. Also as a rule police tends not to perceive these actions as related to journalistic activity. In general the tendency of the police refusing to protect journalists became stronger.

Apart the increase of the amount of pressure on journalists should be mentioned. Such a pressure also was performed by State Security Service making several prophylactic meetings with them.

In response to repressions against freedom of speech on May 21, 2010 the movement “STOP to censorship” was created. The pretexts for the movement initiation were declarations made by journalists of “1+1” and STB channels concerning pressure by their editorial boards.¹⁰

But these declarations were the mere pretext. The attempts of the state to interfere with the information policy, to correct it or even to manage it were the real reasons. Declaration of the movement creation was signed by 134 journalists. The main driving force of the movement was a group of journalists who, first of all wanted to defend their right to profession. Apart from journalists the movement was supported by dozens of non-governmental organizations. Thanks to mutual support and censorship cases reveal the movement managed to stop partially the process of freedom of speech limitation.¹¹ But, most probably, the movement only made the process slower, because every month more limitations were registered.

It is worth mentioning the legislative initiatives of the new power in 2010. Majority of those were aimed at freedom of speech limitation. In particular, in June the law “On Personal Data Protection” was adopted, that, nevertheless, will come into force on January 01, 2011, thus it will deal with freedom of speech limitation next year.

2. THE EUROPEAN COURT OF HUMAN RIGHTS RULINGS IN CASES AGAINST UKRAINE

In 2009–2010 The European Court of Human Rights issued 3 judgments against Ukraine acknowledging the violation of Article 10 of the European Convention of Human Rights (Freedom of Expression). All of them are related to rather remote events.

In case *Marchenko v. Ukraine* (19 February 2009, № 4063/04)¹² freedom of expression violation through disproportionate punishment for calumny is acknowledged.

In particular in 1997 Marchenko filed complaints against actions of the Director of a high school in the city of Lviv. Later he also organized manifestation, where respective accusations were

⁸ See the chronology of events in the case of disappearance of Kharkiv journalist Vasyl Klymentyev on the website of the Institute of Mass Media <http://imi.org.ua/content/blogcategory/68/65/>.

⁹ See monthly barometer of freedom of speech from January 2009 to December 2010, prepared by Mass Media Institute: <http://imi.org.ua/content/category/10/29/50/>. The Barometer contains monthly review of the most important cases concerning freedom of speech violation.

¹⁰ See in more detail here: “*Stop to censorship!: reincarnation of journalistic revolution*”, In more detail see here: “<http://www.telekritika.ua/2010-07-29/54690>”, and also: *Determined facts of censorship and “jeans” in TSN news on 1+1 (+video)*, Telekrytyka, May 7, 2010. <http://telekritika.ua/media-continent/kritika/column/2010-05-07/52835>.

¹¹ See the news of the movement here: <http://www.telekritika.ua/cenzura/>, and also “*Stop to censorship!?: first results*”, Viktoriya Siumar for Telekrytyka, 06-07-2010, <http://www.telekritika.kiev.ua/svoboda-slova/2010-06-07/53481>.

¹² See the annotation of the ruling in Russian here: <http://hr-lawyers.org/index.php?id=1264520917>.

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distributed on posters. As a result on May 14, 1998 he was convicted for calumny to one year of imprisonment with one year punishment deferral and to 200 UAH fine. The Court of Appeal and the Supreme Court left the decision unchanged.

The Court indicated that Mr. Marchenko, despite him being a representative of the trade union representing the interests of the society had an obligation to respect the reputation of others including the presumption of innocence. The court noted that Mr. Marchenko had to address his declarations first to the manager of the Director before addressing the public opinion. Marchenko would better have complained against the Revision Commission decision, and instead he blamed sharply the director during the picket. That is why the Court came to a conclusion that national bodies reasonably convicted Mr. Marchenko for calumny because his accusations lacked the evidences and violated the director's right to be considered innocent unless other was proved. But, because national courts convicted the applicant to one year of imprisonment the Court found the violation of Article 10 of the Convention, as far as similar measure of punishment was excessive and could influence on social debates in a negative way.

In other judgment *The newspaper Ukraina-Tsentr v. Ukraine* dated July 15, 2010¹³ freedom of speech violation was also acknowledged. On June 12, 2002 during the press conference dedicated to mayor elections in the city of Kirovograd, held in UNIAN information agency local journalist, Mr. M. accused one of the candidates, Mr. Y ordering his murder for 5000 USD. According to the newspaper declaration the same information was disseminated by STB TV channel on the same day. On June 14, 2002 in the Newspaper "Ukraina Tsentr" an article appeared, describing the press-conference mentioned. MR. Y quoting especially the following declaration of the article: "Mr. M. accused Mr. Y of ordering his murder" and the quotation of 5000 USD brought in a civil action on defamation to Lenin District Court of Kirovograd city against the newspaper and Mr. M. The Lenin District Court acknowledged the information as false and not confirmed by official sources. The Court also ruled that the newspaper was not free from responsibility and obliged it and Mr. M to pay out as compensation 100000 and 20000 UAH respectively. The ruling of Lenin Court remained unchanged by the Court of Appeal and in October, 2003 by the Supreme Court. The Newspaper paid the compensation imposed and 2500 UAH of the cost.

The court declared that Mr. M's unsubstantiated statement was very serious, especially within the context of widely discussed issue of Kirovograd mayor elections, and taking into consideration the vulnerability of journalists conducting political columns (18 journalists perished in Ukraine from 1991). But, having declared the newspaper and Mr. M. equally responsible for the statements that in fact belonged to Mr. M., Ukrainian courts did not estimate the relation between the necessity to protect the reputation of Mr. M. and the newspaper right to publish information of social interest. Ukrainian courts also did not explain why they had done it this way. Moreover, they did not consider the issue of interference proportionality and did not take into account the opportunity, offered to Mr. Y by the paper, to respond on the publication. That is why the European Court established that violation of Article 10 of the Convention took place.

In another case *Myrskyy against Ukraine*, dated May 20, 2010¹⁴ the court also acknowledged freedom of speech violation. In March 1999 Myrskyy participated in a round table, organized by the Association "For Inter-national Peace and Understanding in Ukraine" in connection with the International Week against Racism. On March 26, 1999 the newspaper "Ukraine and World Today" published selected abstracts from speeches of some participants including the one of Myrskyy titled

¹³ See the ruling in English: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871281&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. See the annotation of the ruling in Russian here: <http://hr-lawyers.org/index.php?id=1286268624&w=%C3%E0%E7%E5%E2%E0%20%D3%EA%E0%E8%ED%E0-%D6%E5%ED%E2%E0>. See also The Ruling of the European Court in the case of the newspaper "Ukraina-Tsentr" is passed to the executive service, Telekrytyka, <http://www.telekritika.ua/news/2010-12-02/58055>.

¹⁴ See the annotation of the Ruling in Russian here: <http://hr-lawyers.org/index.php?id=1286272124>. Full text of the Ruling in English is available here: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=868126&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

“Judophobia on a policy level?”. One of the arguments by Myrskyi in that article was as follows: “Unfortunately the Judophobia may be observed not only in social behavior but in policy as well. For example, “The Party of Ukrainian Unity”, defending its aim to provide people with ideology and psychology of national extremism started to act in Lviv”.

On April 28, 1999, members of the party filed a civil suit on defamation to Zaliznychnyy Court of Lviv city. They affirmed in particular that Myrskyi’s declaration was false, discrediting and damaging their honor, dignity and reputation and also depicted the future of the party in a humiliating way. They demanded apology from him and from the editorial board of the newspaper and also a compensation of moral damage. The applicant objected to the action, affirming that his words had been presented in the interpretation of the journalist and were taken out of context.

By its ruling dated March 07, 2002 the court satisfied the action of the applicants partly, obligating Myrskyi to adduce an excuse in the same newspaper. The Court acknowledged that the declaration had been made by him, that it was defamatory and non true. On September 9, 2002 the Court of Appeal supported the ruling and on March 31, 2003 the Supreme Court revoked the cassation. The excuse was published on October 12, 2002.

The European Court indicated that evaluative judgments may not be proved and local court did not define in what context had the statement been made and what meaning it had for political debates. The courts also did not consider the issue of whether the statement had been insulting and stopped only on it being false.

All these rulings remain topical. The first one is important because from time to time People’s Deputies propose to return “calumny” as a crime to Criminal Code; it was excluded out of it in 2001. The second ruling also remains topical, because the courts often do not consider such circumstances even now. The third ruling also deals with the issue of evaluative judgments and the offence in statements, having a political importance for debates in the society.

3. RIGHTS OF JOURNALISTS AND MASS MEDIA

As it was mentioned earlier, the year 2010 showed an increase of censorship cases and prevention of journalists from fulfillment of their professional duties. In general according to IMA, for 11 months such cases happened than even in 2004.

Information on the violations registered¹⁵

	2002	2003	2004	2005	2006	2007	2008	2009	11 months. 2010
Murdered, disappeared journalists	3	4	0	0	0	0	1	0	1
Arrests, detentions	1	2	8	2	3	1	5	0	4
Beating, attacks, intimidation	23	34	47	16	29	13	29	31	29
Prevention to fulfill professional duties, censorship	46	27	52	14	31	23	18	26	61

¹⁵ According to data of several years’ monitoring by the Institute of Mass Media: <http://www.imi.org.ua>

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3.1. ASSASSINATIONS, DISAPPEARING, DETENTION, BEATING, INTIMIDATION OR OTHER VIOLATION APPLIED TO JOURNALISTS

One of the most famous cases was the disappearing of Kharkiv journalist from the newspaper “New Style” Vasyl Klymentyev, who disappeared on August 11, 2010. The Police immediately started the investigation and already on August 15 a criminal file was open according to the article “intended killing”. Nevertheless according to many experts there is no effective and objective investigation carried out in the case. Up to now many circumstances of the journalist disappearing remain unknown and there is no substantial progress in the investigation observed.¹⁶

Information on crime victims working in mass media¹⁷

	Amount of victims per year				
	2006	2007	2008	2009	6 months 2010
Working in mass media	92	46	47	60	26

3.2. LAWSUITS AGAINST MASS MEDIA AND JOURNALISTS

The lawsuits a long time ago ceased to be an instrument of pressure on mass media. Cases containing demands to reimburse moral damage in very large amounts remain rare in court practice. Even if a person asks for a court to pay big compensation, practically in all cases the courts decrease its amount gradually.

In present there is no data yet on such cases in 2010, but it is possible to evaluate the dynamics of such lawsuits from 2003 to 2009:

Information on the lawsuits on protection of honor, dignity and business reputation against mass media¹⁸

№	Indicator	2003	2004	2005	2006	2007	2008	2009
1.	Were under consideration	19	—	753	926	719	737	567
2.	Procedure finished	627	514	441	605	490	494	390
2.1	Including	The decision issued	308	250	246	356	265	281
2.1.1		Including: lawsuits upheld	187	158	150	193	168	165
2.2		Closing the procedure	118	158	—	—	67	—
2.3		Declaration remained without the consideration	151	141	—	—	150	—
2.4		Transferred to other courts	50	34	—	—	8	—
3.	Amounts of material and moral damage declared to collection, UAH	71 247 890	20 315 264	—	—	39 511 170	—	—
4.	Amounts of material and moral damage assigned to collection, UAH	4 534 785	591 591	—	—	636 562	—	—

¹⁶ See the chronology of the events in case of Kharkiv journalist Vasyl Klymentyev disappearing on the website of Institute of Mass Media: <http://imi.org.ua/content/blogcategory/68/65/>.

¹⁷ According to the Ministry of Internal Affairs: <http://mvs.gov.ua/mvs/control/mai%20n/uk/publish/article/374130> — per 2010, <http://mvs.gov.ua/mvs/control/mai%20n/uk/publish/article/233004> — per 2009.

¹⁸ According to the State Court Administration of Ukraine per various years: http://court.gov.ua/sudova_statystyka/. There is no data per 2010 yet.

On October 1, 2010 Sobolev Oleg Yuriyovych declared a lawsuit on protection of honor, dignity and business reputation, refutation of doubtful information and revocation of moral damage against 8 defendants including former assistant to the Minister of Internal Affairs in the region of Kharkiv Yuriy Chumak, the Ministry of Internal Affairs, "Inter" TV channel and several other mass media. By the order of the Minister of the Interior Yuriy Lutsenko dated February 06, 2009 Sobolev was dismissed from the position of the Director of Ordzhonikidze District Division in the city of Kharkiv. Total suit amount consisted of 1200000 UAH. He was dismissed because of the information in mass media on tortures applied to two women in that district police station. The similar lawsuit was filed by other policeman accused of torture in this case. Surprisingly in first case the court stopped the procedure until the payment by the applicant of information and technical services fee and state duty, consisting of considerable amount. But concerning the other lawsuit the court decided to postpone the term of state duty payment and started proceeding on action.

4. FREEDOM OF EXPRESSION LIMITATION THROUGH THE PROTECTION OF PUBLIC MORALITY

There is still a problem related to the activity of National Expert Commission of Ukraine on Public Morality (see below NEC, National Commission or The Commission <http://www.moral.gov.ua/>). The legislation on protection of public morality lacks the precision and predictability, and the decisions by the commission are non founded and non proportional to the aim declared.

Under the pressure of social critique the NEC considerably reduced its activity. In particular more and more its activity was aimed at prevention of the violations, and the prohibition was applied very seldom. The NEC decisions much more often started to contain recommendations and not the obligatory decisions.

Meanwhile the group of People's Deputies registered the draft bill¹⁹, abolishing the Law on Public Morality Protection and, respectively the NEC itself and making the required amendments to other laws in order to protect minors.

The NEC concentrated its effort on promoting its own draft bill²⁰, aiming at considerable changes of the legislation in the field of public morality protection. The bill establishes even more restrictions for freedom of expression. It is based upon the invented by NEC members "right for information space free from materials threatening to physical, intellectual, moral and psychological condition of human being". And the authorities according to the project have to decide which materials are a threat to human being and respectively will have a right to prohibit distribution of such materials.

As in previous years many decisions by NEC remain inaccessible for public together with NEC conclusions on correspondence of information products to the law on public morality protection. For example, from August 30 to October 25 the NEC provided 85 conclusions dealing with 584 video products, 848 photos, 7 printed items, 44 products of sexual character, 2 mass performances.²¹ All these conclusions are inaccessible for public.

Taking into consideration the activity of NEC rather surprising was the commission of President to wind the NEC in established order²².

¹⁹ Draft bill № 6532 dated June 16, 2010 on making amendments to certain legislative acts of Ukraine (on protection of public morality), http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38002.

²⁰ Draft bill № 7132 dated September 15, 2010 on making the amendments to the Law of Ukraine "On Protection of Public Morality" by 10 people's deputies of Ukraine http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38551

²¹ Report on work of the body of National Expert Commission of Ukraine on Public Morality for the period from August 30, 2010 to October 25, 2010, <http://www.moral.gov.ua/news/284/>.

²² Clause 7 of the Decree by the President dated December 9, 2010 № 1085/2010 On the Optimization of the System of Central Executive Power Bodies <http://www.president.gov.ua/documents/12584.html>.

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On the next day after presidential decree the same initiative was pronounced by the Minister of Justice. “This is rather strange body.... and we recommended to the Cabinet of Ministers to consider the issue of reasonability for this body to exist” Lavrynovych said.²³

5. FREEDOM OF EXPRESSION RESTRICTION THROUGH PRIVACY DEFENSE

On June 24 President of Ukraine signed the Law of Ukraine “On Personal Data Protection”. The Law will come into force on January 1, 2011. It was criticized by human rights activists, mass media and business representatives. The UHHRU²⁴, Independent Association of Broadcasters (NAM) and Association of Ukrainian Banks²⁵ asked to veto the Law.

The Law determines that the law does not apply to the activity of journalist on creation and processing of personal databases. But it applies to the full concerning rules of personal data distribution of the person absent from any databases or present in databases, for example state-owned. Is also applies to the full to mass media.

In practice it means that starting from the day of this Law coming into force it will prohibit mass media distribution for any personal data of a person without his/her consent if he/she does not belong to the first category of state employees.

Moreover, criminal liability is already established for the intrusion into a person’s private life (Article 182 of the Criminal Code), as far as dissemination of such an information already may be considered illegal. Considering this as non sufficient on November 11, 2010 the Government introduced to the Parliament the Draft Bill on making amendments to certain legislative acts of Ukraine on the legislation violation on personal data protection.²⁶

The draft bill provides the amendments to the Law on Information and also provides criminal liability for the violation of the Law on Personal Data Protection.

In many clauses the Law itself violates the requirements of the Council of Europe Convention № 108 “For the Protection of Individuals with regard to Automatic Data Protection” and several recommendations of the European Council of Ministers, EU standards, in particular EU Directive dated October 24, 1995 № 95/46/EC.

6. RECOMMENDATIONS

1. Bring the Law on Personal Data Protection in correspondence with the international standards.
2. Cancel the licensing system registration for printed mass media as not corresponding to the requirements of Article 10, European Convention on Human Rights²⁷.
3. Increase the amount of subjects having a right for publishing activities from the mere enterprises to all kinds of judicial entities. This requires amendments to be made to the Law on Publishing Activities.
4. To abolish laws “On the Order of Coverage of the Activities of State Power Bodies and Local Self-Government Bodies in Mass Media” and “On State Support of Mass Media

²³ Lavrynovych: *It is necessary to abolish strange body for morality*, <http://www.24tv.com.ua/news/1/1/63825>.

²⁴ See <http://www.helsinki.org.ua/index.php?id=1275650651>.

²⁵ See <http://www.helsinki.org.ua/index.php?id=1277016947>.

²⁶ See here: http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38996.

²⁷ It is possible to know about it in more detail from the Special Report of the OCSE Representative on Freedom for Mass Media Miklos Haraszti “Mass media registration within the OCSE region: observations and recommendations” on March 29, 2006.

- and Social Protection of Journalists”; providing elimination of certain privileges to journalists of state owned mass media and to provide them rights equal to those of journalists of private mass media.
5. It is reasonable to reconsider the electoral legislation in order to provide free discussion in mass media concerning candidates, their weak and strong points and different aspects of their political program and activity. With this purpose it is necessary to define more strictly the notion of advertising and election campaigning.
 6. It is reasonable to prohibit the sponsorship for the news on the level of law.
 7. It is reasonable to elaborate the draft bill on journalists’ rights applying the groundwork made by the State Committee for Television and Radio and the draft bill № 9175 dated February 27, 2006 “On Protection for Professional Activity of the Journalists”. The problem is rather important in practice, as far as rights of TV and Radio Organizations (TRO) journalists are not defined in legislation at all.
 8. Make amendments to the Law on Television and Radio Broadcasting in order to bring it in correspondence with the Standards of the Council of Europe, OCSE and European Union and also to recently ratified by the Parliament European Convention on Trans-border Television.
 9. Make amendments to the legislation concerning the opportunity to determine real owner of the mass media, especially of TV channels and radio stations and also cross ownership of printed, electronic and other mass media, introducing the effective control over concentration of mass media by one owner or his family, antimonopoly limitations on the information market according to the recommendations by the Council of Europe (for example Recommendations № R (94) 13), OCSE and European Union and also introducing necessary procedures for punishment of the violators of the legislation on mass media concentration.
 10. Provide fast and transparent investigation of all the declarations concerning facts of violence and death of journalists and also in cases of preventing them from journalistic activity.
 11. To eliminate State Committee for Television and Radio during consideration of the amendments to the Constitution of Ukraine. Besides, it is necessary to reinforce control over expenses by this state body due to numerous cases of abuse, in particular the system of orders for TV and radio programs creation, books publishing and other services provided from state funds should become transparent.
 12. Cancel the Law of Ukraine “On Public Morality Protection”, having adopted the draft bill № 6532 dated June 16, 2010 on making amendments to certain legislative acts of Ukraine (on public morality protection).

IX. FREEDOM OF PEACEFUL ASSEMBLY¹

Freedom of peaceful assembly is guaranteed by the Constitution and numerous international commitments accepted by Ukraine. In 1997 the European Convention on Human Rights was ratified, Article 11 of which guarantees to everyone the right to freedom of peaceful assembly; in 2007, under the auspices of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the ‘Guiding Principles on Freedom of Peaceful Assembly’ were approved with participation of Ukrainian representatives. These are exactly the minimum standards and norms, according to which the state-parties should form their internal policy in order to ensure the observation of the right to freedom of peaceful assembly, and public authorities should create necessary conditions for its implementation. The international standards in the sphere of peaceful assembly oblige a state not only to guarantee the freedom of assembly, that is not to interfere in its implementation, but also imply the positive obligation to ensure this right.

It should be noted that, although in 2005–2009 there were some violations of the freedom of peaceful assembly, the situation as a whole has changed for the better owing to active introduction of the European experience of demonstrations, rallies and meetings. In particular, the fundamental role of public authorities and the organs of local self-government began to include the observance of the right to peaceful assembly. It is clear that not all meetings were peaceful and legitimate, so the authorities had the competence to intervene and use legitimate forms of coercion.

However, after the presidential election the situation with freedom of peaceful assembly has fundamentally changed². This happened for several reasons: lack of special law regulating the right to peaceful assembly, ungrounded prohibition by courts of peaceful assemblies, introduction of various restrictions of the right to peaceful assembly by local authorities as to the place of conduction, terms of the advance notification, etc.; pressure on activists and organizers of peaceful actions by law-enforcing agencies (the Security Service and militia) and administration of organizations, where the activists and initiators of peaceful assemblies were working or studying (heads of organizations, rectors of universities); illegal interruption, obstruction, abuse of authority or passivity of militia officers.

Only during the first 100 days of new government’s work mass media of regional and national level issued more than 350 critical publications about actions of militia during peaceful assemblies. This is an absolute record of critics, received by the Ministry of Interior in one sphere and during short period. Unfortunately, we have to recognize that the authorities have started to use militia to impede the conduction of peaceful assemblies.

The numbers of assemblies and their participants, according to the Department of Public Safety, are shown in charts 1 and 2.

¹ Prepared by Leonid Gema, Vadym Pivovarov, Association of Ukrainian Monitors of Observance of Human Rights by Law-Enforcing Organs, and Yevhen Zakharov, KHPG.

² See Declaration of the Institute ‘Respublika’: <http://helsinki.org.ua/index.php?id=1271400645>

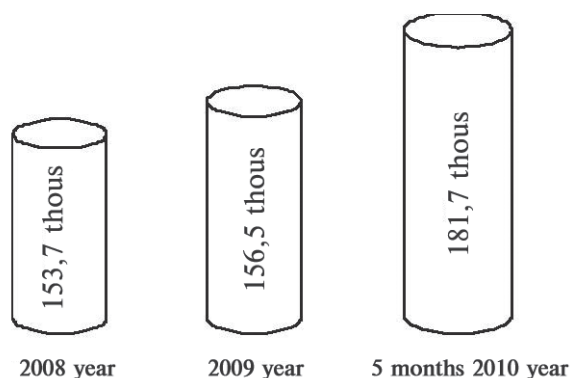


Chart № 1. Number of mass assemblies in the country

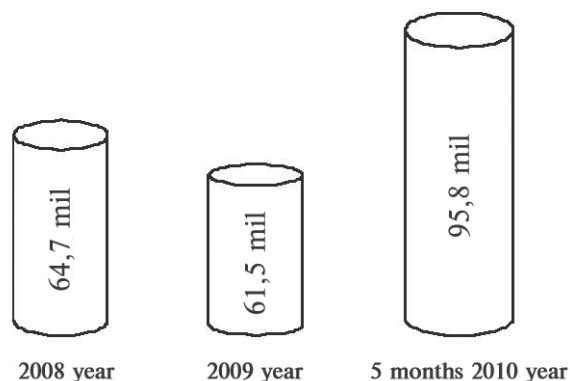


Chart № 2. Number of participants of mass assemblies

As at can be seen from publications in mass media, in 2010 the majority of protest actions were connected with economic and political issues.

Analyzing the amount of information on violations of the right to peaceful assembly in 2010, one can see that, in comparison with previous years, the number of violations of the freedom of assembly by militia has increased significantly and is higher than during previous 5 years together. All positive trends and developments that had appeared owing to joint work of the Ministry of Interior and human rights organizations, in particular in the framework of activities of public councils and cooperation with the Department for human rights monitoring, were destroyed with the arrival of new leaders of the Ministry of Interior in March 2010.

Certainly, the behavior and actions of each militia officer were affected, first of all, by personal attitude to peaceful assembly of Minister of Interior A. Mohylyov, which attitude was expressed in the newspaper 'Segodnya'. In his interview the Minister clearly stated his personal position on this issue:

"...I would allocate for mass actions some great field on the outskirts of Kiev, where nobody will disturb anybody. And there you can shout as much as you want, like in Hyde Park in London. The people interested in your ideas will come there, and you will not interfere in the life of others".

This position is absolutely inconsistent with the Constitution, national legislation, international standards and democratic values. Such views of a top official affect negatively the daily work of his subordinates and other activities of law-enforcing agencies. Excessive politicization of local authorities leads to illegal use of law-enforcing organs for solving the acute and conflict issues that concern local communities.

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This situation is also aggravated by lack in the regions of proper prosecutors' supervision and effective responding to the actions of militia during such events. Despite the scale and significance of the statements in mass media about violations by militia officers, no criminal or disciplinary proceedings were instituted in 2010 under Article 97 of the CPC of Ukraine. Territorial prosecutor's offices should give legal assessment to the materials of inspections conducted by the control services of the Ministry of Interior. They should check the integrity and objectivity of such investigations and inform the public about the results. Unfortunately, this does not happen.

The position of people's deputies on this issue is surprising too. As early as in May 2010, representatives of the Ukrainian Helsinki Human Rights Group proclaimed the statement requiring from the Parliament to publish for public consultation the draft law 'On conduction of peaceful assembly'. This draft has been adopted in the first reading hastily, almost in secret from the civil society, against the background of constant violations of freedom of assembly by the authorities and law-enforcing organs, and now it is ready for the second reading. Its text was not published on the Supreme Council website. Human rights activists repeatedly and soundly expressed their concern about probable restrictions of the right of citizens to peaceful assembly in the new draft.

The law-enforcing organs, on which the positive obligation to guarantee the right to peaceful assembly is relied, more and more often become the violators of this right. Instead of guaranteeing this right, militia officers perform exceptionally repressive and prohibitive functions regarding the citizens' freedom of expression. The majority of human rights violations during peaceful actions on the side of law-enforcing officers are similar to the violations in previous years. Yet, it should be noted that their number has significantly increased. Most systematic types of violations are the following.

1. PREVENTING PEOPLE FROM TAKING PART IN PEACEFUL GATHERINGS

This type of violations includes any attempt by the authorities, including law-enforcing organs, to prevent people from participation in peaceful actions. In 2010 the large-scale facts of such interference have been observed, which makes it possible to speak about giving corresponding orders to militia officers by the Ministry of Interior and/or by officials of regional administrations.

Thus, according to numerous statements of opposition political organizations and the participants, transport companies refused to take them to Kyiv where they planned to take part in peaceful actions on 11 May 2010. Unofficially, representatives of these transport companies told that they had received from local road militia warnings about prohibition of such trips to Kyiv. At that the officials hinted quite clearly that in case of non-obedience to these 'warnings' they would have problems with licenses for transport services, technical inspection, etc. Some most enthusiastic militiamen even took written obligations from the drivers. Those who did not respond to the warning and left Kyiv on 11 May 2010 were stopped at road militia posts and by mobile patrols under various flimsy reasons. Documents were taken away from the drivers, and in some cases the buses were returned back and placed to penalty areas. This happened in Ternopil, Sumy, Chernihiv, Khmelnytsky, Zaporizhzhya, Lviv and other regions. In Zaporizhzhya fans of the local football club 'Metallurg' even had problems with regional road militia in connection with their trip to Kyiv to the final match with 'Dynamo' (Kyiv) on 9 May 2010.

The attempt of the Ministry of Interior officials to justify such actions with large-scale measures for prevention of road accidents looks quite unconvincing. Comments on this situation to mass media and the public were given by the Ministry of Interior only in Lviv and Chernihiv regions. In Sumy region these events were commented by the head of auto-technical inspection of town department of road militia.

Discontent of citizens with the illegal actions of militia in Ternopil region resulted in the protest action held on 11 May 2010 under the slogan 'Green road to Kyiv' at the walls of local department of the Ministry of Interior. Despite numerous applications and the scale of the events, no service investigations regarding these facts were organized.

Similar incident also took place on 7 September, when representatives of the opposition published the information that militia tried to impede the protesters to get to Kyiv from various regions of Ukraine. In particular, in Lugansk, Lviv and Chernihiv regions road militia prohibited to transport companies to render services to the opposition. On the day before the departure representatives of the companies called their customers and told that they refused to drive protesters to Kyiv. They explained that road militia threatened to take away their licenses if they would transport the opposition.

On 13 May in Lugansk militia impeded the conduction of the motor rally devoted to the 67th anniversary of Kolkivska Republic. Before the beginning of this action militia officers blocked to rally participants the access to Teatralna Square. Valentin Shpak, head of the department of public security of Lutsk town department of the Ministry of Interior in the Volyn region, who was present at the place of the event, stated that militia would not allow to conduct this rally.

On 2 August 2010 Volyn Eparchy of the Ukrainian Orthodox Church of Kiev Patriarchate published the appeal to regional authorities and law-enforcing officials demanding to punish the militia officers, which, on 26-28 July, persuaded (or even directly threatened) the drivers and stopped the buses with pilgrims that were going to Kyiv to celebrate the christening of Russia and Ukraine.

The last case in 2010 of mass obstruction of transport companies throughout the country occurred in the second half of November, when entrepreneurs could not get to Kyiv to take part in the protests against the draft of the Tax Code.

2. GIVING PREFERENCE TO ONE PARTY OF A MASS ACTION

Such violations are typical for demonstrations and counter-demonstrations, pickets and other protest actions, during which the cases are possible of conduction at the same place of actions by different parties with different ideological views. Rather often it is used by representatives of pro-government political parties to prevent actions of opposition and other actions that criticize the activities or passivity of the government. National law and international practice in such cases limit the coercive actions of law-enforcers only to separation of opposition parties. But Ukraine militiamen usually ignore this limitation and give preference to pro-government political forces, thus violating the rights of other participants of peaceful actions. This is confirmed by a number of facts that occurred in 2010. The most notable among them are the following.

On 27 May in Lviv, during the visit of the President of Ukraine, and on 4 April, during the actions at the walls of 'Ukrainskiy Dom', owing to the actions of militia, only the groups supporting the President could conduct their actions freely. The other party, the opposition, was simply shoved back by militia, which, naturally, caused just frustration.

Such double standard regarding different political forces was observed during the celebration of 100 days of Viktor Yanukovich's presidency, which took place on 3 June 2010. On that day militia prevented the opposition from holding protest action near the Palace 'Ukraina', where Victor Yanukovich appeared. Meanwhile, activists from the Party of Regions were allowed to hold a rally in support of Yanukovich in front of the Palace. Activists from an opposition party were driven away from the Palace by the unit 'Berkut', 15 protesters were surrounded by a dense ring of militia officers and could not get out.

3. UNWARRANTED STOPPING OF PEACEFUL GATHERINGS AND DETENTION OF THEIR PARTICIPANTS

On 17 May 2010 in Kyiv, at the Mariinsky Palace, militia stopped a peaceful protest action 'Ukraine — not Russia' during the visit of Russian President Dmitry Medvedev, which action included partial denudation of women-participants. The participants of the action were detained and

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taken to militia station, where the protocols were drawn against them on the administrative violation under Article 173 of the Administrative Code (petty hooliganism).

On 27 April 2010, during a meeting near the monument to Taras Shevchenko in Kyiv, militia officers arbitrarily detained Alexey Kayda, the head of the Ternopil Regional Council. He was brought to Shevchenkivskiy district station and released after 2 hours without drawing any materials or protocol of detention.

On 15 May in Kharkiv militia did not allow local residents to hold peace march of protest against garbage on the city streets. Two activists were detained. The action was organized by representatives of the Kharkiv city office of all-Ukrainian youth public organization 'Democratic Alliance' and Foundation of regional initiatives.

On 28 May in Kharkiv militia detained nine, and 2 June — four participants of the protest action against sawing down trees in Gorky Park. The action was ceased, and the detained were accused of committing the administrative offense under Article 185 of Administrative Code of Ukraine, although they did not show any resistance to militia.

On 26 July law-enforcers detained eight members of the All-Ukrainian Union 'Svoboda', which tried to organize the theatrical performance 'Glamour tour of the Kremlin rugby-player'. Immediately after the attempt to start the show militia arrested its organizers. Other participants were shoved back by the unit 'Berkut' to Nezalezhnosti Square and were held there some time in the encirclement.

On 2 September in Kharkiv the militia officers, including officers of the unit 'Berkut', detained about 30 people that were spreading the propaganda leaflets 'Great lie' containing criticism as to the actions of city power. According to the victims, they were detained under various pretexts: someone was suspected of possessing drugs, someone verbally accused of public disorder, and to somebody the 'law-enforcers' even failed to explain the reasons of the detention. At the militia station or in militia cars officers held 'explanatory talks' with the detainees, cautioning them against participation in public actions. Soon the activists were released without bringing any official accusations and without drawing administrative protocols.

On 15 October in Odessa militiamen strictly reacted to the peaceful action of Odessa dwellers that demanded to release the activist of autonomous Ukrainian opposition Alexei Makarov, accused of the attack on the office of TV channel 'ATV'. Militia officers applied force and detained the participants of the action.

Such violations by militia officers have recently become very widespread. The negative practice of drawing 'standard' materials against detained participants of peaceful assemblies and bringing them to administrative responsibility under Article 185 of the Administrative Code (persistent disobedience to legal requirements of militia) is actively restored. This article is very convenient to use because in court the fault can be easily proven, since the preference is given to testimony of militia officers.

At the same time, the cases of bringing the officials to responsibility for unlawful interference in organization or conduction of meetings, rallies, marches and demonstrations (Article 340 of the Criminal Code of Ukraine) and for violation of the order of organization or conduction of meetings, rallies, street marches and demonstrations (Article 185-1 of Administrative Code) are very rare.

4. UNLAWFUL FAILURE BY THE POLICE TO REACT TO SCUFFLES BETWEEN OPPONENTS

On 2 June 2010 in Kharkov a clash occurred between the participants of peaceful assembly aimed at protection from destruction of the trees in the Gorky Park and employees of 'municipal guard' and loggers. The clash took place with silent consent of militia. While sturdy 'guards' were beating the participants, the militiamen just watched at that and made no attempt to intervene or stop the offense, until the action participants were scattered around, and all the trees — sawn

down. The militia officers completely ignored the danger to life of the participants conditioned by the brutality of the events. No attackers were detained. Instead, the law-enforcers detained several defenders of trees. On 3 June 2010 the Ukrainian Helsinki Human Rights Group and other human rights organizations published the statements about the fulfillment by militia of illegal instructions of local authorities. However, only on 5 June representatives of the Ministry of Interior managed to respond and notified about the appointment of check of the legality of actions of Kharkiv militia.

On 8 June 2010 in Kiev, in the park near metro station 'Darnitsa' a scuffle took place between workers and local residents who protested against the illegal sawing of trees in this park. After militia was called, soldiers arrived for some reasons, instead of representatives of the Ministry of Internal Affairs, who had no authority to do anything. Militia refused to visit the place, but invited people to come to the militia station and write statements there.

5. EXCESSIVE USE OF FORCE AND SPECIAL MEANS AGAINST PARTICIPANTS OF PEACEFUL ACTIONS

Practice of the past five years minimized the application of such methods thanks to deliberate strategy of protection of public order and adequate response to aggression. However, recent progress in this direction began to give way to regular violent confrontation.

On 27 April, during a protest action near the Parliament concerning ratification of agreements with Russia, 43 participants from various regions of Ukraine got injuries and burns of various degrees as a result of using force and special means by militia.

Unlawful use of force by militia caused serious conflicts and public condemnation.

On 1 June 2010 students and youth held peaceful assemblies near administrative buildings of the Ministry of Interior in 18 regions of Ukraine. These extemporaneous protest actions 'against militia arbitrariness' were held in commemoration of student Igor Indylo, which had died in Shevchenkivskiy district station of Kyiv after his detention by militia.

On 9 November 2010, during picketing of the Ivano-Frankivsk regional administration and regional election commission, officers of the unit 'Berkut' beat up several supporters of the organization 'Svoboda'. According to the press service of 'Svoboda', several participants tried to get to premises of the regional election commission and to demonstrate the examples of gross falsifications that occurred in Prykarpattya region during the election to Ivano-Frankivsk regional council.

6. RECOMMENDATIONS

1. Pass by Order of the Minister of the MIA and register with the Ministry of Justice "Method guidelines on safeguarding public order during mass-scale events and actions" drawn up in cooperation with members of civic organizations.
2. Set up MIA commissions with the participation of members of the public to investigate incidents during peaceful assembly which involved the police. The results of such commissions should be made public.
3. Carry out training of officers from special units and patrol squads of law enforcement agencies in the following: ensuring public order during peaceful gatherings; protecting those participating in peaceful gatherings; the grounds and conditions for using special means and physical force; ensuring independent control over how they use their authority during peaceful gatherings.
4. Translate into Ukrainian the Judgments of the European Court of Human Rights on Article 11 of the European Convention for the Protection of Human Rights and Fundamen-

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- tal Freedoms pertaining to the freedom of peaceful assembly and provide copies of these translations to all district administrative courts, the Higher Administrative Court and the Supreme Court.
5. Taking into account case law of the European Court of Human Rights, prepare and run a training course for judges of local and appeal courts of all 27 regions of Ukraine as to applying Article 11 of the European Convention for the Protection of Human Rights in court practice with regard to applications from the authorities to ban peaceful gatherings.
 6. The Supreme Court should summarize court rulings in cases involving restrictions on the right of peaceful gatherings and demonstrations.
 7. Pass the draft law on holding peaceful gatherings drawn up by Ukrainian human rights organizations in which the case law of the European Convention for the Protection of Human Rights and the positive practices in democratic countries are taken into consideration. It should be borne in mind that the draft law of the Cabinet of Ministers № 2450 from 6 May 2008³ does not comply with international standards⁴ and the Constitution.

³ Draft law № 2450 from 6 May 2008 http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=32431.

⁴ “European commission for democracy through law (Venice commission) joint opinion on the draft law on peaceful assemblies in Ukraine”, <http://www.helsinki.org.ua/en/index.php?id=1162206184>.

X. FREEDOM OF ASSOCIATIONS¹

1. OVERVIEW

There were no major changes in the situation with freedom of association.

The freedom of associations has been seriously violated over the last year. The state's unwarranted interference into the freedom of associations for political reasons, and, especially, as means of neutralizing an oppositional political party, causes major concerns. In particular, the Ministry of Justice and the courts repeatedly meddled with NGO's operations over 2010.

Current legislation on associations, passed in the main at the beginning of the 1990s, has long failed to meet modern conditions, the needs of civic society as well as international standards, in particular, Article 11 of the European Convention on Human Rights.

During 2010 the administrative practices with regard to freedom of associations has also deteriorated. Specifically, an unmistakable tendency of increasing the number of NGO's inspections, carried out by the Ministry of Justice and its departments has been observed; the pressure imposed on NGO's leaders and activists by Security Service of Ukraine, militia and educational establishments' principles increased as well ². This pressure, in particular, was exerted in the course of regular informal talks, which often contained threats related to the public activity of NGO members. Sometimes Security Service or militia staff tried to get activists to sign a document warning them about criminal liability for blocking power bodies' operation, transport communications or for the organization of mass rallies or other unspecified "illegal activity", although the activists organized nothing but peaceful assembly's.

The practice of informal meetings between Security Service or militia staff with the activists is not new — it dates back to the soviet times. Usually discussions were held between leaders or activists of the numerous non-governmental, charity or religious organizations. Earlier at these meetings the activists were asked to provide information on the operation of their respective organizations, but the threats or hints on undesirability of certain mass events were used very seldom. Over the last year the Security Service operation, aimed at preventing mass events or public campaigns, has become regular: relevant information was gathered from different oblast's of the country; all the sources referred to the similar mode of contact, questions asked and, summarily, the essence of the meeting. At the beginning the Security Service staff officially denied this information, but later, answering specific questions, they stated that acted on "the basis and by means stipulated by the Constitution and current legislation".³

¹ Prepared by Volodymyr Yavorsky, UHHRU Executive Director. Tetyana Yatskiv, Center for civic advocacy (L'viv) also contributed materials and commentary.

² See e. g. information on similar case in Cherkassy <http://www.helsinki.org.ua/index.php?print=1285265162>.

³ See more: <http://www.dem-alliance.org/main/rn/120/news/1519/>, and also <http://www.dem-alliance.org/main/rn/120/news/1520/>.

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During these two years, Ukraine has failed to do anything for fulfillment of the judgment of the European Court of Human Rights in the case of *Koretskyy and Others v. Ukraine*⁴, in which it found that Ukraine had violated the applicants' right of association. The Court found that Ukraine's law on citizens' associations did not meet the quality requirements demanded by the European Convention on Human Rights, and that certain restrictions were not necessary in a democratic society.

The following provisions and administrative practice, for example, unwarrantedly restrict freedom of association:

- Restrictions regarding the aim in creating an association;
- Restrictions on possible legal forms of association and legally stipulated in advance means of management and structure of the association though the implementation of the mandatory principle of "democratic management";
- Restrictions on many forms of associations' activities;
- Restrictions on the territorial activities of associations (territorial status of an association);
- Discriminatory and excessively complicated procedure for registration of associations;
- Abstract assessment of compliance with the law and the Charter of organization and the refusal to register even if no significant match, no comparison of actual statutes and real activity of the organization with aim to check the violation of restrictions for denial of registration;
- Restrictions on membership and taking on volunteers due to a broad interpretation of the mandatory principle of equality of all members of the association;
- Restrictions on business activity and on using the profits received for the activity of the association as per articles of association.

Over the recent years the Ministry of Justice has been devising the draft law "On Civic Organizations" to replace the current law On Civic Organizations. Submitted in the fall of 2008, the draft law was never considered by the majority over the year 2009. In 2010 the new government revoked it for amending alongside with all the other former government initiatives.

The Ministry of Justice amended the draft and offered it for public discussion.⁵ After that further amendments were made, so that the draft was undergoing infinite changes. The final version anyway never made it to the parliament.

Nevertheless, on October 18, 2010 the people's deputies from "Our Ukraine — Public self-defense" block V. Moysyk, V. Karpuk and O. Humenyuk filed a draft law "On Civic Organizations" (№ 7262)⁶, numerous provisions of which contravene the European standards for the freedom of associations. In particular, it bans the setting up of public organizations by foreigners or stateless persons, retains the territorial restrictions in NGO's operation, fails to address the issue of double registration. Among its positive contributions one can quote the cancellation of restrictions preventing legal entities from setting up an organization and established procedure for terminating organizations legalized by notification.⁷

On November 1, 2010 an alternative draft law "On Civic Organizations" (№ 7262-1)⁸, submitted by people's deputies Yu. Miroshnichenko, A. Pincjuk, S. Podhorny, A. Shevchenko, Yu. Lytvyn and L. Orobets, representing various factions, was submitted. The coalition of non-governmental organizations and experts also participated in its devising. It addresses the main aspects of legal regulation in public organizations' setting up and operation: bans the territorial and operational restrictions, removes discriminatory registration procedure, resolves the issue of founding entities,

⁴ Judgment from the European Court of Human Rights from 3 April 2008 in the case of *Koretskyy and Others v. Ukraine* (Application № 40269/02) available at: www.echr.coe.int, in Ukrainian at: <http://zakon.nau.ua/doc/?uid=1014.6553.0>.

⁵ See debate results here: <http://www.minjust.gov.ua/0/30934>.

⁶ Available on Verkhovna Rada site: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38784.

⁷ See draft law in brief: <http://lawngo.net/index.php?itemid=1645>

⁸ Available on Verkhovna Rada site: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38911.

permits the setting up of public organizations' territorial branches etc. It also contains the proposals of cancelling liability for non-registered organizations' operation (article 186-5, Administrative Code of Ukraine) and regular and ad hoc inspections of the NGO's with regard to their internal operation conformity with the law.

2. FORMATION OF ASSOCIATIONS

One of the most serious problems remains the considerable obstacles which the State puts in the way of those creating associations. These obstacles are to a large degree artificial, being the result of numerous clashes in legislation and do not comply with European human rights standards.

The bodies which register organizations (the Ministry of Justice, its local departments and bodies of local self-government) systematically interfere in the internal management of organizations during registration.

Legislation is not sufficiently clear in defining either the degree to which failure of the charter to comply with legislation is admissible, or clear grounds for refusing to legalize the organization. This gives huge scope for manipulation by the authorities which many of them use. We should add that discrepancies in the articles of association have no relation to the real activities of the organizations involved, and the checking of the articles is therefore of a purely formal nature/ It is not corresponded to the European standards.

Perhaps the greatest problem for human rights organizations remains the constitutional provision that a civic organization may only be involved in defending the rights of its own members. This provision is reflected in the Law on Citizens' Association and leads to considerable restrictions on their activities. It effectively prohibits organizations formed for the benefit of the public since charities are not entitled to engage in human rights protection at all. This is one of the most common grounds for refusing to register an organization. It should be noted that on the grounds on provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Ministry of Justice has removed these restrictions in its draft law on civic organizations.

The discriminatory registration procedure remains a serious obstacle for the public organizations. There are two ways to legalize a new body — through notification and through registration. In the first scenario a civic organization does not acquire the status of legal entity, cannot open its own bank account, the rights and operational capacity of such an organization are very limited. In the second scenario a civic organization has to be legalized (by the Ministry of Justice/its departments or by executive committees of village, settlement or city councils) first, and then to be registered as a legal entity with the state registrars. The list of required documents is rather long: two copies of the statute (by-laws); protocol of the constituent convention (conference) or general meeting, at which the statute (by-laws) was adopted; data on the higher management of the central statutory bodies (first and last name, date of birth, domicile, occupation (job), place of work); receipt confirming the payment of registration fee; information on founders of the organization or association of citizens; document certifying the address — location of the organization (or a guarantee letter from the owner, or info on all the family members and written consent from the adult members), the registration card of a legal entity. If the organization has an all-Ukrainian status, the list of documents becomes even longer — the additional papers on local branches and meetings (conference) protocols from all the branches are required (in the majority of Ukrainian oblast's). As a result the number of papers is doubled. Meanwhile, the registration of other legal entities envisages only the registration card, the statute, founding decision and a receipt for payment of the registration fee.

There are still considerable restrictions on types of activities which associations can engage in. Areas of activity, such as publishing, expert assessments and many others, not clearly permitted by

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laws, are not available to associations. This restriction has been found by the European Court of Human Rights to not comply with Article 11 of the European Convention⁹.

Another problem is the maintenance of an association's territorial status with this limiting the association's activities exclusively to the place where it is registered — a village, city, district of a city, district of a region, etc. There are no such restrictions on profit-making organizations this being yet more evidence of discrimination of restricting legislation against associations. This restriction was also found to violate Article 11 of the European Convention by the Court in Strasbourg¹⁰.

The Unified Registry of citizens' formations was finally introduced in 2009.

The Ministry of Justice legalized 246 civic organizations in 2009, 130 — in 6 months of 2010 (237 — in 2008, 277 — in 2007), and also registered (took notice of) changes and amendments introduced to statutory documents of 275 civic organizations (in 6 months of 2010 — 155, in 2008 — 322, 2007 — 336), registered logos for 43 citizens' formations (in 6 months of 2010 — 27, in 2008 — 28, 2007 — 37), 42 charities (25 in 6 months of 2010, 52 — in 2008, 82 — in 2007), 12 political parties (11 — in 6 months of 2010, 20 — in 2008, 4 — in 2007).

The territorial departments of justice legalized about 3 thousand local associations in 2009, (respectively over 2.5 thousand in 2008 and about 2,5 thousand in 2007), about 1,4 thousand local branches of all-Ukrainian and international NGO's (in 2008 — over one thousand., in 2007 — over 900), registered over 650 local charities (in 2008 — over 700), about 4 thousand (in 2008 — about 5 thousand, in 2007 — about 2,3 thousand) structural subdivisions of political parties and legalized by written notification over 18 thousand (in 2008 — 13 thousand, in 2007 — over 4,5 thousand) of primary political parties' cells.

In total the justice departments' legalized/registered about 4 thousand public formations in 2009. 81,5% of those are made up by local, all-Ukrainian and international public organizations, 0,3% — by political parties, 17,7% — by local, all-Ukrainian and international charities.¹¹

The State Statistics Committee information concerning the number of legal entities, taken from Unified State Registry of companies, organizations and institutions differs substantially from that provided by the Ministry of Justice. Thus, as of January 1, 2010 the Registry contained 17 375 (16 719 — in 2009) parties and their branches; 63 899 (59 321 in 2009) public organizations, 22 343 (–21 425 — in 2009) religious organizations, 12 267 (11 660 — in 2009) charity organizations and 24 649 trade unions and their associations.¹²

In 6 months of 2010 the Ministry of Justice refused to register 104 civic organizations (79-in 2009), rejected the statutory changes of 51 civic organizations. (62 — in 2009).

Chief justice departments in 2009 denied legalization to over 800 public organizations. (in 2008 — 800). Territorial justice departments refused the founders of over 400 public formations (in 2008 — 400). The largest number of rejections in 2009, as well as in 2008, was registered in the chief departments of Kyiv, Cherkassy, Odessa, Lviv and Dnipropetrovs'k oblast's, Autonomous Republic of Crimea, and also the territorial justice departments in Dnipropetrovs'k, Mykolaiv, Rivne, Odessa and Kyiv oblast's. We assume, however, that the real number of refusals is even higher, due to a very popular administrative practice of making the petitioners take back their documents “for amendments” or “for revision”. For example, the Ministry of Justice only returned “for revision” 220 statutory and constituent documents in 2009 (38 — in 6 months of 2010). This procedure, however, is not defined by any law and contrary to the law On Civic Organizations, as it represents a hidden refusal to register.

The official information on the refusal grounds is not available.

⁹ Judgment from the European Court of Human Rights in the case of *Koretsky and Others v. Ukraine*.

¹⁰ Ibid.

¹¹ Analytical information on results of operation of the Ministry of Justice and its territorial departments in the area of printed mass media and information agencies registration for the years 2009 and 2010 www.minjust.gov.ua.

¹² The total number of subjects registered in USR in various areas of economy and organizational/legal forms of trade operation as of January 1, 2010, State Statistics Committee info <http://www.ukrstat.gov.ua>

Here is an incomplete list of political parties and all-Ukrainian and international civic associations, denied the registration by the Ministry of Justice in 2009:

- 1) International NGO "International Committee on Supporting the Struggle against Shadow Economy".
- 2) All-Ukrainian NGO "Blahodar".
- 3) All-Ukrainian NGO "Civic platform of Ukraine".
- 4) International association of public organizations "Academician M.Yu. Mianie system".
- 5) All-Ukrainian environmental NGO "Green trident".
- 6) Political party "Economic Renaissance of Ukraine".
- 7) Political party "Our own strength".
- 8) Political party "Joint force".
- 9) Political party "Righteousness".
- 10) Political party "XXI century".
- 11) Internet party of Ukraine.
- 12) Political party "Social-monarchist party".
- 13) All-Ukrainian youth NGO "Association of youth media of Ukraine".
- 14) All-Ukrainian NGO "National Committee of workers' movement in Ukraine".
- 15) International NGO "International Committee on fighting corruption and shadow economy".
- 16) All-Ukrainian NGO "Academy of Ukrainian Cossacks' cultural heritage".
- 17) All-Ukrainian NGO "Voters' Union of Ukraine".
- 18) All-Ukrainian NGO "Ukrainian Para-Olympic Federation for alpine skiing".
- 19) All-Ukrainian NGO "Reliability".
- 20) All-Ukrainian NGO "National Committee of workers' movement in Ukraine".
- 21) International NGO "Life International".
- 22) Political party "Righteousness".
- 23) Political party "Strong Ukraine".
- 24) All-Ukrainian NGO "Cynologists' Alliance of Ukraine".
- 25) All-Ukrainian NGO "National Bureau of Journalists' Investigations".
- 26) All-Ukrainian NGO "National Congress of Journalists".
- 27) All-Ukrainian NGO "National Union of Journalists of Ukraine".
- 28) All-Ukrainian NGO "National Association of mass media".
- 29) All-Ukrainian NGO "National Association of Public Organizations".
- 30) All-Ukrainian NGO "National Investigations Bureau".
- 31) All-Ukrainian NGO "National Association of Public Organizations of Ukrainian Citizens".
- 32) All-Ukrainian NGO "Anticorruption Committee".
- 33) All-Ukrainian NGO "Public Control in Ukraine".
- 34) Civic organization "Ukrainian Association of Literature Institute alumni".
- 35) All-Ukrainian NGO "Christian Orthodox Cossacks Army".
- 36) All-Ukrainian NGO "Cinema".
- 37) NGO "Ukrainian Association of Systemic Distributions".
- 38) All-Ukrainian NGO "Mutual help".
- 39) All-Ukrainian NGO "The Union of Tax-Payers of Ukraine".
- 40) International NGO "Art-pole agency".
- 41) All-Ukrainian NGO "National association of Ukrainian enterprises".
- 42) Political party "For Justice".
- 43) All-Ukrainian youth NGO "Youth movement for healthy Ukraine".
- 44) All-Ukrainian NGO "Committee against corruption and organized crime".
- 45) Political party "Sir Henry".
- 46) Working pensioners' party of Ukraine.

Grounds for refusal can be most diverse; the bodies in charge of legalization can find "contradictions" at their own discretion. The refusal letters, for instance, contain no information on what

statutory provisions contradict specific articles of specific laws. Therefore, the general formulas “the statute of a charitable organization is not in line with part 4, article 12 of the law “On Charity and Charitable Organizations” [the statute (by-laws) should not contradict the Ukrainian legislation], or “ the statute of the civic organization is contrary to the provisions of part 4, article 13 of the Law “On Civic Organizations” [the statutory document of a civic organization shall not contradict the Ukrainian legislation], do not provide any clue as to what specifically is against the law; so, even in cases when the organizations submit the documents for the second time, they can expect rejection.

The legalization bodies demand that the territorial status and the name of respective settlement be included into the name of the organization. As a result, the state registrars refuse to recognize the organization as legal entity after legalization, as their requirements towards the legal entities’ name are totally different. The name is decided upon by the general meeting or other highest body of authority in the public organizations or charities; consequently, the legalization bodies’ demands are nothing but interference into the internal affairs of the organizations. The refusal grounds and interpretation of the law is arbitrary and differs from oblast’ to oblast’ and from one legalization body to another.

Thus, Novomoskovsk city/raion department of justice in its refusal (№01/3-508, issued on August 06, 2010) to register Novomoskovsk children’s charity foundation “Starry family” noted that “the organization name bears no information as to the oblast’ of its operation”. So, the foundation mentioned raion and territorial status in its name, but the legalization body still assumes that oblast’ should be mentioned as well. Dzhankoy city council, in its turn, refused to legalize Dzhankoy city NGO “Committee against corruption and moral turpitude” on the basis that its name does not meet legal requirements, i.e. that name should not refer to the status or the name of a settlement.

The following example of unlawful refusal to register a civic organization is most typical. Hostomel settlement (Kyiv oblast’) council refused to register an NGO “Civic organization of Hostomel residents “Self-governance”. Specifically, in their letter No 1052 of June 27, 2007 the authorities informed the founders that their registration petition would be considered on July 13, 2007 and once again demanded that the [organization’s] “statute be harmonized with the current legislation of Ukraine, as presently pp. 2.1.3, 2.1.11, 2.1.12, 2.1.13, 2.2.3 and 2.3.9 of the Statute contradict article 20 of the Law of Ukraine “On Civic Organizations”. By council decision № 144 of July 13, 2007 the NGO was refused registration on the grounds of discrepancy between its Statute and article 20 of the Law of Ukraine “On Civic Organizations”. The founders appealed the decision and it was revoked by the Resolution of Irpin’(Kyiv oblast’) town court of December, 20, 2007. The council filed appeal with the Kyiv Administrative Court of Appeals. By its decision of February, 17, 2009 this latter confirmed the ruling of the trial court on illegality of refusal. The decision, in particular, read that “*refusing to register the civic organization of Hostomel residents,, respondent violated provisions of article 16, Law № 2460, by his failure to provide the grounds for such refusal*”. In other words, the court ruled that simple reference to the articles of law is not enough — specific clarification of what provisions and why are not in conformity with the law are mandatory. However, the practice, described above, is widely spread, i.e. a legalization body refuses the registration on the grounds of discrepancy with certain laws, without specifying the real reason. On September 29, 2009 the Highest Administrative Court left both decisions unchanged and turned down the cassation appeal of the territorial council. This case demonstrates that even with all documentation in order, the organization spent two years and four months trying to be duly registered.

Evidently, few organizations would be willing to spend so much time in defending their right to freedom of association — people are willing to start practical operation in accordance with the goals set by the organization. That’s why they would rather comply with all the whims of a legalization body, even the totally unlawful ones.

The Circuit administrative court of Kyiv on July 28, 2010 classified as illegal the refusal of Chief Department of Justice (Kyiv) to register civic organization “Energy of the Future”. In its ruling court provided well-grounded characteristics of the mistakes made by the department in its legal opinion and of unreasonable demands in registration procedure.

The Circuit administrative court of Kyiv on February, 14, 2009¹³ revoked the Chief Department of Justice decision № 374/02 of April 6, 2009 “On refusal to register “Falung Dafa (Falun Gong) Association” and ordered to reconsider the submitted documents. It is noteworthy that the organization founders submitted the registration documents as early as September 8, 2008; so, the refusal was issued 7 months later, which in itself is a gross violation of the law, specifying time limits for the consideration of documents. The department claimed that the NGO in question is a religious organization and should be registered according to the Law on freedom of conscience and religious organizations. The NGO founders responded that their organization has no religious affiliation, and its program is aimed at the improvement of personal psycho-physical characteristics, i. e. at promoting better health with the help of physical exercise. Interestingly, the Ministry of Foreign Affairs of Ukraine stated that “the organization’s activity can be classified as anti-Chinese in its essence, therefore, damaging to good relations between Ukraine and PRC and creating difficulties for the operation of Ukrainian Embassy in China”. The expert conclusion offered by the State Committee of Ukraine on Nationalities and Religions maintained that “Falung Dafa” was a religious trend. The court ruling read:

“The court also contends that the Respondent’s opinion that “Falung Dafa Association” is a religious trend is unmotivated and did not find its legal justification in the decision under consideration in this administrative trial. The motives, on which the Respondent decided that “Falung Dafa Association” is a religious trend, are not shown in the appeal”.

On October 12, 2010 The Administrative Court of Appeals (Kyiv)¹⁴ confirmed its ruling of December 14, 2009 on illegality of Chief Department of Justice actions, i. e. refusal of the latter to register the NGO “Falung Dafa Association”. Actually, since 2006, this organization has been refused registration repeatedly.

The Administrative Court of Appeals (Kyiv) on June 10, 2010 dismissed the appeal against the Circuit administrative court of Kyiv ruling of April 23, 2009, which classified the Ministry of Justice refusal to register political party “Socialist Party of the Regions” as unlawful. The Ministry of Justice “did not find the name “Socialist Party of the Regions” significantly different from the names of other registered parties, i. e. “Party of the Regions” and “Socialist Party of Ukraine”, and recognized in it the danger of violating voters’ rights”. The court considered two linguists’ expert opinions presenting two opposing views, expressed by Doctor of Philology professor S. Yermolenko and by Doctor of Philology I. Synytsya. Specifically, the first opinion contended that “the name of “Socialist Party of the Regions” is incorrect”, while the second maintained that “the name of “Socialist Party of the Regions” is not identical to “Party of the Regions” or “Socialist Party of Ukraine” and, therefore, the party can be registered”. Obviously, the two opinions are at variance with each other. The court of appeals ruled that the trial court had no right to use these opinions, as they were “for reference only and did not provide any legal conclusions for the Ministry of Justice”; therefore, the Ministry of Justice decision is right. This position is rather bizarre as well, as the decision on the identity of the parties’ names in fact contradicts the linguists’ opinions.

The Circuit administrative court of Kyiv on April 13, 2010 supported the Ministry of Justice refusal to register political party “Sir Henry”. The court ruled that “the use of a title “Sir”, never used in Ukraine, in the name of a political party, is a direct indicator of a foreign influence on the party”; that’s why its creation is contrary to article 37 of the Constitution of Ukraine.

Before elections, a political party “Motherland” often encountered problems in dealing with legalization bodies. In particular, the Ministry of Justice departments refused to register the changes in the local branches’ leadership, while Pechersk district court (Kyiv) for the unclear legal reasons, prohibited party members from holding their party conferences and electing their leaders, as a means to satisfy the claim, filed by the dismissed leaders. Thus, the activity of the local branches was completely blocked for the unspecified time period. For example, it could not approve the vot-

¹³ <http://www.reyestr.court.gov.ua/Review/8403099>.

¹⁴ <http://www.reyestr.court.gov.ua/Review/11885444>.

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ers' lists for the local elections.¹⁵ The dismissed leaders, in the meantime, tried to register their own list of candidates, enjoying active support from the official bodies. Only under the pressure of local and international public opinion the alternative party clones' lists were banned from registration. The problem, however, was not resolved and this party never managed to nominate its candidates in Kyiv and Lviv oblast's.

For example, in August 2010 the leadership of Kyiv oblast' branch of the political party "All-Ukrainian"Motherland" Association", was dismissed, as it, allegedly, started to act on behalf of the ruling party. On August 21 the party approached the Chief Department of Justice for Kyiv oblast', but on August 30 the Department passed a decision "on ignoring the information on changes in the party leadership". The Law contains no provisions for response by "ignoring". In fact, it was Department's intervention into the party governance, as it tried to question the legitimacy of the 13th election meeting of Kyiv oblast' party branch.

A bit earlier, on May 25, 2010 presidium of political party "All-Ukrainian"Motherland" Association", dismissed V. Mibozhenko from the office of the head of Kyiv oblast' party branch. He wanted the court to revoke the decision. On July 13 he submitted a formal appeal. On the same day the appeal was filed, the judges appointed and the case tried. The adjudicator allowed the appeal with the ruling which annulled all the decisions concerning Mibozhenko's dismissal. It looks like such speedy trial would be impossible in usual cases, when a judge is really independent.

On September 8 Mibozhenko appealed against the new decision on his dismissal, issued by his political party on July 14. Like in the previous case, his appeal was immediately filed, the same judges appointed, the hearing started and his appeal satisfied. The only difference laid in the fact that this time the court not only annulled all the former decisions concerning Mibozhenko, but also prohibited the Chief Department of Justice for Kyiv oblast' to register any changes in the party leadership.

Both appeals have not been considered before the end of 2010 and activity of the oblast' branch was practically blocked for the time of local elections in September–November 2010. In the meantime, the officials who disagreed with their dismissal, tried to carry on with oblast' branch operation disregarding party interests. Namely, they tried to register their representatives or their list of candidates to Kyiv oblast' council, in the election committees.

3. INSPECTIONS OF THE ASSOCIATIONS' STATUTORY ACTIVITIES

Under article 25 On Civic Organizations the legalization body is empowered to carry out inspections of the associations' statutory activities.

In the course of 2009 the Ministry of Justice monitored the adherence to statutory provisions in 337 public associations and other NGOs. The inspection results showed that 275 (82% of the total number of organizations subject to monitoring) organizations function in compliance with the legislation and their own statutes. In 62 (18% of the total number of organizations subject to monitoring) organizations the violations of legislation and their own statutes were revealed. They were informed about the violations and refused the registration of statutory changes.

In 2009 the territorial justice departments monitored the statutory activity of nearly 9 thousand public associations (in 2008 — 7,3 thousand, in 2007 — 6,5 thousand respectively) and 572 judgments were pronounced (in 2008 — 730, in 2007 — 550 respectively).

These figures show that the number of public associations' inspections carried out by the justice departments, is increasing.

¹⁵ "Tymoshenko accused authorities of stealing oblast' branches of her party" September 9. <http://helsinki.org.ua.index.php?id=1284056834>.

The justice departments in Zaporizhzhya, Cherkassy, Donetsk, Odessa, Zhytomyr, Kirovohrad, Mykolaiv oblast's and Kyiv were among the most active. The raion, city and district justice departments of Zhytomyr, Odessa, Donetsk, Kyiv, Mykolaiv and Poltava oblast's ranked first in exercising their control functions.

The inspection results of 2009 showed that out of 9 thousand inspected public associations 1,3 thousand were not found at the registration addresses (14,5% of the total number of organizations subject to monitoring); respective protocol were written down; nearly 1,4 thousand (15,5%) received recommendations on the necessity of harmonizing their operation with current legislation and their own statutes.

The routine and extraordinary inspections of 66 political parties were organized in 2009. Typical faults were revealed in the statutory operation of 17 parties. Namely, they concerned the procedure for electing delegates to the conventions and conferences by the city, raion and oblast' party branches, failure to notify the justice departments of the changes in party leadership or address; non-compliance with part 6, article 11 of the Law on political parties, concerning the setting up of party organizations in raions, cities of oblast' subordination districts of Kyiv and Sebastopol, primary party organizations etc.

Even so the Ministry of Justice spelled out the need for further intensifying the check up process as one of its major goals.

Absence of clear legal provisions for initiating the extraordinary inspections allows legalization bodies to act at their own discretion. The procedural recommendations for the Ministry of Justice and its territorial departments stipulate that their control functions in regard to public associations should be exercised 16 when registering the statutory changes, reviewing the information party clones n on changes in the leadership of the entity under control; within the framework of routine inspections of NGOs (defined by special annual plans); extraordinary inspections of the organizations are in order if legalization bodies receive specific information from law enforcement bodies, individual or public complaints; or legalization body can initiate the inspection on its own, if mass media publish the information on illegal (non-statutory) operation of the inspection object. The executive committees of the village, settlement and city councils have no clearly defined provisions, under which they, as the legalization bodies, authorized by the law, are supposed to carry out inspections. Article 25 of the Law "On Civic Organizations" stipulates that the legalization bodies' staff can be present at the events, organized by public associations, demand relevant documents and clarifications.

4. PRESSURE ON ORGANIZATIONS, THEIR LEADERS AND MEMBERS

The pressure, put upon public organizations and their activists, substantially increased in 2010.

An employee of the Chief Directorate for fighting organized crime under the MIA of Ukraine for Vinnytsa oblast' on February 2, 2010 visited the office of Vinnytsa group for human rights' protection to check "the legality of Vinnytsa group for human rights' protection, specifically, in relation to its declarations causing damage to the international image of Ukraine". Upon request from the Chief Directorate officer he was shown the certified copies of the constituent documents — the organization statute, certificate of official registration, registration in State tax inspection and in the Statistics department. The "inspector" also demanded and received written clarification concerning Vinnytsa group for human rights' protection declaration, published following the detention of a refugee Akhmed Chatayev in Zakarpat'ska oblast'"¹⁷. In the MIA

¹⁶ See procedural recommendations for the Ministry of Justice and its territorial departments in exercising their control functions, stipulated by legislation with regards to civic organizations. . <http://www.minjust.gov.ua/0/7744#9>

¹⁷ See here: <http://korrespondent.net/ukraine/politicalals/1033870>.

opinion this declaration could be harmful to the international image of Ukraine.¹⁸ Here Chief Directorate intervention ended.

On October 15, 2010 a search, sanctioned by Lenin district court (Vinnytsa) on September 22, 2010, was carried out in the apartment of the group coordinator Dmitry Groisman, in relation to criminal case addressing pornography dissemination. The criminal case was opened after Groisman published a video-clip, available for free on YouTube, in his blog “Live Journal”. The video-clip, made with hidden camera and shown on Russian TV, contained the scenes allegedly involving well-known members of Russian opposition. This clip was published by many resources and not disseminated by Groisman personally. According to Groisman, it was published to demonstrate how authorities can meddle in the private lives of oppositionists and activists to discredit them.

After the search militiamen wanted to see the office of Vinnytsa group for human rights’ protection, rented in the neighbouring flat. Without court sanction they asked and were given permission from the property’s owner, although this latter mentioned that it is rented by an organization, contains nothing but organization’s property and, therefore, the organization’s consent would be needed as well. On entering the office of Vinnytsa group for human rights protection, militiamen practically searched it and confiscated documents and equipment, which, in their opinion, looked suspicious. Specifically, all the computers and electronic carriers, all book-keeping documents, confidential clients’ and refugees’ information, written communications between the group and European Court of human rights on the cases *Kulik v. Ukraine*, *Zabolotni v. Ukraine* and *Aleksei Makarov v. Ukraine* were seized. The aforementioned documents had absolutely nothing to do with the criminal case, which was an alleged ground for the search.

The law stipulates that the search can be carried out only during the daytime; this search, however, lasted till 2 a.m, in line with the best soviet KGB traditions. It was also strange that, although search sanction was issued a month earlier, it was scheduled for the very day of Groisman’s absence from town — he was on business trip and, therefore, could not be present.

After the search Groisman was interrogated several times. A lot of questions had nothing to do with criminal case under investigation, but related to the operation of the Vinnytsa group for human rights protection. Several other organization members were interrogated too.

Obviously, all the procedural steps and confiscated property had nothing to do with fabricated criminal case. Their real goal was seizing of evidence proving human rights’ violations and paralyzing group’s operation.

By November 2010 the confiscated documents have not been yet returned to the organization. Among other documents there are legal documents of the group’s clients, whom it assists in courts. The delay creates a threat for timely procedural actions. Therefore, the law enforcement officials set up impediments in access to court or efficient law-suits for many individuals.

On September 1, 2010 a murderous assault against Vasyl Karev was committed in Komsomolsk (Poltava oblast’). Vasyl was the workers’ movement activist in Poltava ore mining/processing plant, member of trade union organization “People’s solidarity”. Returning home after the night shift, V. Karev felt something was wrong with his car. He pulled over, examined the car and found out that all the four nuts of the front wheel were completely loose. Karev was among the organizers of protest action at the plant in August 2010, during which he refused to be discharged under administrative pressure “by mutual consent”. As of today, 4 out of 15 persons on administration’s “black list” already signed their resignations, i. e. I. Bozhok, S. Burlaka, V. Savchuk and O. Tatarinov. The statement concerning the murderous assault against the workers’ activist was submitted to law enforcement bodies by “People’s solidarity”.

On October 8, 2010 the head of Eupatoria city department of the MIA of Ukraine in ARC O. Osadchy demanded that the head of “User”, the all-Ukrainian NGO of individuals with mental disabilities R.Imereli send him the copies of fiscal and book-keeping documents of the organization,

¹⁸ Chief Directorate for fighting organized crime under the MIA of Ukraine checks “the legality of Vinnytsa group for human rights’ protection, specifically, in relation to its declarations causing damage to the international image of Ukraine”, <http://helsinki.org.ua/index.php?id=1265196163>.

as well as the organization project description. The alleged goal was to monitor the use of the project money. Specifically, it concerned the project which monitored the violation of human rights in mental institutions of ARC. The project uncovered a lot of violations. It was right after the project results were made public, that the project manager Andriy Fedosov was severely beaten and received numerous phone threats. None of these incidents were investigated, despite numerous statements made by human rights activists¹⁹. On the contrary, the demand demonstrated that militia launched the investigation of the organization's activity. The grounds for investigation or alleged Fedosov's offence remain unknown. These actions are clearly aimed at intimidating the activists and blocking further project implementation and organization's activity as a whole.

The Vinnytsa court decision on forced hospitalization of A. Bondarenko with the goal of assessing his mental lucidity is another example of human rights activist's persecution. The decision was made on the grounds that he filed too many complaints, despite the fact that the file contained the documents certifying his normality.²⁰

5. TEMPORARY BAN ON TYPES OF ACTIVITIES AND THE LIQUIDATION OF ASSOCIATIONS

There were no cases recorded during 2009–2010 of sanctions for participating in associations. Administrative responsibility for the activity of unregistered civic organizations remains as acting (Article 186-5 of the Code of Administrative Offences).

According to the Unified State Registry of Ukraine 63 political parties or their branches, 450 civic organizations, 21 religious organizations and 177 trade unions or their associations were removed from registration in 2009.

As the Ministry of Justice stated on its site, "Analysis and summary of the territorial justice departments' information on political parties' compliance with part 6, article 11 of the Law of Ukraine "On political parties in Ukraine" shows that 8 parties are at variance with the requirements, having failed to register their oblast', city and raion organizations in the majority of Ukrainian oblast's, Kyiv, Sebastopol and Autonomous Republic of Crimea within 6 months ". Therefore, the Ministry approached the Circuit administrative court of Kyiv demanding the cancellation of their registration certificates (over 6 months of 2010 same applied to 4 parties). Let's have a look at some exemplary cases.

On March 1, 2010, the Circuit administrative court of Kyiv annulled the registration certificate of a political party "Safeguarding local interests of people" (the Ministry of Justice Resolution № 1093/5 of May 20, 2010).

By the same court's decision of September 29, 2009 the party "People's will" was terminated. Its members filed an appeal, which was allowed on November 5, 2009, with the revocation of the earlier annulment decision. This outstanding ruling of Kyiv administrative court of appeals, quoting the European convention on protection of human rights and Fundamental principles of banning political parties and similar formations, approved by Venice Commission at its 41 plenary session (Venice, December 10–11, 1999) stated the following:

"By April 3, 2009 the respondent has set up primary organizations and local party organizations in 15 oblast's of Ukraine, which constitutes more than half of administrative and territorial units of Ukraine as defined by article 133 of the Constitution of Ukraine.

¹⁹ See, e. g. a letter sent by Human Rights Watch to Prosecutor General on May 5, 2010: <http://www.hrw.org/en/news/2010/05/05/letter-prosecutor-general-ukraine-re-andrey-fedosov>.

²⁰ For more on Bodnarenko's persecution see "Right to freedom" section.

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By July 31, 2009, before the suit was brought to the trial court, 21 oblast' party organizations of "People's will" already functioned in Ukraine.

Meanwhile the annulment of a political party registration certificate in its legal consequences equals forced dissolution of a political party or similar prohibitive measure.

As the respondent's branches function in the majority of Ukrainian oblast's, the respondent's activity does not present a threat to Ukrainian independence, constitutional order or sovereignty, or to the rights and freedoms of the citizens, and, therefore, the termination of respondent's operation by annulling its registration certificate cannot be applied.

By the decision of the Circuit administrative court of Kyiv, passed in October, 2010, the Ministry's of Justice suit was not satisfied on the same grounds. The suit concerned the dissolution of "Future Ukraine" party; the same applied to political party "Human Rights Protection" in February 2010; "Civic movement of Ukraine" and "Awakening" parties — in November, 2009; Progressive-Democratic Party — in 2009 (the Ministry of Justice appeal of October 12, 2010 was satisfied only in part and did not change the essence of the decision).

At the same time, Kyiv administrative court of appeals on February 11, 2010 rejected the appeal of "Party of Law" against the trial court decision on its annulment on the same grounds. Earlier the Ministry of Justice suit was satisfied by the decision of Pechersk district court (Kyiv) of May 30, 2007 and consequently party registration certificate of June 1, 2006 was annulled. Kyiv administrative court of appeals ruling of June 11, 2008 denied the appeal. The cassation appeal of "Party of Law" was satisfied by the ruling of High administrative court of Ukraine of March 26, 2009. The case was sent to the court of appeals for revision, which finally resulted in the same decision. This decision of February 11, 2010 was once again annulled by the decision of September 14, 2010 of High administrative court, so that the case was returned to the court of appeals, which revised it already twice.

In July 2010 political party "For Ukraine!" reported that Ministry of Justice departments went to law trying to liquidate its local branches. For example, the Circuit administrative court of Sumy nullified the official registration of Sumy oblast' organization of "For Ukraine!" party. The party speakers announced that it was done to exclude the party from local elections.

The desire of the Ministry of Justice and its territorial departments to annul parties' registration and centers has no logical explanation — the legal practice is quite unambiguous and their suits are usually denied. One would assume that there is a special order concerning rigid control over parties and their number.

Various bodies of authority tried to liquidate public organizations by court decisions. In particular, the Prosecutor's office and the Ministry of Justice departments tried to liquidate civic organizations on the grounds of their absence at registration address, while tax inspections tried to do the same on the grounds of failure to submit tax declarations required by the law.

Thus, on July 6, the Circuit administrative court of ARC met the claim of the Prosecutor's Office (Krasnogvardeysky raion) concerning the dissolving of Krasnogvardeysky raion civic organization "Association for education and enlightenment promotion". The inspection of the organization statutory activity, held by Krasnogvardeysky raion ARC justice department, showed that the aforementioned organization was not located at the premises, specified in the statutory documents, which rendered inspection impossible. Respective protocols of March 24, 2008, of August 5, 2008 and of April 16, 2009, testifying to the absence of organization, were compiled. The court's ruling read as follows:

"Under the circumstances the court arrives at the conclusion that Krasnogvardeysky raion civic organization "Association for education and enlightenment promotion" is not to be found at its legal address, does not hold the meetings or re-elections of its constituent bodies and does not provide legalization body with the information on its statutory activity or officials constituting its central governance body, which is a violation of the Law of Ukraine. "On Civic Organizations" and causes damages to national interests, making it impossible for the control bodies to exercise control over civic organization operation".

On the same grounds the Crimean Scouts' Association was liquidated by the decision of the Circuit administrative court of ARC on the motion of the Chief justice department under the Ministry of Justice of Ukraine in ARC. The decision read:"

"Under the circumstances the court arrives at the conclusion that the Crimean Scouts' Association is not to be found at its legal address, has no fiscal or book-keeping activity, does not provide reports on mandatory payments or pay the fees in accordance with the procedure and in sums, envisaged by the legislation, which is a violation of articles 24 and 26 of the Law of Ukraine "On Civic Organizations" and causes damages to national interests, making it impossible for the control bodies (i. e. pension fund) to exercise control over the civic organization's fiscal and economic operation.

The organization does not hold the meetings or re-elections of its constituent bodies, which is a gross violation of the Statutory provision 6,5, under which the board of the association meets at least once a year to approve the presidium decision on new memberships and new board members".

On the same grounds the Circuit administrative court of ARC by its decision of September 9, 2009 liquidated a youth NGO "Crimean association of young activists", and by decision of November 26, 2009 — Saky local organization of "Ukrainian social-democratic youth".

Odessa ranks first in the number of such lawsuits. By the decisions of Odessa Circuit administrative court of September 3, 2009 on the motion of the Chief justice department for Odessa oblast' 2 public organizations were liquidated, i.e. Regional foundation of soldier's mothers "Hope initiative" and "Yoga and life" group, on the grounds of their absence at the legal address and failure to submit information on their activities. On the same grounds Odessa oblast' Board of the Scientific Research association of radio engineering, electronics and communications of Ukraine, Odessa Children's leukaemia foundation and "ABC of Love" NGO were disbanded by the decision of December 18, 2009. The same court passed respective decisions on liquidation of "Maria -A" NGO (March 17, 2009), "PHARAOH" NGO (June 9, 2009), "Anglers' Club" NGO (June 25, 2009), "Chernobyl Union" Bilyaivka branch (July 19, 2010).

On March 24, 2010 the Circuit administrative court of Kyiv denied the suit, filed by State tax inspection requesting the termination of the legal entity "Information society — Center for civic initiatives" due to its failure to submit the tax declarations required by the law. The court ruled that such lawsuits can be initiated exclusively by legalization bodies or the prosecutor's office, while the tax inspection has no jurisdiction in the matter. Similarly, on the same grounds, on March 17, 2010 the Circuit administrative court of Kyiv denied the State tax inspection request to liquidate the Obolon' district branch of all-Ukrainian Party for peace and unity.

Earlier, in 2008 Report, we mentioned the illegal liquidation of "Eurasian youth association" NGO. This organization was legalized by written notification on its founding, under the order of the Chief justice department for Kharkiv oblast' № 70/2 of April 24, 2007.

By the order of the Chief justice department for Kharkiv oblast' № 267/2 of September 04, 2007 the NGO "Eurasian youth association" incurred penalty in the form of notice. The Circuit administrative court of Kharkiv by its resolution of September 19, 2007 re case № 2a-1466/07 on the motion of deputy prosecutor of Kharkiv oblast' under the Chief justice department for Kharkiv oblast', banned the activity of "Eurasian youth association" NGO for three months. This resolution was appealed against in Kharkiv administrative court of appeals, which did not allow the appeal by its decision of August 20, 2008.

The Circuit administrative court of Kharkiv by its decision of November 6, 2008 liquidated "Eurasian youth association" NGO. The organization filed an appeal. On July 6, 2009 Kharkiv administrative court of appeals revoked the liquidation decision and rejected the claim. In particular, the court's decision read:

"The panel of judges found that the trial court has made an erroneous decision concerning the continuation of "Eurasian youth association" NGO operation after penalty in the form of notice and temporary ban on activity were imposed.

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Thus, the trial court classified the operation of “Eurasian youth association” NGO without duly registered statute or logo and its absence at the legal address as illegal...

The panel of judges makes a note that p. 1 article 32 of the Law of Ukraine “On Civic Organizations” defines the exhaustive list of conditions, under which the grounds for enforced disbandment (liquidation) of a civic organization can be established.

This list, which is not to be interpreted extensively, does not mention the absence of an organization at its legal address as valid grounds.

The panel of judges classifies the decision of trial court stipulating that the absence of an organization at its legal address is an illegal act as wrong.

Taking all the aforesaid into consideration, the panel of judges arrives at the conclusion on inconsistency between the case circumstances and court’s rulings, which led to the unlawful decision.

In addition the panel of judges points out that the trial court justifiably ignored prosecutor’s and respondent’s references to the fact that, while the Kharkiv Circuit administrative court resolution of September 19, 2007 was still in force (till December 29, 2007) the supporters of Kharkiv “Eurasian youth association” and International Eurasian movement with center in Moscow continued their anti-Ukrainian activities, both in Kharkiv and in other regions of Ukraine. More than once the “Eurasian youth association” NGO advocates organized picketing of Criminal Investigation Department of MIA for Kharkiv oblast’, in violation of the Kharkiv Circuit administrative court decision. They demanded exemption of “Eurasian youth association” activists who participated in demolishing Ukrainian Insurgents’ Army monument on December 20, 2006, from criminal liability; they also picketed the Kharkiv city hall, demanding to stop “political persecutions” of “Eurasian youth association” activists. On October 14, 2007, in the Youth Park in Kharkiv, the proponents of “Eurasian youth association”(Kharkiv branch) used logos and attributes of their organization (banners and arm-bands) and tried to provoke the members of nationalist–democratic into physical confrontation, thus violating article 185–1 of the Administrative Code of Ukraine. The operatives of the raion division of Chief department of the Ministry of Interior of Ukraine also detained a Ukrainian citizen, who claimed that he was the leader of Lyubotyn “Eurasian youth association” branch. Respective administrative protocol № 006616 of October 14, 2007 was compiled, incriminating him with violation of article 185–1 of the Administrative Code of Ukraine. The paragraph, containing “explanations from the person brought to administrative liability”, read [that he] “participated in the rally, representing “Eurasian youth association”. The judges’ attention was drawn to the fact that the official site of “Eurasian youth association” NGO (www.rossia3.ru) published a EUA functionary declaration of his intention to kill President V.Yushchenko, which constitutes a felony, under p. 1 article 346 of the Criminal Code of Ukraine.

Herewith, the panel of judges contends that the evidence, supplied by the prosecutor and the plaintiff to the case, does not confirm the facts of illegal actions, committed by the “Eurasian youth association” NGO, due to the following:

The materials, printed out from the Internet (www.rossia3.ru) by the prosecutor and the plaintiff to support the illegal activity accusation, cannot be accepted by the panel of judges as material evidence in the case, because, according to the letter of June 2, 2009, submitted by Kharkiv National Radio–electronic University and expert opinions, provided on June 4, 2009 by the experts from Kharkiv National University of Internal Affairs, the quoted site is registered under the name of an individual in Moscow (Russian Federation), and no connection between the respondent and the aforementioned site has been established by the panel of judges discovering the case.

The pictures, submitted to prove respondent’s activity in organizing mass events, do not prove the participation of “Eurasian youth association” activists in these events and fail to establish the fact of the respondent’s unlawful activity at the time, when his operation was temporarily suspended.”

Obviously, the legal practice is most varied. The courts are unanimous in arguing that tax inspections have no authority to bring a suit demanding the termination of a civic organization or

a party. In real life, however, there are many ways to liquidate a civic organization on the grounds of its absence at the registration address.

6. PARTICIPATION IN ASSOCIATIONS: JOINING, SANCTIONS FOR PARTICIPATION, FORCED MEMBERSHIP

In late 2009 the European Court of Human Rights referred the case "Sherfedynov and others vs. Ukraine for Ukrainian government's consideration"²¹. The application was submitted by 9 supporters of an international Islam party Khizb-ut-Tahrir, not registered in Ukraine. The party discussed the philosophical background of the party and disseminated information about it. In particular, on September 15, 2004 they distributed a leaflet "Khizb-ut-Tahrir address to Muslims", signed "Khizb-ut-Tahrir members in Ukraine". On March 22, 2005 raion militia division of Balaklava went to court demanding bringing members to account for their participation in unregistered organization. On March 31, 2005 Balaklava raion court found them guilty of this administrative offence and imposed fines, ranging between 425 and 527 UAH. The decision was final and could not be appealed. In the course of hearings 4 of the respondents claimed they had nothing to do with this party, while others testified that, although not the party members, they were interested in its ideology. Finally these individuals approached the European Court of Human Rights filing a complaint of violation of the freedom of associations and of opinion.

In 2010 the well-forgotten practice of forcing certain professionals into joining a party was reported. Specifically, such reports came from Kharkiv oblast' concerning the teachers who were coerced to join the Party of Regions.

Problems also do exist with regard to membership of trade unions, especially with the heads of independent or newly formed trade unions experiencing persecution. They face threats of dismissal or threats of other nature.

7. RECOMMENDATIONS

1. Change the current law "On citizens' associations" by passing a law "On civic organizations", which should be in line with the requirements of the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Recommendations of the Committee of Ministers of the member states of the Council of Europe "On the legal status of nongovernmental organizations in Europe" (CM/Rec(2007)14). The following, among other measures, are needed:
 - Make the registration procedure cheaper, quicker and non-discriminatory as compared with profit-making organizations.
 - Abolish double registration of civic organizations by concentrating all registration functions on the Ministry of Justice and its local departments, or to make registration of civic organizations as all other legal entities are registered;
 - Eliminate discriminatory registration procedures of organizations and registration of changes to statutory documents compared to other legal entities through applying to every single registration procedure which is envisaged by the Law "On State Registration of Legal Entities and Individual Entrepreneurs" (including the list of documents, requirements to documents, methods of changing and documents for registration of amendments);
 - Remove restrictions on types of activities for associations.

²¹ *Bayazet Ruslanovich Sherfedinov and Others against Ukraine* (№ 29585/05, 29 July 2005).

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- Recognize the right of civic organizations to not only defend the rights and interests of their own members, but also allow them to engage in any activities helping other individuals or society as a whole;
 - abolish territorial restrictions on associations' activities (the all-Ukrainian status may remain, however it should not lead to a restrict of the territory of local associations, while the procedure for gaining all-Ukrainian status should be voluntary);
 - Provide the possibility of creating different forms of associations (associations of legal entities and individuals, associations of citizens' associations and other types of organizations, for example, charities, etc)
 - Eliminate restrictions to create subdivisions in other administrative-territorial units;
 - Cancel a scheduled and unscheduled inspections, controlling responsibilities of the legalization authorities for the activities of NGOs, as illegal activities should be controlled by law enforcement agencies within the law;
 - Abolish the obligation for local branches of civic organizations to register (we are not speaking of associations and unions of civic associations where the members are independently legalized citizens' associations);
 - Recognize the right of civic organizations to engage in economic activities without the purpose of receiving and dividing between the founders of the profits, but rather directed the profits towards fulfilling activities as per the articles of association;
 - Recognize the right of NGOs to symbols and not compel them to fail to register its.
2. Remove Article 186-5 which establishes liability for the activity of unregistered civic organizations from the Code of Administrative Offences.
 3. Introduce amendments to the Law on publishing activities in order to enable non-profit making organizations, and not only businesses, to establish publishing houses.
 4. Introduce amendments to the law on charities and charity activities in order to:
 - harmonize the procedure for their registration with civic associations and other legislation, and also abolish double registration;
 - Cancel territorial restrictions over the activities of charitable organizations;
 - Make it possible to create other forms of charities, for example, funds (including those created in accordance with a will.
 5. Sign and ratify the Convention on recognizing the legal rights of an international nongovernmental organization (ETS № 124), which came into force on 1 January 1991.
 6. Bring legislation, in particular the law on citizens' associations, on freedom of conscience and religious organizations with norms with the European Convention on the Legal Status of Labor Migrants, ratified by parliament in April 2007.
 7. Legislate the conditions of State assistance to nongovernmental non-profit making organizations, for example, stipulating the criteria for such assistance and the procedure for receiving it. Make the procedure for providing and using State funding directed at civic associations for carrying out State programs competitive and open.

XI. FREEDOM OF MOVEMENT AND CHOICE OF THE PLACE OF RESIDENCE¹

1. OVERVIEW

The right to freedom of movement has been grossly disregarded in 2009–2010. Curfew for the minors, introduced by local self-governments on a broad scale, was the most negative development in this regards. The long duration of investigation, often involving written obligation of a party not to abscond, used as a preventive measure, is another restriction of freedom of movement. Groundless restriction of freedom of movement for the persons, released from custody and put under administrative supervision, presents another serious problem. Obtaining a passport, either internal or for travel abroad, also is a complicated procedure restricting the freedom of movement.

It is indicative that in 2010 the cases when militia would restrict the freedom of movement to prevent public from attending peace manifestations in Kiev, was registered again, for the first time since 2004. Without any explanations and for no good reason, militiamen would block transportation vehicles (buses and minivans) taking the participants to the peaceful meetings to Kiev. Often the drivers of the vehicles were threatened with revocation of their licenses. These cases were registered, in particular, at the time of mass events, set up by the opposition in May, during patriarch Cyril's visit to Kiev in August, in the course of mass protests against Draft Tax Code in October and November. In all these instances militia denied the illegality of their actions.²

The process of transition from the system of residential permits ("*propyska*") to registration so far remains unaccomplished — a lot of public services, i.e. health care, placing a child in a school etc, are not reconciled with the **registration system**, thus restricting the free choice of place of residence.

The procedure of issuing travel passports also remains unsatisfactory — it takes a lot of time, is linked to bureaucratic red-tape, is costly and unaffordable for many citizens. It does not comply

¹ Prepared by Volodymyr Yavorsky, UHHRU executive director.

² See, e. g. Opposition claims that the power tries to ruin Kiev rally on May 11. <http://www.newsru.ua/ukraine/07may2010/sorvatmeet.html>; Tyahnybok's people at the meeting in front of Rada talk about pressure on carriers, <http://world.pravda.com.ua/news/2010/05/7/5017305/>; Volyn' council deputies are upset with the Road inspection pressure on carriers; <http://zik.com.ua/ua/news/2010/06/30/235059>; Opposition protest action: Road inspection and Security Service exert pressure <http://www.dw-world.de/dw/article/0,,5979909,00.html>; In Khmelnytskyi oblast' pressure on carriers is exerted <http://moyagazeta.com/news/a-2880.html>; In Ternopil and Lviv there is also talk about Road inspection pressure related to Kiev rally <http://www.pravda.com.ua/news/2010/05/10/5028407/>; Road inspection was ordered to ban entrepreneurs from participating in protest action in Kiev <http://tsn.ua/ukrayina/dayishnikam-nakazali-ne-puskati-pidpriyemciv-na-akciyu-protestu-do-kiyeva.html>; Militia banned entrepreneurs from participating in the rally in front of Rada <http://www.pravda.com.ua/news/2010/10/21/5500627/>; Road inspection was ordered to ban entrepreneurs from participating in protest action in Kiev <http://www.4post.com.ua/politics/174132.html>; **never made it to the rally** <http://www.rivnepost.rv.ua/showarticle.php?art=025308>; Militia banned entrepreneurs from participating in protest action in Kiev <http://www.newsmarket.com.ua/2010/10/10022222/militsiya-pereshkodzhala-pidpriyemtsyam-pr>

with legislation in force and therefore leads to many abuses and corruption in this area. For example, many documents not stipulated by the law, e.g. insurance policies, or additional fees, e.g. for the certificate of absence of criminal record, are demanded from the public.

The situation with the internal passports is not much better. Terms of passports' issue are not observed, thus restricting the freedom of movement for the individuals who, without a passport cannot either register or perform any other related actions. Militia offers partial explanation, i. e. lack of passport forms, but that does not explain the problem as a whole. The passport departments, operating under the auspices of Housing and Communal Services, presently turned into usual offices. As such they often refuse services to the public, (passport issue or replacement, registration or its removal at the place of residence, issue of various certificates) on the basis of the residents' debts in payments for communal services. This practice, obviously illegal, is spreading due to the lack of the MIA control over the passport offices.

The conflicts, arising from border control units' refusal to let foreigners enter the Ukrainian territory, remain rather frequent. Over 9 months of 2009 the border control turned down 16 415 persons; over 9 months of 2010 — 13 576 persons (over 12 months of 2008 this figure amounted to 24 760 persons).³

2. FREEDOM OF MOVEMENT: "WRITTEN OBLIGATION NOT TO ABSCOND" AND "ADMINISTRATIVE SUPERVISION"

As criminal investigations tend to take very long, a preventive measure in the form a "written obligation not to abscond" is often applied under the articles 148–150 of the Criminal Proceedings Code.

It means that a person cannot leave the boundaries of an administrative/territorial unit of his/her registration without a permit from the investigative body. The longer the term of forcible "staying in place", the more serious is the violation of personal right to freedom of movement.

On February 18, 2010 the European Court for the human rights passed a ruling in the case "Nikiforenko v. Ukraine" (application № 14613/03), in which the violation of article 2 of the Protocol № 4 of the European Convention on Human Rights (*freedom of movement*) was established. Nikiforenko has been under criminal investigation for a lengthy period of time; the case was continued more than once for additional inquiries. Between January 1998 and October 22, 2008, i.e. for 10 years, 9 months and 19 days, she was under the obligation of staying at the same place. During this time she was not allowed to leave the city boundaries without a permit: several times she was granted the permit to see her family, and several times she left without permit. The court agreed that the restriction of *freedom of movement* was imposed in accordance with the law and in pursuit of lawful goal. It disagreed, however, that such a long term was an appropriate measure of restricting Nikiforenko's rights. Besides, the court added in its ruling that it looks especially disproportionate with regard to unjustifiably long investigation of a minor offense. That's why it passed the decision on the fact of violation of the freedom of movement.

On October 7 the European Court of human rights passed a ruling in the case "Pokalchuk v. Ukraine" (application no.7193/02) in which the violation of freedom of movement through "written obligation not to abscond" was established. Criminal proceedings were instituted against the applicant, with further use of a preventive measure i. e. "written obligation not to abscond" which remained in force for 10 years starting 2000.

Actually, the problem is still in place, despite the rulings of the European Court of human rights and the fact that the court already identified this problem in the case *Merit v. Ukraine* (decision of March 30, 2004).

³ Results of the field operations of the State Border Control Official Site http://www.pvu.gov.ua/control/uk/publish/article?art_id=48708&cat_id=78111.

Under the law on administrative supervision, in force since 1995, the person released from custody can be subject to preventive measures of control and supervision by the court decision. These measures, however, in real life result in restriction of freedom of movement. One can see the point of regular reporting to the law enforcement agencies on a person's place of residence. However, article 10 of the said law, envisages the following restrictions, which can be fully or partially applied to the persons under administrative supervision:

- a) prohibition to leave a house (an apartment) for a given period of time (not longer than 8 hours at a time);
- б) prohibition to visit certain places in a district (city);
- в) prohibition of leaving a district (city) or restricted duration of absence.

These supervision measures can be used for a term from one to two years. Under article 2 the administrative supervision is ordered for some individuals released from custody to prevent crime and re-educate them. How does the restriction of freedom of movement contribute to achieving these goals? How justified and necessary is the establishment of 2-years' term for restrictions? Can't it be classified as a punishment metered out in addition to all the other punishments imposed on a convicted person already? It is unclear, how keeping a person in one place, let us say, in Kiev, would help militia in preventing him/her from committing another crime. The difference in leaving city for private purposes (e.g. to meet with family), or business purposes, is also hard to grasp. These issues are open to discussion and we would argue that the restriction of freedom of movement is contrary to article 33 of the Constitution of Ukraine and the European Convention on Human Rights.

3. FREEDOM OF MOVEMENT: CURFEW FOR THE MINORS

In 2009 numerous self-government bodies started to pass decisions, prohibiting children unaccompanied by adults from staying in the streets or in public places.

According to these decisions, if a child is found in the street, he/she can be detained by militia-men who would take him/her to the militia department, call parents and hold them administratively accountable under article 184 of the Administrative Code (negligence of parental or guardian's duties penalized by the fine in the sum of three to five salaries before taxes). The application of this article is open to discussion, as the parental duties defined in the Family Code do not include an issue concerning unsupervised children's stay outside at night. In fact, the new duty was introduced without any amendments to the Administrative Code of Ukraine, thus calling the accuracy of the administrative law into question.

In general, the prohibition for the unaccompanied minors' to stay in the streets or in the entertainment venues at night-time does not raise any objection. But this prohibition entails the restriction of freedom of movement, protected by the European Convention on Human Rights and the Constitution.

The intervention should be carried out *in compliance with the law*. I.e. any interference into the human rights must be regulated by the law, and not by the decisions of local self-governments.

These decisions in themselves represent *disproportionate restrictions* of the freedom of movement, as they have no time limits and do not promote the protection of child's rights. In other words, they *are not necessary*, as a form of restriction, *in a democratic society*.

Freedom of movement can be restricted only in cases stipulated by the law for the times of emergency. This law spells out the implementation of the restrictions under specific circumstances, in specific areas and for the strictly defined time period.

All the arguments considered, the permanent prohibition for minors from staying in the streets, without exceptions, is a violation of their right of free movement.

XI. FREEDOM OF MOVEMENT AND CHOICE OF THE PLACE OF RESIDENCE

UHHRU considers that local self-governments have no authority in establishing bans for the movement of children. With this certainty in mind, UHHRU helped a citizen to appeal the decision of Chernihiv obalst' council of December 24, 2009, which restricted the freedom of movement for the minors'.

The appeal qualified the aforementioned decision as "gross violation of human and citizens' rights, specifically, the fundamental right to freedom of movement.

"1. According to article 2 of the Law of Ukraine "On Freedom of Movement and Choice of Place of Residence in Ukraine" Ukrainian citizens are guaranteed the freedom of movement. Article 3 of the said Law spells out that freedom of movement means the right to move around freely and unimpeded on one's own free will in the territory of Ukraine in any direction, by any means, at any time.

According to article 2 of the Law of Ukraine "On Freedom of Movement and Choice of Place of Residence in Ukraine the freedom of movement can be restricted only by the law.

2. As the appealed decision is not a law, Chernihiv oblast' council in passing it exceeded the scope of its competences. The article 2 of the Law of Ukraine "On Local Self-Governance" stipulates that the local self-governments can address the local issues only within the framework of the Constitution and Laws of Ukraine. Article 10 of the same Law reads that oblast' councils are bodies of local self-governance, representing common interests of the territorial communities of the villages, settlements and cities within the scope of competences defined by the Constitution of Ukraine and its Laws.

Therefore passing the decision in question Chernihiv oblast' council went beyond the scope of the law.

*3. The right to the freedom of movement is also guaranteed in **article 12 of the International Covenant on Civil and Political Rights** (ratified by the Decree № 2148–VIII of the Verkhovna Rada of Ukraine Presidium on October 19, 1973). And part 1 of article 9 of the Constitution of Ukraine spells out that international treaties in force constitute a part of the national legislation.*

*4. On July 17, 1997 Verkhovna Rada by Law № 475/97–SR ratified **Protocol No4 to European Convention for the Protection of Human Rights and Fundamental Freedoms**. Article 2 of this Protocol also guarantees the right to free movement. It also stipulates that this right can be restricted by law only, if a need for that arises in a democratic society. Therefore the council decision is not a law, and the imposed restrictions cannot be regarded as necessary in the democratic society. The set goals, i.e. preventing alcohol sale to the minors, reducing the instances of child delinquency, could be achieved without violating human rights, by means of enhanced control over the alcohol selling stores, preventive measures etc.*

Thus, Chernihiv oblast' council exceeded its competences in passing the decision "On restrictions of children's stay in the entertainment venues, public catering places, computer clubs, in the streets and other public places". It violated the fundamental right to the freedom of movement for my son and other minors residing in Chernihiv oblast'."

By the decision of Desna district court of the city of Chernihiv of June 10, 2010, this administrative appeal was partially satisfied; specifically, items 1–3, restricting the freedom of movement, of this decision were cancelled. However, other items of the decision concerning preventive measures remained in force. UHHRU did not object. In June Chernihiv oblast' council filed appeal against this decision, but it has not been heard in the court yet.

Thus, the court annulled the decision of a local self-governance body on introducing a curfew for the minors, as it violated the human rights and represented administrative access. The court, agreeing to this argument, stated in its ruling:

"Therefore, taking into account that Chernihiv oblast' council passed a normative/legislative act exceeding the authority, granted to self-government bodies, the decision under appeal does not comply with laws of higher order and violates legitimate right of Chernihiv oblast' minors to freedom of movement, the appeal is satisfied. "

On June 3, 2009 Minister for the Family, Youth and Sports Yuri Pavlenko declared that prohibition for unaccompanied children and underage persons from staying in the public places after 22:00 should be stipulated by respective law. Pavlenko stressed that the Ministry developed following proposals to amend legislation: not only restrict the children and underage persons' stay outside at night-time, but enhance the parents' and other concerned adults' responsibility for children's safety and health as a whole. In particular, the amendments were to be made to the Law on the Protection of Childhood and Administrative Code of Ukraine. Article 184 of the Administrative Code of Ukraine was to be amended with sections 5 and 6, which would establish a notice or fine — from five to eight minimum wages for “parental or guardian's neglect of children under 16 years of age, which leads to the children's stay in the streets or in public places after 22:00 without plausible reason”.⁴ This draft, however, never made it to parliament.

On June 29, 2010 Verkhovna Rada rejected a draft law,⁵ forbidding children under 16 to appear in entertainment venues, discotheques and night clubs between 22:00 and 6:00. Only 38 members of parliament out of required 226 voted for this draft, submitted by Communist Party representative Volodymyr Danylenko. Besides, the Rada refused to return the document to its author for amendments. Under the draft law, parents or the adults performing parental functions are also held administratively liable for allowing their minor children to stay unsupervised in public places between 22:00 and 6:00.

3.1. ILLEGAL INTRODUCTION OF CURFEW FOR THE MINORS: TIMELINE

November 2005 — decision of Bila Tserkva (Kiev oblast') city council: “Establish due procedure for the restriction of minors' visiting public places at night-time — after 21:00 in winter time and after 22:00 in summer time”.

April 30 2009 — decision № 498 of Novohrad-Volynsky (Zhytomyr oblast') city council: “Restrict the stay of minors and juveniles under 16 years of age, unaccompanied by parents or guardians... in the city streets at night-time, after 22:00 during fall-spring period and after 23:00 during summer period”.

May 28 2009 — decision № 822 of Zhytomir oblast' council “Restrict the stay of unaccompanied children under 14 years of age in the city streets and other public places in Zhytomyr oblast' settlements at night-time after 22:00 and of persons between 14 and 16 years of age — after 23:00”. Later similar decision was passed by Zhytomyr city council.

July 2009 — Berdychiv city council (Zhytomyr oblast') passed a decision “Restrict the stay of the children under 14... in public places after 22:00 and of persons between 14 and 16 years of age — after 23:00, if unaccompanied by parents or guardians”.

June 2009 — decision was made in Kremenchug.

December 24 2009 — decision of Chernihiv oblast' council: “Restrict the stay of children under 14 years of age in the city streets and other public places in Chernihiv oblast' settlements at night-time after 22:00 and of persons between 14 and 16 years of age — after 23:00”.

January 26 2010 — decision № 6 of Pryluky city council (Chernihiv oblast'): “Restrict the stay of children under 14 years of age in the city streets and other public places in the city at night-time after 22:00 and of persons between 14 and 16 years of age — after 23:00 if unaccompanied by parents or guardians”.

February 11 2010 — decision of Ternopil oblast' council: “Prohibit the “stay of children under 14 years of age in the city streets and other public places in Ternopil oblast' settlements at night-

⁴ Ministry for the Family, Youth and Sports: restrictions for children's stay in the public places at night should be defined by the law press-service of the Ministry: http://www.kmu.gov.ua/control/uk/publish/printable_article?art_id=219764917.

⁵ Draft law No 4243 of June 18, 2009. On introducing amendments to some legal acts of Ukraine 9 on the childhood protection).

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time after 22:00 and of persons between 14 and 18 years of age — after 23:00, if unaccompanied by parents or guardians”.

March 20 2010 — decision of Koryukiv raion council (Chernihiv obalst') : “Restrict the stay of children under 14 years of age in the city streets and other public places in Zhytomyr oblast' settlements at night-time after 22:00 and of persons between 14 and 16 years of age — after 23:00 if unaccompanied by parents or guardians”.

March 31 2010 — Simferopol city council passed decision on “restricting the stay of children, if unaccompanied by parents or guardians, in the public places of the city between 22:00 and 6:00”.

April 28 2010 — Khmelnytsky city council at its session passed decision № 2 : “Children under 16, if unaccompanied by parents or guardians, are prohibited from staying... in the city streets and other public places (parks, gardens, stadiums, at night-time after 22:00 in fall-spring and after 23:00 — in summer”.

April 29 2010 — decision № 1325 of Chernivtsy city council: “Prohibit the stay of children less than 18 years of age in the city streets and other public places in Chernivtsy at night-time after 23:00, if unaccompanied by parents or guardians”. Earlier, in September 2009 the draft of this decision was withdrawn from the city council agenda to be published and discussed as a regulatory document. On January 28 2010 the city council submitted a proposal on restriction of children's stay in the entertainment venues, public catering premises, computer clubs, in the city streets and other public places, to Verkhovna Rada. Evidently the city council was aware of the fact that it lacked the authority to regulate this issue; nevertheless, in four months' period the decision was passed.

May 12 2010 — decision № 98-38/10 of Chernivtsy oblast' council: “Prohibit the stay of persons under 16 years of age in the city streets and other public places at night-time, after 23:00, if unaccompanied by parents or guardians”.

June 23 2010 — decision № 3956-MP of Sumy city council: “Restrict the stay of unaccompanied children under 14 years of age in the city streets and other public places in Sumy at night-time after 22:00 and of persons between 14 and 18 years of age — between 23:00 to 6:00, if unaccompanied by parents or guardians”.

July 2010 — decision of Horodyshche city council (Cherkassy oblast'): “Restrict the stay of unaccompanied children less than 16 years of age in the city streets and other public places after 23:00, if unaccompanied by parents or guardians”.

The aforementioned list shows that this unlawful practice is rapidly gaining momentum in the country. It also makes it evident that new decisions are made on the basis of the earlier ones.

4. FREEDOM TO CHOOSE THE PLACE OF RESIDENCE

The freedom to choose the place of residence is generally respected. Nevertheless, the legal regulation of the issue has a number of faults, dating back to “*propyska*” era. The problems arise in two areas.

1. Realization of many rights and freedoms depends on the official place of registration. This connection dates back, probably, to the times of serfdom and soviet practice of mandatory registration. The realization of rights, stipulated by Laws of Ukraine “On Governmental Social Standards and Governmental Social Guarantees”, “On Pensions”, “On Education”, “The Basics of Health Care Legislation”, “On Protection of Public against Contagious Diseases”, “On Employment” etc, is possible only with valid registration. Citizens without permanent place of residence or registration cannot renew their papers, find employment, and get medical care or social assistance.

In fact, this requirement is an indirect lever of power, forcing citizens to register. Administrative liability for unregistered residence is another form of coercion. It goes without saying, that the state has the right to introduce the registration system to safeguard public order. This registration, however, should not lead to numerous complications and inconveniences for the citizens, as it does today.

2. Citizens, who do not have their own house/apartment, for the most part, are not able of registering at their actual place of residence, due to groundlessly narrow definition of registration eligibility. In other words, the registration concept is not clearly separated from the concepts of housing ownership or use. In practice, it creates a lot of registration-related problems, which increase on daily basis.

The obstacles to registration at the end of the day are harmful for the state, as significant number of people lives without registration or at the places other than those, where they are registered (i. e. where it is legally feasible, e. g. with family). Thus, the system of mandatory registration fails, and, as of today, is inefficient. That's why the country does not have a comprehensive database on physical persons' registration at their place of residence.

It's noteworthy that the registration legislation in Ukraine is rather strict; the MIA, however, does not use it in full measure, which means that the law does not reflect the real situation in the society. For example, there is no mechanism to register temporary sojourn of the individuals in a given place.

Hence, the amendments to registration legislation are called for. The registration should be a formality, and not a procedure linked to any rights of housing ownership or use.

5. RIGHTS OF THE HOMELESS

Protection of the homeless' rights still remains topical. As mentioned earlier, the citizens without registration are denied many rights. It aggravates the legal status of the homeless persons and practically throws them out of the social security system.

The state attempted to overcome this gap by adopting a number of laws to resolve this issue. By their force, the shelters for the homeless and centers for their social rehabilitation were set up. However, the implementation of these laws' provisions remains unsatisfactory.

In Kiev, for example, the homeless are provided with temporary 2-months' registration in the special offices, but then they are refused the registration renewal without any logical or legal explanation. So the temporary registration is granted for obtaining the identification documents. After that the person returns to the previous condition, due to the lack of registration, and, consequently, lack of access to the social assistance programs.

Mister K. Lived and worked in Kiev. He did not have his own housing. That's why he could not get registered. He approached the Center of social assistance under the Chief Directorate of social protection of population in Kiev State Administration. He was registered there, but only temporarily. Later the registration was removed. He appealed, complained to the prosecutor's office, but in vain. He was either completely ignored or registered for a short period of time, e. g. for 14 days. Evidently the head of the Center of social assistance had no legal grounds for his actions. In July 2008, with a help of UHHRU attorney, Mr. K. brought an administrative suit to the court. On December 3, 2008, Solomenka district court in Kiev passed a positive decision, obliging respective bodies to register him permanently and to provide him with a bed in the Center of social assistance' shelter. Thus, the court confirmed that the homeless should be granted permanent registration.⁶ The Center of social assistance, however, refused to implement the decision, and the executor was reluctant to comply with it by enforcement. Later the Center filed an appeal. The Appellation court, despite obvious fact that appeal period had expired, did not call the plaintiff or even inform him about the appeal, which was considered without the plaintiff. On April 27 2010 (the full text of the decision was compiled on April 29, 2010), Kiev Appellation court repealed the Solomenka district court decision of December 3 2008. The plaintiff filed the cassation appeal on May 29, 2010, but it was never considered.

⁶ See court decision: "A homeless Kievrte assisted by UHHRU attorney won the case against KCSA" UHHRU site 15.01.2009 , <https://www.helsinki.org.ua/index.php?id=1232022165>.

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The case is a typical example of the violation of the homeless' rights.

Besides, the relevant legislation is in place only in certain populated areas, predominantly in oblast' centers. In real life it means that significant number of homeless people do not have access to any forms of assistance.

According to the data provided by the regional employment and social protection agencies, as of March 2010, 47 centers (departments) for the registration of the homeless were set up and are in operation. 44 of them are communal centers, while 3 have been created by the NGOs. (In 2008 there were 44 social centers for the homeless in place, including 13 operating under NGOs.).

In 2009 the centers for the registration of the homeless identified over 10 thousand persons, including 1,3 thousand senior citizens (almost 13%). 6,2% among them were made up by disabled persons (documented or visibly disabled), 16,3% — persons released from penitentiary institutions, and almost 4% — by families with children.

In 2009 the centers registered over 7.6 thousand people and supplied them with relevant certificates. About 5.4 thousand of them were registered for the first time.

In 2009 the centers sent almost 3.2 thousand persons to social assistance offices; 1.7 thousand of them were helped;

- to medical institutions — almost 2.23 thousand; 505 persons among them were hospitalized.
- to employment and social protection agencies — 453 persons, 100 out of which were placed into the shelter.

Due to these activities, according to the MIA, in 2009 almost 4.8 thousand homeless persons were registered at their predominant domicile (in 2008 this figure amounted to 4.4 thousand); 1.4 thousand Ukrainian passports were issued, including 696 passports issued to the persons released from jail (in 2008 these figures amounted respectively to 1.4 thousand and 348).⁷

6. RECOMMENDATIONS

1. According to the Opinion of the Council of Europe Parliamentary Assembly No 190 concerning Ukraine joining the Council of Europe, the functions of registration of Ukrainian citizens, foreigners and stateless persons in the Ukrainian territory should be passed from the MIA to the Ministry of Justice of Ukraine.
2. Finalize the reforming of registration legislation taking into account best world practices and the Law of Ukraine on freedom of movement and free choice of the place of residence.
3. For the registration of physical persons:
 - Revoke the temporary registration procedure stipulated by the Law of Ukraine on freedom of movement and free choice of the place of residence (though envisaged by the law, this procedure is not applied in practice);
 - Accomplish the introduction of computerized registration system, using best world practices and observing international standards for human rights protection. The system should be autonomous and not contain other personal data, collected by other governmental agencies;
 - Consider the possibility of broadening the list of criteria for registration eligibility (e.g. as it was done in the Law on voters' lists), and also revise the legislation removing from it interdependence between fulfilment of rights and registration. The provision entitling

⁷ Report on implementation of the order of Ministry of Labor, Ministry for the Family, Youth and Sports, Health Ministry, MIA, State Committee for Nationalities and Religions, State Department for the execution of the punishment of 19.02.2009 № 70/411/101/65/19/32 "On procedure of interaction of the agencies providing assistance for the homeless citizens" March, 18 2010, http://mlsp.kmu.gov.ua/control/uk/publish/category.jsessionid=508EA4EDEB5BCD5889554D417DAE2609?cat_id=34941.

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a person to the housing ownership or use through registration shall also be removed from the law. The procedure of removal from registration in private housing shall be simplified, while interdependence between registration and claims to the public and communal housing shall also be withdrawn. Without these measures an efficient registration system is not feasible.

4. Harmonize the MIA procedure for the travel passport issue with the acting legislation; namely, make it uniform for the whole territory of Ukraine and put an end to the illegal demands for additional documents (e. g. insurance policies, certificate on the absence of criminal record, ID number, confirmation of payment of additional fees).
5. The MIA should ensure timely issue of internal passports.
6. The MIA should enhance control over the operation of passport offices under Housing and Communal Services Departments.
7. Specify the procedure for issuing seaman's passports with due considerations to the freedom of movement and clear provisions on restrictions to travel abroad.
8. Abolish the practice of restrictions on travels abroad for the persons who have access to state secrets.
9. Local self-governments should repeal their decisions on curfew for minors, as it contradicts the law.
10. Criminal Proceedings Code should be amended with provisions regulating maximum term of "written obligation not to abscond" as preventive measure.
11. The Law "On Administrative Supervision" should be amended with specific provisions regulating restriction of freedom of movement for the persons released from custody.
12. The MIA should put an end to the practice of stopping/detaining buses and other means of transportation bringing participants to the venues of peaceful public events, as this practice can be regarded as illegal restriction of their freedom of movement.

XII. PROTECTION FROM DISCRIMINATION, RACISM AND XENOPHOBIA¹

As you might know, the number of hate crimes started growing rapidly starting from October 2006, and by the middle of 2008 developed a threatening scale. This forced the state to take various measures², owing to which the upper layer of these crimes was removed, and their number started to decline in 2009–2010, which is confirmed by both official government statistics and the NGO monitoring. Nonetheless, it is obvious that the problem of racism and xenophobia remains quite acute.

In 2009, 1249 attempted crimes against foreigners were registered. Of them 804, or 64.3%, were against people born in the CIS countries. The largest part of those who suffered from such crimes, are from the Russian Federation (586 persons), followed by, with a large gap, representatives of Belarus (91 person) and those of Moldova (51 person).

Other 445 crimes (35.7%) were committed against the citizens of so called “far abroad” countries, among which 8 were murders (6 solved), grave bodily injuries — 6 (5), medium injuries — 7 (4). Among the crimes committed against the “far foreigners” the most common crimes are the following: robbery with violence (71% of all cases of robbery with violence against all foreigners), hooliganism (59.6%), robbery (52%), inflicting medium bodily injuries (36.8%), and theft (28.4%). Cases of murder and causing grave bodily injuries against non-CIS citizens comprised 22.3% of all crimes committed against foreigners.

For comparison with the data of 2008, it should be mentioned that in 2008, 403 crime attempts were made against far foreigners, of which the violent crimes were 15, including 12 murders (8 solved), grave bodily injuries — 13 (10), medium bodily injuries — 9 (7).

Among all the crimes of the aforementioned category, of a specific concern for the domestic security bodies of Ukraine are the facts of crimes against the foreigners by the participants of radical youth organizations and movements, such as so-called “skinheads” and neo-Nazi. The main goal of their activities, as they say, is the fight for the “purity” of the Caucasoid race by means of banishing from Ukraine people who came from Africa, Asia and Latin America.

Today, over 1,200 persons who consider themselves the partisans of the ultra-right ideology, are on the preventative registration list of the domestic security bodies, including 60 persons in the Autonomous Republic of Crimea, 150 persons in Zaporizka oblast, 105 in Odeska oblast, 60 persons in Kharkivska oblast, 126 persons in Chernihivska oblast, 793 skinheads — in the city of Kyiv.

In addition, in the city of Kyiv there are at least 263 hooligan fans of sport clubs “Dynamo-131”, “CSC-94”, “Arsenal-38”, who often act together with the ultra-right groups during public events. In Chernihivska oblast, there are partisans of the Congress of Ukrainian Nationalists, who are not participating in any fights or attacks, yet conduct active ultra-nationalist political events, and disseminate the relevant information on the Internet. In Lvivska oblast, there is an unstable

¹ Prepared by Volodymyr Batchayev, Oleg Martynenko, Association of Ukrainian monitors on observance of human rights in activities of law-enforcement agencies, and Yevhen Zakharov, Kharkiv Human Rights Protection Group.

² See more at <http://khpg.org/index.php?id=1245855623>

group of “White Power Skinheads” members of around 30-40 people, who are not conducting any affairs or events.

Attempts of Kharkivska oblast NGO “Patriot Ukrayiny” to conduct its activities caused official warnings from the courts for the violation of civil order by the 22 of its representatives. The reason for this was their organizing of the march with xenophobic mottos, dissemination of racist fly-sheets, blocking the access to the monument. In Kirovohrad, 12 persons were discovered who are members of non-official “national labour party”, and are partisans of ultra-right ideology.

According to the information of the Chief Administration of the Ministry of Internal Affairs, and the Ministry of Internal Affairs of Ukraine, in 2009 only in 6 oblasts (Volynska, Zhytomyrska, Zakarpatska, Luhanska, Rivnenska, Chernivetska) no radical youth groups and organizations were found, and the domestic security bodies have no information concerning activities of any such organizations there. No “hate crimes” or any anti-Semitic or extremist manifestations were detected in 10 oblasts (Volynska, Donetsk, Zhytomyrska, Ivano-Frankivska, Kirovohradska, Rivnenska, Sumska, Ternopil'ska, Chernihiv'ska, Chernivetska). Although it should be mentioned that in Chernihiv'ska and Ivano-Frankiv'ska oblasts there were cases of vandalism.

In the Autonomous Republic of Crimea, in the cities of Kyiv and Sebastopol, and in the rest of the oblasts — Vinnytska, Dnipropetrovska, Zaporizka, Kyiv'ska, Lviv'ska, Mykolayiv'ska, Odeska, Poltav'ska, Kharkiv'ska, Kherson'ska, Kmelnytska, Cherkaska — radical youth groups and organizations are active, and some hate crimes were registered. Yet these were not only against foreigners, but also against people with non-Slavic appearance, so it is impossible to separate them from the general crime statistics.

On November 5, 2009, the Verkhovna Rada of Ukraine approved amendments to the Criminal Code, initiated by the people's deputy Taras Chornovil. They introduced criminal responsibility for crimes on the grounds of race-, ethnicity- or religion-related intolerance, such as murder (article 115 of the Criminal Code of Ukraine), intentional grave bodily injury (art. 121 CCU), intentional medium bodily injury (art. 122 CCU), beating and cruelty (art. 126 CCU), torture (art. 127 CCU), threat to murder (art. 129 CCU) also importing, producing or dissemination of works that advocate the cult of violence and cruelty (art. 300 CCU). In addition, the sanctions for the article 161 of the Criminal Code of Ukraine, relating to instigating hostility and violating the equal rights of people basing on their race, ethnicity or attitude to religion, were made stricter. Yet these changes did not affect the practice of application of the mentioned articles, because proving the intention and execution of the mentioned actions is very difficult, especially in cases where the action in question in publishing xenophobic texts.

At this time, we do not have the statistics for crimes committed against foreigners in 2010. During 2010, in Ukraine there was a pretty broad range of xenophobia manifestations: starting from existence of radical organizations that openly preach racism, and to the arrogant and contemptuous attitude of common citizens to foreigners, ranging from openly chauvinistic speeches of some politicians to racist graffiti on the walls and hatred-infused materials on some web sites, that disseminate the ideology of racial inequality and make appeals to take violent actions basing on racial or ethnic hatred.

It should be mentioned that, compared to the previous years, in 2010 the number of hate crimes and cases of violence against representatives of ethnic minorities in Ukraine somewhat decreased, yet such cases still happened. Below we will provide several examples.

1. In the night of September 19, 2010, a citizen of the city of Chakhra (Kuwait) was delivered to the neurological reanimation department of M.O.Semashko Hospital, in Simferopol, with a diagnosis: “brain injury, injury of the right forehead area, hypodermic haematoma of right forehead and temporal area, fracture of underjaw on the left, bruised left brow, 2nd degree coma.” The mentioned foreigner, a student of the Crimean State Medical University, fell victim of an assault, when he was returning at night to the dormitory of his educational institution.³

³ <http://www.kianews.com.ua/node/24241>

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2. From the interview with N., citizen of Azerbaijan (36 y.o., private enterpriser, resident of Cherkasy city): “When in the evening I was resting at a cafe, three young guys sat at my table. At first they behaved normally — they were asking who I was and where I came from to Ukraine, were treated to my cigarettes. Later, during the conversation, one of them asked me if I like Ukrainian girls. I responded that Ukrainian women are very beautiful and cordial. I do not know why, but this response made them angry. The one who asked said: “Our women are not for you, black ass! – and splashed out the mug of beer into my face. They knocked the chair from under me and started kicking me. All three of them were beating me for several minutes, and then ran out.”

And this is how the “Social Nationalist Assembly” evaluates its “contribution to the struggle against illegal migration” on its web-site: “On July 24, 2010, in Vasytkiv, a raid of fighters of the “Patriot Ukrainy” and the entrepreneurs of the city took place. As a result of the raid, several Vietnamese containers were closed, together with the goods of the aliens, and the counters of Uzbeks and Gypsies were removed. The majority of Ukrainians, who were at the open air market at that time, were approving of the actions of national-socialists. As it was already mentioned before, Ukrainians entrepreneurs who sell at the market are firmly against aliens, in particular Vietnamese, Gypsies, and Uzbeks, etc., selling their goods there. Ukrainian entrepreneurs were supported by Social National Assembly, and by the organization “Patriot Ukrainy”. With joint efforts, the patriots and the entrepreneurs forced out the majority of aliens from the open air market of Vasytkiv during the last 2 weeks. Some members of Vietnamese diaspora had to be forced out, and some of them needed an ambulance. Social-National Assembly... from the first day of the confrontation in Vasytkiv between the Ukrainians and the migrants declared it was for complete removal of all migrants (Vietnamese, Gypsies, Uzbeks) from the near-market area ... On July 31, 2010, the fighters of the organization “Patriot Ukrainy” raided the open air market of Vasytkiv and were explaining to those migrants who remained there that tolerant attitude of police does not guarantee them the place under the sun on the territory of the city of Vasytkiv in particular, and in Ukraine in general. The illegal immigrants who suffered are tending to their wounds, and the free patriots celebrate their new victory over the aliens, and this means that the struggle against the migrants in Vasytkiv continues”.⁴

Along with this, the racist front, in spite of reduced, compared to Russia, activity in physical harassment of the “aliens”, gradually increases in numbers and acquires new partisans — as a rule, the youth. Presently, in Ukraine there are a number of organizations and movements with various degrees of radicalism that declare either the idea of the necessity “to keep the white race clean” in general, or the motto “Ukraine is for Ukrainians only”. If several years ago radical racism in Ukraine with its classical international features was in fact imported into Ukraine from abroad (mostly from Russia), in 2010 there was a stable tendency of consolidation of the domestic chauvinistic forces, with vision of affirmation of the idea of the exceptional role of the “title nation” in the social life of the country. For example, along with the Ukrainian centres of such well-known international racist groups as “White Power”, “Blood & Honour”, “World Church of the Creator — Ukraine”, we observed the increase of influence in the society of such organizations and associations as “Ukrainian national labour party”, “Patriot Ukrainy”, “Slava i Chest”, “All-Ukrainian Organization “Tryzub””, etc., whose activists several times participated in the manifestations against so called “dominance of non-Ukrainians”.

In 2010, some chauvinistic and racist organizations demonstrated their power several times by holding public actions, during which they declared openly racist mottoes and appeals to ethnic discrimination.

On the public request, the authorities stopped the musical festival “Traditions of Spirit” near Kyiv, scheduled for June 26–27, 2010, under the aegis of the radical “Social Nationalist Assembly” with the goal to promulgate among the youth the ideas of neo-Nazi and chauvinism. During the festival, the performances of ultra-right musical bands

⁴ <http://sna.in.ua/?p=4482>, <http://sna.in.ua/?p=4602>

were planned (“Sokyra Peruna”, “Seitar”, “Nachtigall”, “White Lions”), who in the lyrics of their songs openly approve and show in romantic light the skinhead movement, promote Hitlerist aesthetics, and encourage to harass national minorities.⁵

On September 04, 2010, in the city of Uman, the local centre of the all-Ukrainian assembly “Svoboda” organized an anti-Hasidic march. The protest participants formed a column and marched the streets of the city. The march was performed under the mottoes “Uman without Hasid!”, “No to Hasidic rampancy!”, “Honta will come and bring order!”, and “Who owns Ukraine — Ukrainians! Who owns Uman — we do!”. During the meeting that was organized later, the “People’s Resolution” addressing the people was read out that, in particular, proclaimed the following: “We are indignant and we declare our dissent with the criminal inaction of the central and local authorities on the background of the wave of aggression of the aliens, Hasids, that is growing rampant”.⁶

On September 7, 2010, in Kyiv a march of several thousand people “For Ukrainian Football” directed against “the dominance of “legionaries”” was organized. It was announced that march would be attended by mostly normal football fans, instead, the chief role was that of neo-Nazis, and so people who had just the football symbols comprised at most 1% of the total. The column marched under the eloquent **flags with Celtic crosses, and “Roman greetings” were used.**⁷

On December 12, 2010, the office of the Chernihiv Non-Governmental Committee for Protection of Human Rights was attacked by unidentified people who were partisans of extremist and racist ideology — in the room, the windows were broken, and fascist swastika was painted on the front of the building. The damage and the theft of the signboard of the Committee is already something the members of the Committee are accustomed to. In various extremist and radical right Internet resources unidentified people keep posting appeals to lynch the members of the Non-Governmental Committee for Protection of Human Rights and its clients.⁸

In Crimea, the law-enforcement agencies prevented the mass “solidarity action” of the local skinheads, who wanted to organize one on December 19 at noon near the Green Theatre, in the centre of Simferopol. The partisans and the activists of the extreme right informal movements were going to express their support to their Russian fellows, who organized the civil disorder actions in Moscow, St.Petersburg, and other cities of the neighbouring Russia. One of the action participants, who called himself Max, explained: “We are concerned that in the city, first of all, there are too many illegals, emigrants. And the second, this action was in honor of supporting the situation in Moscow. As the saying goes, one stands for all, and all stand for one. We are Slavic people, Russian people. We need to support each other. Why emigrants can do it, and us, Russian nation, Slavic nation, why are we deprived of this right?”.⁹

During 2010, in Ukraine there were several cases of vandalism against the buildings that were used by ethnic minorities for their religious, cultural, educational, or other needs.

In April of 2010, in Ternopil, monuments and graves were vandalized at the ancient Jewish cemetery, on some of them abusive anti-Semitic inscriptions were found.¹⁰

On August 23, 2010, in the city of Simferopol, the memorial to the deported Crimean Tatars was vandalized: at the inscription on the monument “This should never happen again”, the word “never” was painted over, and on the memorial itself inscriptions were made “Crimea is Ukrainian, not Tatar”, “Long live Ukraine!”, and the Ukrainian trident

⁵ <http://www.xenodocuments.org.ua/factitem/1919>

⁶ <http://procherk.info/all-news/444-uman-bez-hasidiv-natsionalistiprotestujut-proti-svavillja-palomnikiv>

⁷ <http://marochkina.wordpress.com>

⁸ <http://helsinki.org.ua/index.php?id=1292242448>

⁹ <http://www.radiosvoboda.org/content/article/2253286.html>

¹⁰ <http://jewish.kiev.ua/news/3444/>

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was painted. This chauvinistic manifestation was on the eve of the meeting of Crimean Tatars near the memorial, timed to the European “Memorial Day of the victims of totalitarian regimes”.¹¹

In September 2010, in Poltava, on the monument of “Mourning Mother” that stands on the place where the Fascists shot down over 30 thousand non-combatants and prisoners of war, the vandals painted an SS symbol and inscription “Death to Jews”.¹²

On November 15, 2010, in the city of Kirovohrad, unidentified people vandalized the memorial sign “To Jews — victims of Nazism”, by painting the mottos “Shame on Jews”, “Death to Jews”, and swastikas.¹³

In Lviv, in the night from 7th to 8th of December, 2010, an insulting act of vandalism was committed against the Monument of Combat Glory of Soviet Army. The bronze image of the Order “Victory” was poured on with red paint, and on the granite slabs of the monument, a Nazi swastika was painted.¹⁴

Yet it would be incorrect to consider that xenophobia in Ukraine is only rooted in Ukrainian nationalism. Ambiguous, as many in Ukraine think, change of the “political affinity” of Ukraine towards Russian Federation, that was being actively implemented in 2010 by the new government, caused growth of the cases of “counter-discrimination”, where the subject of certain kinds of discrimination are ethnic Ukrainians.

In this aspect, an indicative is Crimea, where Ukrainians were those who often suffer from anti-Ukrainian attitudes of the large Russian community. It should be mentioned that the opposition of Russians and Ukrainians in the Crimea is almost openly supported by some politicians of the Russian Federation, who spread the ideas of contemptuous attitude to anything Ukrainian, and instigate the pro-Russian residents to confrontation, saying that Crimea is a Russian territory. In the East and South of Ukraine, there are several movements and groups (“Russian Fellowship”, “Orthodox choice”, “Union of the Russian people”, “Eurasian Association of Youth” and others), who, distorting the idea of “Slavic brotherhood with the Russians”, have and express openly negative attitudes towards Ukrainian language, Ukrainians themselves, integrity of the state, etc. At that, they use the methods similar to those of Ukrainian chauvinists — organizing meetings, pickets, demonstrations, and other public actions, vandalizing the monuments, etc.

On January 17, 2010, the NGOs “Union of the Russian people”, “Russian Fellowship”, “Union of Loyal Cossacks” conducted a march under the motto “Let us confirm our pledge we gave 365 years ago”. The organizers of the action advocated the idea that in 1654 all residents of Kyiv city solemnly pledged loyalty to the Russian Tsar on the Bible, and now the people of Ukraine must confirm this choice that was made in the past.¹⁵

On July 22, 2010, in Kyiv city, initiated by the All-Ukrainian NGO “Orthodox choice”, a religious march was held under the motto “Against expansion of Western civilization”, with the voiced demands to the authorities “to stop the course to the integration with the European Union that is alien to our people, as such integration threatens the civilization of “Pax Russia”, of which the people of Ukraine is a part”.¹⁶

In the night from 17 to 18 of August, in Ternopil city, the memorial plate for Slava Stetsko, head of Organization of Ukrainian Nationalists (revolutionary), head of the Congress of Ukrainian Nationalists, was broken. Ivan Bilakh, head of Ternopil oblast organization of the Congress of Ukrainian Nationalists, believes it was a provocation of pro-Russian

¹¹ <http://tsn.ua/ukrayina/u-simferopoli-na-memoriali-zhertvam-deportaciyinapisali-krim-ukrayinskiy-a-ne-tatarskiy.html>

¹² <http://tsn.ua/ukrayina/u-poltavi-na-monumentu-skorbotnoyi-materi-napisali-smert-zhidam.html>

¹³ <http://tsn.ua/ukrayina/u-kirovogradi-pam-yatnik-zhertvam-nacizmu-obmalyuvali-svastikami.html>

¹⁴ <http://www.vgolos.com.ua/politic/interview/147.html?page=1>

¹⁵ <http://www.russians.kz/society/995060-vseukrainskijj-pravoslavnyjjvybor-podtverdim.html>

¹⁶ http://www.novorossia.org/kr_hod/888-krestnyj-xod-v-kieve-protivyekspansii-zapadnoj.html

forces planned on the eve of the Independence Day. "...This is not an accident, as at the same night they ruined the memorial board to the colonel of Ukrainian Insurgent Army Omelian Poliovyi. With the team of Yanukovych in power, anti-Ukrainian forces felt that no one will punish them and they can do anything", — Ivan Bilakh emphasized.¹⁷

In October 2010, the Ukrainian branch of the Russian Institute of CIS countries organized the conference **"De-Banderization — urgent need for European integration of Ukraine"**, during which publicist Myroslava Berdnyk declared that Holodomor of 1932-33 in Ukraine was **"delirium of geopolitical adversaries of Russia"**, and said that "Holodomor was invented by the uniates, by the Americans, and by Kateryna Chumachenko (wife of the ex-President of Ukraine Viktor Yushchenko)". "Institute of CIS Countries" is headed by the deputy of the Russian State Duma Konstantin Zatulin, who was declared persona non grata in Ukraine several times because of his public denials of its language, and national identity.¹⁸

As it was already mentioned, Crimea is still the point of stress in the interethnic relations in Ukraine, where the level of confrontation between the Crimean Tatars and the authorities in 2010 even increased. In June of 2010, the head of Mejlis of Crimean Tatars Mustafa Djemilev informed the press about the discriminative HR policy of the government aimed to force out Tatar representatives from the administrative positions of the autonomy. "...This policy is the one of limiting the representation of Crimean Tatars in the sphere of administration. If this tendency persists, it can become a certain problem in the relations with the authorities", — were the words of the head of Mejlis, and the response of Mykola Azarov, Prime Minister of Ukraine, was: "Neither the President nor the Government fear any kind of ultimatum, or boycott, or anything similar, and they do not intend to fear them... We are ready for the dialogue, yet we will not accept any ultimatum as a condition". On December 15, 2010, the head of Mejlis Mustafa Dzhemilev, during his meeting in Washington with the political scientist and politician Zbigniew Brzezinski, informed about the increase of discrimination against Crimean Tatars when they apply for administrative positions.¹⁹

The crisis in the relations between Crimean Tatars and the authorities became more acute after Anatoliy Mohilev became the Minister of Internal Affairs, as he used to be the head of Crimean police, and was remembered by police operation at the Ai-Petri plateau, during which the Crimean Tatar population suffered. It was then when one of the Crimean newspapers published an interview with Mohilev, where the latter in fact declared that Stalin's deportation of Tatars from the peninsula was justified.

The head of Mejlis Mustafa Djemilev drew attention of the European community to this fact at the European Parliament during the hearings concerning the situation of Crimean Tatars in March of 2010 and said, "Such appointment is a threat to peace and quiet in Crimea. As the person whose position is about combating xenophobia and interethnic animosity, is himself a hatemonger".²⁰

What also causes disquietude is continuous opposition of separate groups of population of Ukraine on the grounds of religion: besides traditional for the entire world exacerbation of relations between Christians and Muslims, Greek Catholics and Orthodox Christians, there are numerous cases of intolerant attitude between supporters of different branches of Orthodox Christianity. To a certain degree this was caused by ill-conceived actions of the authorities, including public demonstrations by the first persons of the state of their religious preferences, what caused overt discrimination of a certain category of believers.

For instance, the press service of the Ukrainian Orthodox Church of Kyiv Patriarchy distributed information about cases of attempts to prevent their faithful to come to Kyiv for the celebration

¹⁷ <http://novynar.com.ua/politics/129823>

¹⁸ <http://opir.info/2010/10/29/holodomor-prydumala-uniaty-amerykantsi-i-druzhyna-viktora-yuschenko/#more-5064>

¹⁹ <http://human-rights.unian.net/ukr/detail/194254>, <http://human-rights.unian.net/ukr/detail/194268>, <http://www.kianews.com.ua/node/27828>

²⁰ http://news.bigmir.net/world_about_us/256740/

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on July 28, 2010, of the anniversary of the baptism of Kyivan Rus. In the statement it is mentioned that with this purpose the authorities and the law-enforcement agencies exercised significant pressure on transportation companies up to threatening to revoke their license for public transportation for an attempt to depart with their passengers to go to the capital. Such cases happened most often in Southern and Western oblasts of Ukraine. According to the data of the Ukrainian Orthodox Church of Kyiv Patriarchy, there were also cases when road police officers under vain pretexts tried to prevent the buses with pilgrims from passing on highways.

On July 28, approximately at 5 a. m. at the border of Kyiv, the road police officers stopped 5 buses with people supporting Ukrainian Orthodox Church of Kyiv Patriarchy and tried to prevent them from entering the city with an explanation that “in Kyiv there is no parking space.” Only after one hour of negotiations and threats from the passengers to start a protest action the buses were allowed to follow their route.

On that very day, July 28, in Odesa the road police officers and people in civil clothing on three police cars blocked the bus with pilgrims of Kyiv Patriarchy headed to Kyiv, used force to passengers to stop them from boarding the bus, and took away from the driver the keys from the transportation means and his driver's license as well as the documents for the bus.

At the same time, the press service admits that the authorities did not take such actions against believers of Moscow Patriarchy; to the contrary, they facilitated them in every possible way so that they would get to places of religious services in Kyiv.²¹

In the recent years, in the Ukrainian society a suspiciously alert attitude towards migrants, refugees and asylum seekers is still widely observed, and in regard of foreign citizens of certain countries it becomes overly hostile. The government perceived the European community's suggestions to Ukraine to intensify combating illegal migration with the purpose of securing proper control over the migrational processes as a call to combat migrants in general. Such a deformed policy gets reflected in activities of mass media that keep feeding to the Ukrainians clearly xenophobic clichés concerning migrants — “criminals”, “people with infectious diseases”, “threatening to take your job away.” The Ministry of Internal Affairs enthusiastically joined this blackwashing campaign: on its departmental websites the news about detention of illegal migrants in Ukraine and about crimes committed by foreigners with special emphasis on their ethnic origin are being published all the time. Thus, during the year 2010 the law-enforcement agencies were purposefully establishing in the society the idea about “invasion” into our state of a significant number of foreigners with an alien and thus adversary outlook, and about their significant influence over the economic and criminal situation in the country.

As an example we can mention a TV program ‘Shok-Info’ aired at the end of June of 2010 on a rather popular TV channel “Novy Kanal” that was dedicated to the issue of foreigners staying in Ukraine. This program, with the help of video materials and commentaries, made the audience believe in controversial and unsupported by the official statistical data statements that “illegals” (with no explanation of what this term means) that keep coming to Ukraine intend to sell drugs, carry unknown and dangerous diseases, and Ukrainians are forced to go abroad looking for jobs because they are forced out of their jobs by labour migrants. At that the commentaries concerning illegal migrants contained disdainful remarks like “human garbage”, “half humans.”²²

Politicians have been making numerous public statements concerning threats that migrants pose to the very existence of Ukraine as a state.

Levko Lukianenko, veteran of the Ukrainian dissident movement, in his interview to Expert magazine said that migrational processes in Europe forced the European Christian civilization to the brink of downfall, Muslims have all the chances to overpower Christians, and the Blacks will overpower the Whites. To Lukianenko's opinion, Ukraine is

²¹ <http://www.cerkva.info/uk/publications/articles/692-press-conf-unian.html>, <http://censor.net.ua/go/offer--ResourceID--166491>, <http://www.pravda.com.ua/news/2010/07/28/5256887/>

²² <http://noborders.org.ua/sfery-dijalnosti/mova-vorozhnechi/shok-idezynformatsiya-v-efiri-zvernennya-proektu-bez-kordoniv-do-kerivnytstvanovoho-kanalu/>

in a more advantageous position: “We are not obliged to let Blacks and Indians into our country, and so we can avoid a disaster.”²³

Oleg Tiahnybok, leader of the all-Ukrainian assembly “Svoboda”, characterizes the threat from foreigners migrating to Ukraine in the following way: “We can only imagine what they will bring with them. They will bring ethnic crime as they have to earn their living; they will bring exotic diseases — I can tell you this as a former medical doctor... They will bring a new wave of drug addiction, of sexual deviations, of prostitution; moreover, these people will be looking for the Lebensraum... Europe has already gotten a full share of this, and through it is Europe that happily throws them back to Ukraine you can rest assured: the best of them will stay in Europe — those who can do science, who is more well-off, who has some talent or authority or something like this. And here to us they will send those who would do no good as I already explained; those who will pressure Ukrainians from their workplaces, as illegal migrants would agree to work for a plate of soup so, correspondingly, Ukrainians would be losing their jobs.”²⁴

No wonder, then, that a significant share of the Ukrainian society is being infected with xenophobia, expresses distrust and aggression towards migrants and, following the imposed stereotype “migrant-enemy”, approves of the consistent strict actions by the law-enforcement agencies towards foreigners.

What is representative is that “migrant phobia” in the Ukrainian society and, primarily, in the agencies of internal affairs is generally rather selective: a neutral attitude to foreigners that look European combines with a suspiciously alert attitude towards representatives of other ethnic groups. The difference in skin colour, in shape of eyes, accents in their speech or other attributes of the non-European type inevitable draw attention of law-enforcement officers and become a cause for groundless acts of coercion — detention and bringing over to police departments and dactyloscopy under coercion. In separate cases such detentions combine with overtly degrading and racist remarks addressed to them, cruel attitude and beatings.

On July 18, 2010, in Kharkiv in a Target supermarket the employees of the state guard service of the Ministry of Internal Affairs beat O., citizen of Uganda. The victim informed that when he entered the supermarket he was approached by police officers and asked to show his ID, and then led him to one of accessory rooms on the second floor of the supermarket where they took his clothes off and started searching, while explaining that they were looking for drugs. At that the police officers humiliated him and when he expressed his indignation at such actions they kicked him and beat him with a rubber truncheon. At that they did not document the detention and the conducted search; no witnesses were invited to be present at these procedures.²⁵

The most vulnerable ethnic groups in Ukraine still are Roma and people from the countries of the Caucasian region, who in 2010 most often suffered from discrimination, xenophobic prejudice of the population and repressions from the law-enforcement officers. Violation of the rights of representatives of these ethnic categories has already become a shameful “tradition” of the police that is officially castigated by the heads of the law-enforcement agencies, while unofficially it is not only supported but encouraged. A groundless detention and conducting of the personal search, bringing over to district police departments and detainment there for an ungroundedly long time, searches of homes and cars, copying of information from cell phones and dactyloscopy — these are the measures of “prevention” that the police have been widely practicing towards Roma and Caucasians with no regard to the law that directly forbids conducting such procedures of coercion without the appropriate grounds.

²³ <http://www.expert.ua/articles/8/0/8001/>

²⁴ <http://www.radioera.com.ua/eranews/?idArticle=19690>

²⁵ <http://www.umdpl.info./index.php?id=1279845258>

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In June–July 2010, in Chernihiv the police introduced a practice of detaining and bringing all Roma to the district police departments to conduct dactyloscopy and to take their photographs — with the purpose of updating the existent databases. These actions were conducted with no legal grounds, based only on their appearance.²⁶

In June 2010, in the city of Chyhyryn, Cherkaska oblast, a conflict between a local dweller and a Roma man named L. erupted because of a quarrel between their children. Later L., as well as his wife and his underage son were beaten, but when L. came looking for help to the local district police department, it was him whom the law-enforcement officers apprehended and, according to L.'s statement as, forced him with humiliation and illegal application of force to tar himself. The Roma family came for protection to the public political edition "Pres Centr," so their journalist came to Chyhyryn district police department to find out the facts but she was told to leave the building of the police, and one of the employees of the district police department told the journalist and the man: "Gypsies are not human beings!"²⁷

From an interview with M., citizen of Ukraine, Azerbaijani, a private enterpriser (newspaper "Rivne Vechirnie" № 55 as of August 5, 2010): "For 30 years out of my 52, I have been living in Rivne and I have Ukrainian citizenship. I studied here, I married here and together with my wife we are raising our teenage children. I am sick and tired of those permanent inspections that happen virtually every month, they are very degrading to me and to my family. As I never had any problems with the law, I always behave as a law-abiding, good citizen. ... Last Friday law-enforcement officers came to my work at the café and once again asked about my ID documents. When I said that on me I have only my driver's license and that my passport is somewhere in the car they forced me to come with them to the city police department. There they copied all the phone numbers from my cell phone, as they said, to see with whom I keep in contact and whether any of these people is on the wanted list in their database. Then they took their time checking on the computer whether what I was telling them was true."²⁸

From an interview with R., citizen of Ukraine, Azerbaijani, a private enterpriser (newspaper "Rivne Vechirnie" № 55 as of August 5, 2010): "I have been living in Rivne for 20 years already, I have Ukrainian citizenship, I work here, have a family. But I also have good relationships with my previous family. My two sons came from Azerbaijan to visit me, and when they came to a café to have dinner with me, in the street they were stopped by three men in civil clothing and were told to show their ID documents. The boys answered that their IDs were in the car a couple of meters away and that at the café their father was waiting for them. In response they were told rudely and with cursing that they should have had their passports in their pockets and then they were thrown into a car and brought to the city police department. I followed them but at the department I was told they didn't have my sons but I should wait. In an hour they did admit that they had my boys and ordered me to bring their passports. After I brought the passports they held my sons for another three hours.

As the sons said, in the city department they were called "niggers" and were told that they as islamites cannot stay here, in Rivne. They were threatened with charges of possessing drugs and were hit on their heads and backs. Then all contacts, family photos and videos were copied from their phone".²⁹

A special threat to the society is posed by that in 2010 the country's new government, while declaring themselves to be "the government of professionals," in fact, paid no attention to implementing the state policy on cessation and prevention of cases of racism and ethnic discrimination and gave up on targeted and consistent work concerning reduction of the level of xenophobia in the Ukrainian society. Because of this in 2010 the activities of the Interdepartmental group in the issues of combating xenophobia, interethnic and racial intolerance, which held only in 2009 held 7 sessions that resulted in a set of measures in all spheres of social life of the country, were completely halted.

²⁶ <http://www.romaniyag.org/?what=paper&number=108&article=6>

²⁷ <http://www.pres-centr.ck.ua/security/14976/>

²⁸ <http://www.rivnepost.rv.ua/showarticle.php?art=024929>

²⁹ <http://www.rivnepost.rv.ua/showarticle.php?art=024929>

Let's remind that during 2009, the Cabinet of Ministers adopted "Action plan on combating manifestations of xenophobia, racial and ethnic discrimination in the Ukrainian society for the years 2008–2009", the National coordinator on cooperation between the law-enforcement agencies of Ukraine and the OSCE Office for Democratic Institutions and Human Rights was appointed; 4 bills concerning improvement of effectiveness of combating manifestations of racism and xenophobia were filed for consideration of the Verkhovna Rada committees; amendments were made to several articles of the Criminal Code of Ukraine. NGOs were invited to join the wide circle of such joint events as providing legal advice to victims of manifestations of xenophobia and discrimination; performing the examination of the national legislation concerning combating manifestations of discrimination and xenophobia; development of proposals on improvement of the legislation with the purpose of combating race-related crimes; improvement of the mechanisms to respond to mass media using xenophobic clichés and statements; development of the corresponding curricula. Currently none of these varied measures is implemented in Ukraine.

Instead, the Ukrainians are being actively fed with two intrinsically contrary statements: on the one hand — the authorities completely deny the issue of proliferation of xenophobia in the society, and at the same time, on the other hand — the idea about existence of significant threats to Ukraine's safety and stability from the so called "ethnic strangers" is being actively promoted. This leads to the situation, when the covert forms of xenophobia and discrimination, which used to be present in the social mores and domestic life of dwellers of Ukraine, currently become more and more wide-spread and dangerous and, as the authorities keep inactive, gradually entrench in people's prejudices and biases. It is exactly this, latent and externally inconspicuous kind of xenophobia, becomes the most serious and threatening, as even the most perfect and strict antidiscriminatory law adopted by the state would not automatically lead to changes in the consciousness of the citizens. Unfortunately, the current government doesn't understand that it is exactly its stance and balanced actions, its dedication to resolving this issue that the level of tolerance indicative of the civilized country depends on.

In its turn, the Ministry of Internal Affairs of Ukraine completely accepted the rules of the game established by the authorities on ignoring the development of the interethnic tension in the society and thus in 2010 wound down the activities on prevention of xenophobia and discrimination and started to act not upon the actual situation in the state, but upon the lulling departmental statistics that mistakes decrease in the number of crimes on the grounds of racism for an indicator of peace in the interethnic relations.

One can say with certainty that in 2010 the heads of the Ministry of Internal Affairs kept adopting illogical managerial decisions that were obscure to the public. Under the motto of the so-called "staff optimization", in March the Department for monitoring of observing human rights in activities of the agencies of internal affairs was disbanded — and this was a department that had combating racism, discrimination and xenophobia among its priority tasks and whose work was effective and supported by the human rights NGOs of Ukraine. The next wrong step by the heads of the police was disbandment of offices within the Criminal Investigation Department that dealt directly with solving crimes on the grounds of ethnic, racial or religious animosity or hatred. Laying off the employees that already obtained necessary knowledge and certain practical experience led to incompetence in actions of law-enforcement officers and sometimes even to explicitly illegal attempts on their part to qualify the racist crimes as less loud and more convenient for investigation domestic crimes.

For instance, according to the information available, during the first 9 months of the year 2010 not a single criminal case was initiated to investigate crimes committed due to motives of racial, ethnic or religious intolerance (corresponding sections of Articles 115, 121, 122, 126, 127, 129, 300 of the Criminal Code of Ukraine), and on Article 161 of the Criminal Code of Ukraine only one criminal case was initiated.

In fact, the Ministry of Internal Affairs failed implementation of its own "Action plan on combating racism and xenophobia for the period till the year 2012", most of its items planned for implementation in 2010, stayed unimplemented. The government pretty much ignored this fact.

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This situation resulted, among other things, in a significant proliferation of xenophobia among the police officers themselves.

For instance, in January 2010, the Head of the Main Department of the Ministry of Internal Affairs of Ukraine in Odeska oblast ordered a dismissal of a detective of the Criminal Investigation Department, Odesa City Department of Police, for promotion of fascism and Nazism. The mentioned “police officer” was an active supporter of the Nazist movement, had a tattoo in the form of a fascist eagle with a swastika and was wearing SS-Nazi attributes. We can only presume how his ideology was influencing his professional performance.

This fact is a pretty impressive warning signal not only for the Ministry of Internal Affairs of Ukraine but for the entire Ukrainian society. It is exactly the threat of the police transforming from the institution that protects the rights of all — with no exceptions — citizens of Ukraine into a body that persecutes certain minorities and groups of population that requires special attention from the government and the civil society.

Currently such law-enforcement agencies as the Ministry of Internal Affairs and the Security Service of Ukraine face a lot of urgent and important tasks: from initiating making amendments and additions to the corresponding legislative documents to effective control over activities of radical ultra-right and ultra-left movements, from conducting educational work among all strata of population to expanding investigations to detect and prevent hate crimes, from actions to prevent disseminating racist ideology through Internet to open and candid dialogue with ethnic minorities. But at the moment, there are no grounds to make optimistic forecasts about the situation improving. At the Ministry of Internal Affairs, for instance, manifestations of xenophobia and cases of discrimination keep proliferating and become usual occurrences in how law-enforcement officers treat separate groups of population. Many police officers restored in their imagination a notion of the so-called “ethnic crime” specific to representatives of certain ethnic groups that live in Ukraine. As if it were not bad enough that this false stereotype is typical for many people working in the internal affairs agencies, it is being reproduced in the mass consciousness through messages of the Public Relations Department of the Ministry of Internal Affairs of Ukraine. It may sound paradoxical but sometimes it is exactly this institution that instead of promoting tolerant attitude among police officers becomes a source of xenophobia and biased information concerning ethnic minorities.

On April 23, 2010, on the official website of the Ministry of Internal Affairs an article was posted that was explicitly hostile towards the Roma people — “Six ways to lose your money or how to keep yourself safe against deceivers.” It had a section “Way 3: poor good Roma in your home”, in which all Roma were openly accused of being prone to commit crimes and citizens were advised to abstain from any communication with them. For instance, the article says, “The law-enforcement agencies keep encouraging citizens to keep away from Gypsies as almost every such contact ends in an act of swindling. Be alert when Gypsies try to enter your home due to any reasons: to drink water, to change a baby’s diaper, to ask for food or clothing. While empathetic and nice people are looking for something to give to the allegedly needy, the swindlers start rummaging through their things and taking anything of any value... The Gypsies tend to pick deceivable and credulous people as their victims as they are easy to persuade... That is why you shouldn’t let people of Gipsy ethnicity into your apartment. Never come into contact with them. Don’t respond to any of their requests...”.

In total, in 2010 on the website of the Ministry of Internal Affairs of Ukraine dozens of materials were posted that were negative towards people from specified ethnic backgrounds, including 16 concerning Roma, 8 — concerning citizens of Georgia, and 17 — with the phrase “persons of Caucasian ethnicity” or “Caucasians”. On press conferences with mass media and meetings with representatives of the international community, the leaders of the Ministry of Internal Affairs keep denying existence of xenophobia among police and declaring their readiness for changes to the better. But such declarations, as a rule, still stay far from the actual everyday practices — the heads of the Ministry of Internal Affairs of Ukraine haven’t prepared even a single instruction to inform

the ranks about the Minister's decided stance that for his subordinates it is inadmissible to violate a person's rights because of his or her ethnicity.

To summarize the described above, we can state that under the influence of a range of economic, social and political factors, the level of ethnic prejudice in Ukraine demonstrates a stable tendency to grow. The psychology of rejecting the "stranger", intolerance to people of different ethnicity, religion, language is getting the attributes of a dangerous social disease that demands immediate response from the state including in the criminal law area. Nevertheless, the authorities, while generally agreeing with the requirements of the international community in regard of prohibition of all forms of discrimination, steers clear of development and implementation of effective mechanisms for actual combating of this shameful phenomenon.

RECOMMENDATIONS

1. Draw up and pass a basic anti-discrimination law which should contain all necessary definitions, a list of prohibited grounds for discrimination, as well as mechanisms for protecting against such discrimination. It should also increase the State's responsibility for combating discrimination and introduce a special anti-discrimination body.
2. Prepare a Draft law on amendments to the Law "On national minorities in Ukraine", and undertake an expert analysis of the Draft to ensure its compliance with OSCE, Council of Europe and European Union standards.
3. Draw up a Draft law on amendments to the Law on languages and review the Law on ratification of the European Charter on regional languages and language minorities.
4. Prepare Draft laws "On national-cultural autonomy", on amendments to the Civil Code and other laws, as well as special programmes aimed at developing the principle of non-discrimination, and allow special quotas for discriminated ethnic groups (the Roma, Crimean Tatars, Karaims, Krymchaks, etc.).
5. Prepare a special electoral law for the Autonomous Republic of the Crimea.
6. Carry out an inventory of land in the Crimea to help resolve the problem of land allocations to representatives of formerly deported peoples.
7. Broaden the force of anti-discrimination norms to cover foreign nationals legally abiding in Ukraine.
8. Draw up and adopt changes to legislation in order to regulate single-sex cohabitation.
9. Develop a policy of zero tolerance for manifestations of racism and xenophobia, including drawing up and implementing educational and cultural campaigns aimed at building tolerance towards people of other nationalities.

XIII. RIGHT TO FREE ELECTIONS AND PARTICIPATION IN REFERENDA¹

In 2009–2010 352 extraordinary elections of mayors, settlement and village heads, local councils' members, presidential elections and regular elections to the local councils of all levels took place in Ukraine.

Ukrainian citizens also tried to exercise their right to public referendum. In some cases they managed to do it at the local level only.

In this report we analyzed main tendencies concerning adherence to the citizens' right to freely elect and be elected to the bodies of power and local governments and to participate in referenda for the years 2009–2010.

The voters' rights were seriously violated over this period. In particular, the use of administrative resource and attempts to influence election process by court decisions, creating unfair conditions for the election process subjects and for the voters by introducing dubious amendments into the law, impediments to the exercising of right to free elections and referenda, including undue election process and law enforcement bodies' interventions etc have been registered.

The situation aggravated considerably by the end of the period in question.

In this report we will use chronological principle, and, therefore, will start with the voters' rights observance in the course of presidential elections in Ukraine. Then, we will discuss the observance of rights during extraordinary local elections and nationwide election campaign at the local level. At the end we will address the issue of right to public referenda.

1. PRESIDENTIAL ELECTIONS IN UKRAINE²

Both international and local independent observers maintained that the presidential elections did not involve systematic violations or falsifications and were carried out in compliance with the main democratic standards.

Thus, OSCE/BDIHR mission concluded that presidential elections in Ukraine were carried out in compliance with the principal obligations to OSCE and other international standards concerning democratic elections³ and secured successes, achieved since 2004. According to international

¹ Prepared by D.Byely, Ukrainian voters' committee, Kherson oblast' branch.

² Monitoring mission OSCE/BDIHR reports, ENEMO reports, Ukrainian voters' committee reports and "Support" NGO reports were used in this study, as well as Ukrainian Helsinki Union materials. Links: <http://www.osce.org>, www.enemo.eu, www.cvu.org.ua and www.opora.org.ua

³ See: European Commission for Democracy through Law. Code of good practice in electoral matters. — 2002 p. <http://www.venice.coe.int/docs/2002/CDL-AD%282002%29023rev-ukr.pdf>

observers, election process was transparent, and voters were offered a real free choice of candidates representing different political standpoints.⁴

In the judgment of ENEMO mission “voting at the presidential elections in Ukraine was held without systematic violations or falsifications”. The atmosphere of the repeated voting “remained free from pressure, harassment or threats to the participants of the process”, stated the head of ENEMO mission Taskyn Rakhimbek.⁵

All-Ukrainian NGO “Ukrainian voters’ committee”, which observed the election campaign, came to the conclusion that the elections were free, competitive and transparent. The Committee found no significant or systematic violations or facts of pressure on voters, although some instances of civil rights violations were registered.

The violations, due to the faults in election legislation and use of political expediency principle in its amending, were among most common. The shortening of terms for election preparations as well as unsatisfactory operation of authorities and departments of state voters’ registration in the course of these preparations, logistic problems, and professional incompetence among district election committees’ members were also noted.

Some random facts of abuse of public authority in campaigning, “in-kind” bribing of voters, political corruption and criminal interference into election process, attempts to hamper independent observers’ operation etc. were registered.

The number of these violations increased in the second round of elections. It is noteworthy, however, that campaign headquarters of the main candidates consciously avoided systematic violations of law in force or falsifications, and this was the main achievement of the election campaign.

1.1. ELECTION LAW AS THE CAUSE OF CHALLENGES AND VIOLATIONS

One year before the presidential elections in Ukraine, in February 2009 press service of the all-Ukrainian NGO “Ukrainian Voters’ Committee”, made the following statement: “in the course of 4 years since last elections of the President, Ukraine failed to implement the main body of recommendations made by OSCE/BDIHR observers’ mission, other international and national independent observers”.⁶

Later on, the level of amending current election legislation in accordance with international recommendations only decreased. Five months before the election date, on July 24, 2009 the Verkhovna Rada adopted amendments to the Law on presidential elections, which came in force in August 2009. The draft law was devised without public hearings and caused serious criticism from the election experts, who judged that adherence to election standards was seriously neglected. A well-known election expert Andriy Duda argued that the new amendments to the Law were made by two largest political opponents trying to turn election process into “administrative resources’ competition”.⁷

New election legislation was criticized also by NGO activists. For example, all-Ukrainian NGO “Ukrainian voters’ committee” listed a number of serious threats brought to life by the new amendments, i. e. restriction of voters’ rights, promoting falsification mechanisms by permitting to include new voters into the voting lists on the election day, decreasing public control over election process, virtual impossibility of appealing potential violations and election results.⁸

⁴ See: OSCE/BDIHR mission Final report re Presidential elections in Ukraine January 17 and February 4, 2010. — Warsaw, April, 28, 2010 .

⁵ Ukrainian elections met the standards — international observers’ mission // Liberty radio, February 8, 2010 <http://www.radiosvoboda.org/content/article/1952088.html>

⁶ I. Popov: “In 4 years Ukraine failed to comply with the majority of international missions’ recommendations on elections”, February, 16, 2010 p. http://cvu.org.ua/?lang=ukr&mid=fp&id=2160&lim_beg=285

⁷ A. Duda “Yes to falsifications”. //Ukrainska Pravda — 2009 — August 5, link <http://www.pravda.com.ua/articles/2009/08/5/4126107/>

⁸ Potential threat to transparent and democratic elections. <http://helsinki.org.ua/index.php?id=1253536867>

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The experts' concern was shared by Joint Opinion of Venice Commission and OSCE/BDIHR⁹.

On October 19 the Constitutional Court of Ukraine classified some of the quoted provisions as unconstitutional¹⁰.

Despite all international and national experts' recommendations and public efforts, Ukrainian legislators did not repeal its most contradictory provisions. Moreover, the people's deputies kept changing election legislation even between the two elective rounds; namely, they annulled the requirement to have election committee quorum for decision-making, and granted local councils the authority to replace the election committees' members, who failed to appear on Election Day.

The independent public observers contended that the amendments to the Law on presidential elections, which came in force on February 5, 2010, did not contribute to democratic nature or quality of the repeated voting, because they were introduced just a few days before it, violated collegiality principle in the election committees and armed the local authorities with additional levers to influence the election committees decisions.¹¹

All these controversies, inconsistencies and gaps in the election law could become a cause of mass falsifications and serious factor in violating equal electoral rights of the public, destabilizing political situation and undermining the voters' trust in the fairness of election process and voting results.

Lack of clarity in the election law forced the candidates to go to courts that kept passing inconsistent decisions and introducing changes into election procedures overnight or even on the voting day, thus making it impossible to familiarize the election committees with the new provisions. As a result, as OSCE mission observed¹², the voters encountered different attitude in different election committees, depending on what polling station they voted at. For example, they might or might not have been included into the list of constituents, voting at their area of residence, or to the list of voters on the day of elections.

In the course of both rounds the candidates appealed the attempts, made by Central Election Commission (CEC), to clarify some ambiguous or inconsistent clauses in election legislation. In practice it meant that the arguable issues were sent back and forth between the court and CEC. This latter also availed itself of the legal ambiguity in deciding, which provisions should be applied in the second round of the elections. For example, in the morning of the second round of voting CEC offered explanations, concerning voting at home, under which the ballot-box could be brought to a voter's domicile by two election committee members, although the law stipulates three members. Kiev administrative court of appeals found this explanation illegal, but its decision was refuted by the Highest administrative court.

Therefore, the lack of consistent and stable election legislation, considerations of political expediency and non-compliance with international bodies' recommendations led to the situation, when the national election legislation caused a lot of challenges and violations in people's voting rights (i.e. principles of general and equal voting right) thus creating serious threats to free and democratic elections in the country.

A lot of aforementioned problems could be avoided, if the law had been precise and unambiguous and if the amendments had been introduced earlier, instead of at the last moment, when the parties were striving to achieve political advantages.

⁹ Joint opinion of European Commission "For democracy through law" (Venice Commission) and OSCE/BDIHR on the Law "On amending some laws regulating presidential elections in Ukraine" passed by the Verkhovna Rada on July 24, 2009, — Strasbourg, October, 12, 2009, link: http://www.osce.org/documents/odihr/2009/10/40858_uk.pdf

¹⁰ Constitutional Court Decision № 26-rp/2009 of October 19, 2009 <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v026p710-09&p=1291828374868111>

¹¹ Ukrainian voters' committee assessed the election campaign preceding repeated voting and identified main threats at the Presidential elections in Ukraine, February 7, 2010 — Ukrainian voters' committee press-service — 2010 — February 5. Link: http://cvu.org.ua/?lang=ukr&mid=fp&id=2514&lim_beg=120

¹² See: OSCE/BDIHR mission Final report, pp. 6–7

We believe that mass falsifications, which could have occurred due to the gaps in the election legislation, were avoided thanks to political rivalry, absence of one authority's monopoly to power and close observation of the presidential elections in Ukraine by public at large and world community.

1.2. MAIN CHALLENGES AND VIOLATIONS OF VOTERS' RIGHTS IN THE COURSE OF PRESIDENTIAL ELECTION CAMPAIGN

1.2.1. Voters' freedom of opinion

Media experts argue that mass media failed to ensure objective coverage of the election campaign of 2010. Thus, executive director of the Public Information Institute Victoria Syumar believes, that mass-media in the course of elections were nothing, but a tool in the politicians' hands and distorted actual developments and facts in their coverage.

President of "Community" Fund and head of National Committee for Freedom of Speech under the President of Ukraine Taras Petriv argues, that there were three most crucial faults in Ukrainian media operation over the elections "First — abuse of public office by the candidates, who retransmitted their political advertisements and slogans free of charge; second — black lists with the names of journalists, who were not welcome at political shows and, third — "dzhynsa"¹³.

The experts agree that the main challenge lies in the fact that the Ukrainian mass media are concentrated in the hands of some big business managers, who are not professional journalists. "As a result we have to deal with the censorship imposed by media owners, as opposed to official censorship we experienced earlier", said Victoria Syumar.¹⁴

Quantitative and qualitative monitoring on nationwide news carried out by OSCE/BDIHR mission on prime-time between December 4, 2009 and January 15, 2010 and between January 26 and February 5, 2010,¹⁵ demonstrated that the majority of nationwide TV broadcasters gave preference to Yu. Tymoshenko and V. Yanykovich. The international monitors specified, that it was evident both in the amount of air-time, dedicated to the coverage of their campaigns, and in the nature of the coverage itself.

State TV broadcasting company UT-1 failed to offer the viewers well-balanced and impartial coverage, as required by the law. In the second round, UT-1 gave 65% of campaign coverage air-time to Yu. Tymoshenko, while V. Yanukovich got the remaining 35% of air-time.

Results of local mass-media monitoring demonstrated partiality and bias with regards to the political force, prevalent in a given region.

Despite the fact that the election Law forbids the national newspapers "Holos Ukrainy" and "Uryadovy Kurier" to give preferential treatment to any candidate, the latter showed obvious partiality to Yu. Tymoshenko.

So, while in general the freedom of speech and expression was observed in Ukraine and no pressure on journalists has been registered, mass media in the course of election campaign failed to follow fundamental standards of campaign coverage, thus violating the voters' right to form their own opinion.

1.2.2. Poor organization of electoral process

Unsatisfactory rate of organizational operation became the main shortcoming of the elections and the cause of many electoral rights violations.

¹³ "Dzhynsa" — slang word, meaning deliberately hidden advertising or black PR, disguised as news, independent information, analytical materials and programs, ads etc. — Wikipedia.

¹⁴ At 2010 elections mass media were used as a tool in politicians' hands <http://polit-kherson.info/new/svoboda-slova/7112---2010-----.html>

¹⁵ See: OSCE/BDIHR mission Final report — pp. 18–19

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According to independent observers, the level of material and technical support in election committees' operation was the worst in the whole history of Ukrainian elections.¹⁶ The main reason for that was insufficient and delayed state funding of the election process, as well as frivolous attitude of local governments responsible for election process organization. The election committees' members faced lack of working space, transportation, phone communications, even shortage of office supplies and paper.

The committees' operation was further aggravated by inclement weather conditions.

Poor incentives and lack of professional training for the election committees' members presented another challenge. Sometimes people were appointed to the committees without their consent, on the basis of faked applications. In some cases different candidates included the same persons into different election committees. This was a ubiquitous problem. (Sometimes up to 200 "doubles" per one district were registered)

The committees' members were quite unhappy with their work conditions both in the circuit and district election committees. As a result many of them refused to work in the committees. The circuit election committees had to dismiss these members, so that incessant rotations took place and the workload of other members in charge of voting increased.

Only slightly more than one half of the district election committees started their operation within the time-frame stipulated by the law.

Due to these problems and shortened election process, the committees' members could not cope with due election procedures; e.g. the adjustment of voters' lists virtually failed.

At the beginning of the election process public observers informed that the majority of rural polling stations had no heating, which made appropriate election procedures most questionable.

1.2.3. Faults in voters' registration as the cause of voters' rights violations

The unresolved issues concerning voters' lists became major problems for both extra-ordinary parliamentary elections in 2007 and presidential elections.

In two years that passed since those elections the situation has not improved, although, for the first time in history, a uniform centralized and computerized state registry of the voters (SRV) was set up in Ukraine, and the voters' lists were compiled by the said registry departments.

The SRV database was put together between February and August 2009 on the basis of the voters' lists, used in 2006 and 2007 elections.

The voters' lists for the elections' first round have been compiled in three stages. Preliminary voters' lists contained the names from the SRV and were sent to DEC for preliminary examination, starting December 28. Finalized voters' lists were printed out before January 10 and contained corrected and updated information, provided by the individuals and institutions by that time.

It is noteworthy that out of twelve days, assigned for the preliminary adjustment of the voters' lists, six days happened to be holidays and weekends, so that many committees did not work. Besides, there were some discrepancies in the terms for finalizing the lists, defined by the election law and reflected in the election committees' instructions. Under the law, the updated voters' information could be submitted for the first round till January 10, while the DEC database was technically closed for amendments on January 9, and some state registry departments on pretext of holidays stopped taking the voters' applications as early as January 6.

Before compiling the voters' lists for the second round, the Central Election Commission passed a decision on amending the new voters' lists with changes, collected by DEC in the course of the first round. Wrong timing prevented implementation of this decision.¹⁷ Potential problems for hundreds of thousands voters, who were not on the voters' lists, were eliminated only due to the

¹⁶ Ukrainian voters' committee summarized the election campaign results and identified main threats at the Presidential elections on January, 17, 2010 <http://www.cvu.dn.ua/news/399>

¹⁷ See: OSCE/BDIHR mission Final report — pp. 11–12

ambiguous provision of the law on presidential elections, which allowed for adding voters' names to the lists even on the voting day.

It should be stressed, though, that this provision contradicts the Code of due election practice, adopted by the European Commission for Democracy through Law (Venice Commission) in 2002¹⁸ and could have opened the door to major falsifications.

According to OSCE mission, between January 13 and the end of voting on January 17, DEC kept introducing changes on public requests, which led to the increase in actual number of voters by 666 thousand or 1,8% of total number of voters.

In the second round, the number of voters increased by another 83.4 thousand.¹⁹ Some of the voters included were the members of election committees, added to the voters' lists at their workplace shortly before the voting.

Here are some typical violations of the voters' rights due to deficient voters' lists and to the adding of voters on the voting day.

Donetsk oblast'

Territorial electoral constituency (hereinafter — TEC) № 47. District polling station № 48. The international observers reported that 30 strangers, whose names were not on the lists, came to a polling station, wrote down requests to be added to the lists, then received the ballots and voted. They entered polling booths in pairs. Neither observers, nor other voters intervened.

TEC № 42, 43, 45. Observers and DEC members for candidate Yu. Tymoshenko registered mass adding of names to the voters' lists.

TEC № 41, polling station № 19. A voter, residing in Tankerna str., 24-a, called the hot line. For the first round of the elections his grandmother, who had passed away several years earlier, was included into a voters' list. An illegible pencil-made signature and a tick accompanied her name on the list. On the voter's request the tick was erased. The voter brought grandmother's death certificate to the state registry office. When he came to vote, however, he saw his grandma's name on the list again, accompanied by a tick and a signature, this time written with a pen. The committee members offered no comment or response to the voter's complaint.

Vinnytsa oblast'

The state registry offices in Vinnytsa failed to submit the voters' lists to the circuit election committee, TEC №11, due to the lack of quorum in the election committees.

Zhitomir oblast'

At Zhitomir TEC № 63, attempts to include significant numbers of voters into the voters' lists were revealed at the polling stations №105 and №108. Buses with soldiers were parked nearby the polling stations. At the station № 108 the committee members already added 46 soldiers' names. Arrival of BYUT deputies put an end to this procedure.

Trans-Carpathian oblast'

TEC № 69, polling station №21 — at the second round it turned out, that half of the residents of a house in Kapushanska str., 149 (Uzhgorod) could not find their names in the voters' lists. Paradoxically, it was the half, which had been in the lists at the first round, while the other half, excluded from the lists at the first round, now was included into the lists. It happened because after the second round the housing and communal services office submitted to the registry the names of

¹⁸ Code of good practice in electoral matters (guiding principles and explanatory report, adopted by Venice commission at 52 session in October 2002 — p. 5 [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-ukr.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-ukr.pdf)

¹⁹ Ibid.

residents forgotten at the first round, and the registry office just replaced the old names with the new ones.

Zaporizhzhya oblast'

TEC № 76, polling station № 25 ("Energetic" Cultural center) — observers registered numerous additions of names to the voters' lists; three buses were already parked at the polling station and voters, brought there by other means of transportation, kept coming.

TEC № 76, polling stations № 10–14, 17, 18, 19, 23, 25 — mass arrival of the voters (many of whom commuted by micro vans; license plate of one of them — AP 1049 AA). The voters' names are added to the lists on the basis of requests, printed in advance; the voter's instruction brochure was embellished with corporate colors of the Party of regions; it recommended the voters to get their names added to the list on site, instead of going through the courts or registry.

Odessa oblast'

Polling station № 144 (town of Artsyz) and, partly, polling station № 135 (Kiev district, Odessa). On the CEC request, on January 8, 2010 preliminary voters' lists were submitted to the committees; therefore, the voters could not see them on site between January 8 and 14.

TEC № 137. Many voters' names were used twice in the list.

Also, the list contained the names of the residents of a house in Viykovsky spusk, 12, Odessa, while in fact there is nothing but construction site at this address.

According to the lists, the house at Transportna str., 54 has 124 apartments, while in fact it has only 60.

Often the voters' lists contained the names of the deceased persons as well as of those who moved out of the area.

Kherson oblast'

Kherson. On the first round voting day the number of new voters' names added to the list that day reached about 4 — 5% in large residential areas. The majority of committees included the voters on the basis of their requests after seeing their passports, which constituted a procedural violation.

The committee members almost never got in touch with state registry offices to verify the voters' data. Their justification was "very poor phone connection", "no one takes the phone, and if they do, they immediately tell us to go ahead and include whatever names into the list".

Compliance with Central Electoral Commission Resolution № 475 was registered only at one polling station, where the names were added in accordance with decisions, duly recorded in district election committees' resolutions.

Some election committees accepted public complaints, registered them and promised to consider them right after the voting, or included the voters into the lists only on the basis of court decisions.

TEC № 184, polling station № 23. By 2.00 pm over 100 persons' names were added to the list. This constituency has a lot of students' dormitories in its territory, and their residents were not included into the lists by the state registry office. On the other hand, the graduates were somehow "forgotten", so that their names remained on the lists. In another electoral district with a lot of students (TEC № 184, polling station № 22) 42 voters were added to the list.

The people's deputy of Ukraine Yuri Odrachenko reported that BYUT representatives found over five thousand foreign nationals' names on the voters' lists. This information was confirmed by visa and registration office. BYUT representatives immediately approached respective circuit election committees. Only two of them (№ 184 and № 187) responded properly. All the others rejected the claims. Complaints to law enforcement agencies were filed.

TEC № 185, polling station № 35. The committee members complained that, despite their submitting 73 voters' names to the state registry office, they were never added to the list.

1.2.4 Administrative resource or political corruption as the source of voters' rights violation

At the time of presidential elections, quite correctly described as free, the power was upfront in using the so-called administrative resource to promote its protіgіs. This became one of the sources of voters' rights violations in the whole country. It is noteworthy, however, that, in contrast to the presidential elections of 2004 and local elections of 2010, the administrative resource was not used on a broad scale.

The concept of "administrative resource" at the time of elections means the use of public office, organizational, financial and human resources by the officials striving to gain advantage in the elections. The experts maintain that if administrative resource is "dispersed" and not monopolized by one political force, i.e. used by the authorities to ensure advantages for various political forces, it is "neutralized" and becomes less threatening for the human rights.

We believe this statement erroneous.

The concept "administrative resource" is in fact just a euphemism for "political corruption". And political corruption cannot "neutralize" itself or its adverse impact on a specific person, whose rights are violated. In other words, the goal does not justify the means.

Independent observers in the course of this election campaign noted such manifestations of political corruption as use of public office by chief executives, local governments, CEOs of companies and institutions to arrange the meetings with candidates and their representatives, election campaigning during the working hours and administrative influence on election committee members.

The observers concluded that the administrative resource was used, mainly, for the benefit of the most high-ranking candidates in the country (Volodymyr Litvin, Yulia Tymoshenko, Victor Yushchenko), and also for the benefit of Victor Yanukovich, popular among many local self-governments.

Most widely and systematically used administrative resources included allotting land titles, providing school buses and ambulances, accompanied by campaigning for Yulia Tymoshenko. These facts were registered in the majority of Ukrainian regions.

It is noteworthy, that in contrast to the previous presidential elections, these traditional means, used by the power to bribe the voters with public money, were duly denounced. Namely, on December 24, 2009 and on January 27, 2010 Yu. Tymoshenko was given notice for the violation of the election law, from Central Electoral Commission and Kiev administrative court of appeals respectively.

On the eve of the second round, the judiciary suffered pressure from the Procurator's General office and Supreme Judiciary Council, when several suits, related to Kiev administrative court of appeals decisions concerning election process, were filed. The judges were "invited" to the Procurator's General office and asked to explain their position, i.e. failure to satisfy V.Yanukovich's claim, while the Supreme Judiciary Council filed the motion to remove 500 judges for the breach of oath.

Other violations took place as well — the NGO activists observing the elections took notice of isolated cases of voters' harassment or pressuring by the officials, and of seldom facts of creating obstacles to election campaigning. The fact that such occurrences were few in number is definitely positive.

Most typical violations

Donetsk oblast'

A. Hrytsenko's, V.Litvin's and S.Tyhipko's oblast' headquarters reported that they were not allowed to hold meetings with the voters at their working places in Krasnoarmeysk. The local authorities also refused to provide candidates other than V.Yanukovich, with premises for the meetings.

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People's deputy from the Party of regions V. Dzharty and local officials organized public campaigning for V. Yanukovich on November 25 and 26, 2009 in Makeyevka, abusing their authority.

Odessa oblast'

Head of Odessa oblast' council M. Skoryk organized a meeting with education and health care workers in the building of Bilhorod-Dnistrovsky city council, campaigning for V. Yanukovich.

Local authorities of Ismail banned campaigns in favor of all candidates except V. Yanukovich.

Head of Kotovsk raion council V. Syn'ko warned education professionals and council employees that if they wanted to retain their positions in 2010, they would have to vote for V. Yanukovich.

Rivne oblast'

Professors of the International S. Demyanchuk economic and humanitarian university (Rivne) were pressured to work as canvassers in V. Litvin's campaign.

Kherson oblast'

Head of Kherson oblast' state administration B. Sylenko ordered heads of the raion state administrations to provide gas and vehicles for V. Yushchenko's raion headquarters. Some heads chose simply to sabotage these orders.

Local self-governments' heads in many oblast' raions openly campaigned for V. Yanukovich. Thus, Skadovsk mayor O. Havrysh spoke on the local TV program and published his address in several local newspapers ("Novy Den'", "Bulava" etc.) encouraging all the CEOs in local self-governance bodies to support V. Yanukovich.

Human rights' NGO activists reported that in Kalancha, Kakhovka and Tsurupinsk raions BYUT champions together with local officials distributed land titles and campaigned for Yu. Tymoshenko. They let the farmers know that, if they wanted the land titles, they should vote for Yu. Tymoshenko.

1.2.5. Hampering observers' and mass media operation

Attempts to put obstacles to observers' and mass media operation on the Election Day have already become traditional in Ukrainian elections. These impediments led to the violation of equal access and freedom of elections' principal. It is noteworthy that, probably, for the first time in the elections history, Central Electoral Commission forbade an entire group of international experts to observe the elections. We refer to the CEC decision to deny accreditation to the Georgian observers' mission, including the head of Georgian CEC, 20 members of Georgian parliament and deputy ministers.²⁰

In experts' judgment, at the second round of presidential elections the number of cases when observers' and journalists' operation was hampered, increased, although these instances were not numerous or regular.

Here are some examples of the committed violations

Donetsk oblast'

TEC № 42, polling station № 43. A voter got his mother's ballot and was going to vote. The journalist, who shot the event on video, was harassed by the people present, who threatened to break his camera.

²⁰ Ukrainian voters' committee: many committee' members — all incompetent. BBC Ukraine, January 13, 2010. http://www.bbc.co.uk/ukrainian/ukraine/2010/01/100113_chernenko_voters_ie_sp.shtml

TEC № 60, polling station № 109. An international observer from ENEMO mission was banned from entering the station. The reason, given by the district election committee, was that CEC registration was not sufficient for international observers, who, allegedly, had to register with circuit election committee № 60 as well.

Vinnitsa oblast'

TEC № 12, polling station №111 (village of Stryzhavka, correction facility). District election committee impeded the operation of TV shooting crew, sent by "Vinnytschyna" TV company.

Odessa oblast'

TEC № 141, polling stations №136 and №137. After journalists from the "Vyborchkom" and "Tochka zoru" newspapers started taking pictures of campaigning materials in the room, election committee members called militia and tried to confiscate reporters' cell phones and IDs.

TEC № 137. Head of the circuit election committee № 137 would not let the reporters from "Nova Odessa" TV channel enter the premises and take pictures with their cameras, ordering them to leave cameras outside.

TEC № 142, polling station № 56 — election committee members forbade the journalists to enter the room without personal permit from the committee head, who had to step outside to make the decision.

"Tochka zoru" reporter was not let into the polling station № 74 (special status station) TEC № 137. Election committee members justified their decision by the fact that the principal of correction facility was not happy with reporter's ID, which was, allegedly, not in order.

ATB TV channel journalists were forbidden from entering polling station № 69 TEC № 137, because the members of election committee did not like the look of their IDs. They were also refused the entrance to the circuit election committee, on the pretext that a committee meeting was taking place.

Kherson oblast'

TEC № 189, polling station № 3, Novotroitsky raion. Before the voting, head of the district election committee did not let an observer enter the premises, requesting his additional registration with district election committee. Circuit election committee's intervention resolved the conflict.

TEC № 185, Kherson. In two polling stations official observers were denied entrance, on the grounds that they failed to report for registration on Saturday. After the short dispute, observers were let in.

TEC 185, polling stations №22 and № 32. Attempts to deny entrance to the journalists were registered, on the alleged grounds that their IDs differ from the samples, shown at the "partisan" seminar, held by an official from Kiev.

Chernivtsy oblast'

TEC № 205, polling station № 3, town of Storozhynets. At 08.30 am election committee members refused to let "Tochka zoru" journalists into the building without circuit election committee permit.

On the voting day few other violations and falsification attempts were registered, e. g. throwing in the ballots, use of pens with disappearing ink in the ballot booths, (Odessa and Donetsk oblast's), destroying the ballots (Sumy and Mykolaiv oblast's), issuance of ballots without checking IDs.

Six criminal law-suits were filed by the MIA on violations' complaints.

1.2.6. System of appeals and access to justice

In the opinion of international observers the system of appeals against electoral violations was inefficient and did not provide the access to real restitution of voters' rights. There was no transpar-

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ency in either district or circuit election committees' dealings with the majority of complaints. "We were under impression that the Central Electoral Commission and some circuit election committees put up administrative obstacles for the complaints' consideration". Short time-frame, allowed for the filing of election-related complaints was a constant challenge, so that many complaints were dismissed without consideration.²¹ By February 7 the Central Electoral Commission received 260 complaints and passed only 22 resolutions on them. All the other complaints were dismissed.

Conclusions

Summing up, we can conclude that the elections of the President of Ukraine were, in general, democratic and transparent, without systematic pressure on voters or on subjects of the election process.

1. Due to real competition between, the three branches of power, intense political struggle, good will of the election process subjects and enhanced public control, mass falsifications and violations of electoral rights were successfully avoided.
2. Most serious violations were accounted for by:
 - ungrounded amendments to election legislation;
 - poor organization of election process;
 - instances of political corruption among the officials.
3. Imprecise voters' lists remained one of the most serious problems in general elections. Several hundreds of thousands voters managed to vote only due to the dubious permission, granted to the election committees, to add the voters' names to the lists on the voting day and to the determination of election process subjects to abstain from faking the lists.
4. Political corruption was manifested in the use of public office to organize or to ban meetings with the electorate, election campaigning through nationwide and local media, offering goods and benefits on behalf of a candidate, using public money.
5. Although freedom of speech was generally respected in media coverage of election process and there was no pressure on journalists, mass media failed to comply with fundamental standards of coverage. With no censorship in place, information sometimes was restricted by media owners; political PR was offered under the guise of objective information, thus misleading the voters and violating their right to form their own opinion.
6. On the voting day, especially, at the second round, isolated facts of pressure on observers and journalists were registered.
7. The system of appeals against the violations of election legislation was found lacking by the international experts.

2. EXTRAORDINARY ELECTIONS OF MAYORS, SETTLEMENT AND VILLAGE HEADS

Extraordinary elections which took place in the country in 2008–2009 often became the testing area for black technologies of falsifications, manipulations and use of administrative, law enforcement and judicial resources.

In 2009–2010, 352 extraordinary elections of city mayors, settlement and village heads took place in Ukraine.

Out of hundreds elections, which took place over the discussed period, several became a serious trial for the public. Let us analyze some of them in the focus of human rights' violations and their further impact on nationwide local elections campaign.

Specifically, we are talking about the elections to Ternopil oblast' council, mayor elections in Svitlovodsk (Kirovohrad oblast') and mayor elections in Ismail (Odessa oblast').

²¹ See: OSCE/BDIHR mission Final report — pp. 20–21

2.1. ELECTIONS TO TERNOPIL OBLAST' COUNCIL AS PRECURSOR OF LARGE-SCALE VIOLATIONS

The elections to Ternopil oblast' council, which took place on March 15, 2009, were preceded by events, which put them into the focus of nationwide attention.

In fact, the public witnessed the beginning of new era in the use of various technologies, aimed at influencing the electoral process from the outside, after a break, following 2006–2007 elections (it is noteworthy, that presidential elections of 2010, although chronologically following the elections to Ternopil oblast' council, were closer to “fair” elections of 2006–2007 in terms of observance of voters' rights).

To begin with, on March 3 the Verkhovna Rada cancelled its own resolution concerning voters' selection. A number of court disputes followed and only on the elections' eve Kiev and Lviv courts of appeals “released” the electoral process. Biased courts' decisions (judicial administrative resource), use of law enforcement bodies to achieve political goals (militia at some stage ducked its duty of safeguarding ballots in the course of their transportation), recall of election committee members to disrupt the quorum, bribing of the electorate became components of this process.²²

After the elections were called, the Minister of Interior Yuri Lutsenko, probably, for the first time engaged the MIA units to investigate potential falsifications and bribes; the public at large, however, never learnt the results of power abuse investigations.

Later, the “nightmares” of the elections to Ternopil oblast' council transformed into controversial electoral norms, which led to numerous violations of the electoral rights both in presidential, and, especially, in local elections.

Use of courts, law enforcement entities, controlled election committees and ballots' issuance were to become important components of the local elections in October 2010.

2.2. FAILED ELECTIONS OF SVITLOVODSK MAYOR, 2007–2010

The residents of Svitlovodsk town (Kirovohrad oblast') never got a chance to exercise their right to elect their mayor.

As early as in October 2006 members of Svitlovodsk town council dismissed mayor Pavel Solodov and his deputies and disbanded the city executive committee. After all the disputes were settled, in January 2007, Svitlovodsk town council submitted a motion on extraordinary mayor elections. Due to political situation in the country and extraordinary parliamentary elections, the Verkhovna Rada considered the motion only 11 months later, on December 28, 2007. Extraordinary elections of Svitlovodsk mayor were called on March 16, 2008.

But it was just the beginning. In early January almost all the members of the town territorial election committee of the previous convocation suddenly resigned. Members of Svitlovodsk town council did not come up with the new election committee, in violation of the election law. As a result, all the time limits stipulated by the law for election procedure (launching election campaign, candidates' registration, setting up district election committees, beginning of campaigning) were disrupted, and, after a number of court decisions, territorial election committee passed a decision, under which March 16 elections were considered invalid, and announced the new election date — May 18. Immediately a number of legal collisions came into being, the principal among them being that the repeated elections, in contrast to extraordinary elections, are to be funded from the local budget. The town council members decided they would not be able to cover all the elections-related costs. The decision of Svitlovodsk town council was found illegal by the court decision. The Verkhovna Rada Committee on state building and local self governance, proceeding from the court decision, recommended disbanding Svitlovodsk town council and announcing simultaneous elections of the town council and of the mayor. This initiative, however, was rejected by the council members twice, in December 2008 and in February 2009.

²² Ukrainian voters' committee did not register serious violations at the extraordinary local elections on March 15, 2009 http://cvu.org.ua/?lang=ukr&mid=fp&id=2189&lim_beg=285

XIII. RIGHT TO FREE ELECTIONS AND PARTICIPATION IN REFERENDA

Due to manipulations with election committee, members, protracting time-limits established for elections' preparations, lack of funds for the electoral process, blocking the issue in Verkhovna Rada on political reasons, the members of Svitlovodsk community never managed to exercise their electorate rights, while all the aforementioned techniques later would be actively used in local elections of 2010.

2.3. REPEATED INTERFERENCE OF THE AUTHORITIES WITH ELECTION COMMITTEES' OPERATION. ELECTIONS OF ISMAIL MAYOR

In May 2010 the Verkhovna Rada of Ukraine called 50 extraordinary elections on August 1, elections of Ismail mayor among them (Odessa oblast'). However, on July 8 that year the Verkhovna Rada classified this decision as invalid, on the grounds that overnight the people's deputies have finally announced the date for regular local elections, i.e. October 31, 2010.

By that time electoral process for Ismail mayor elections was fully funded, district election committees were set up and started their operation in due order; the voters were invited to participate in the elections. Eight candidates, running for mayor, were registered.

The Verkhovna Rada resolution invalidating the decision on elections' date was contrary to the Constitutional court decision concerning compliance of the Verkhovna Rada resolution "On invalidating the Verkhovna Rada resolution "On calling extraordinary elections of Ternopil oblast' concil members" № 14-rp/2009 of June 10, 2009 with Constitutional provisions; therefore, following the Central Election Commission recommendations, Ismail local election committee proceeded with elections preparations.

At this point local administrative resource started to interfere with the procedure. Local officials, namely, head of Odessa oblast' administration E.Matviychuk and acting Ismail mayor, city council secretary I.Rudnichenko, who also ran for mayor, spoke up against the elections.

Ms. Rudnichenko refused to sign payment orders for the funding of electoral process. Next, 380 thousand UAH, allocated for the electoral process by Ismail executive committee decision, were returned to the oblast' budget.

Starting July 22, Ismail territorial election committee has been audited by Odessa finance department, raion auditing board and prosecutor's office. Election committee's operation was virtually paralyzed.

The Ministry of Extraordinary Situation officials launched inspection of palling stations. Some stations were closed down, due to their alleged non-conformity to the fire protection requirements. By the way, the head of the local department of the Ministry, at that moment also headed the local Party of regions organization and ran for mayor himself. It is also remarkable that in winter 2010 the same palling stations were used for presidential elections and the Ministry of Extraordinary Situation found nothing wrong with them at that time.

Ismail city council tried to impede the ballots printing on a frivolous pretext. In particular, they motivated their decision by lack of MIA guard at the printing facilities.

On July 23 the CEOs of companies and institutions started to get letters from Ismail city council, advising them that Ismail mayor's order on granting election committees premises and equipment was no longer valid. Consequently, the officials were requested to ensure return of all material resources, granted to election committees, by July 27.

The acting Ismail mayor in the meantime filed a claim with Ismail district court, requesting the arrest of the ballots. Court dismissed the claim, but issued an order for militia to ensure ballots' protection for two days. Then, the acting mayor appealed this decision in the Odessa oblast' court of appeals.

Head of the local voters' state registry office under Ismail city council S.Fedyura refused to submit the adjusted voters' lists to the local election committee, while militia refused to hand out the ballots.

Under the circumstances, the territorial election committee on Friday, July 30, passed a decision on impossibility of holding extraordinary mayor's elections.²³

Evaluating the actions of power bodies and law enforcement agencies, the head of Odessa oblast' administration E. Matviychuk, declared at the administration meeting on August 2, 2010, that "order was re-established in Ismail. Private elections, instigated by certain political force, failed".²⁴

Reminder: territorial election committees are independent bodies, which organize elections within the terms of their reference. Authorities are prohibited from intervening into their operation. Decisions, actions or inaction of the said committees can be appealed in the court or in the Central Election Commission.

Public observers severely criticized Ismail elections. Thus, press-service of Odessa oblast' branch of Ukrainian voters' committee disseminated a statement, maintaining, in particular, that "the voting was brought to naught as a result of systematic interference of local power bodies with the electoral process"²⁵. Committee activists also filed complaint with the Procurator's General office.

Meanwhile, we became witnesses to systematic interference of power, law enforcement bodies and controlling agencies into the electoral process and to the boycott of election committee.

Several months later such interference became common.

2.4. CONCLUSIONS

Large-scale violation of the citizens' voting rights in the course of extraordinary elections still remains traditional in this country.

Due to the failure of law enforcement bodies to pass appropriate judgment concerning violations of the citizens' voting rights in a number of extraordinary elections, in the fall of 2010, during election campaign preceding local elections, we came face to face with numerous facts of similar violations.

3. LOCAL ELECTIONS OF 2010²⁶

Local elections of 2010 took place at the time of deepening political and social crisis, restructuring of power system, which followed presidential elections and was accompanied by lesser and lesser respect of human rights and fundamental freedoms. The elections date was moved several times, depending on political ambitions of the law-makers and increasing political tension.

Peculiarity and complexity of the election campaign was predetermined by the fact that 23,5 thousand elections of city mayors, village and settlement heads and local councils of all levels were happening simultaneously and independently all over the country. Nevertheless, some common tendencies, characteristic of almost all elections, as well as similar methods and forms of violations, could be identified. Hence, thousands of independent local elections had a lot of features in common, and voters' rights violations were registered at nationwide scale.

Having analyzed the observance of electoral rights in the course of two election campaigns of 2010 and during extraordinary elections of 2009, we can conclude that the negative tendencies, observed both at the extraordinary local elections and presidential elections, have developed and

²³ Petition to the Procurator General "On filing criminal lawsuit against officials guilty of frustrating mayoral elections in Ismail" <http://forumspaskiev.org.ua/databox/2010/08/18136.php>

²⁴ Odessa governor claims that order has been reestablished in Ismail UNIAN— August, 2 2010 <http://www.unian.net/rus/news/news-389484.html>

²⁵ Extraordinary mayoral elections in Ismail failed http://cvu.org.ua/?lang=ukr&mid=fp&id=2631&lim_beg=90

²⁶ Materials, prepared by Ukrainian voters' committee observers and "Support" NGO, news agencies and political parties' reports, were used in this section.

increased at the regular local elections of 2010. The isolated cases of violation of the citizens' voting rights during local elections became a regular tendency at the nationwide level. In general, the local elections marked serious deterioration of situation concerning the observance of the electoral rights.

Here are some of most typical violations:

Large-scale use of administrative resource for the benefit of one political force, active role of law enforcement bodies and judicial power as the instruments of defeating the competitors of more powerful candidates, control over election committees' operation, selective/random use of election legislation norms, low level of competence among election committees' members at all levels as one of the obstacles in applying same law for all, limited voters' access to information concerning electoral process, negligence in election procedures and vote-counting, brutal violations of both the voters' and the candidates' rights

3.1. ASSESSMENT OF THE LOCAL ELECTIONS BY LOCAL AND INTERNATIONAL OBSERVERS

Public at large and world community assessed negatively the observance of democratic standards at the local elections.

The head of the Council of Europe Congress of Local and Regional Authorities, Gudrun Mosler-Tornstrom stated that "the voting did not meet the standards we would like to see, in particular, all the requirements of the European standards concerning fair, transparent and professionally organized elections".²⁷

She further justified her opinion: "First of all, a new law on elections was adopted right before the elections. Second, we uncovered violations in voters' registration process, non-inclusion of opposition candidates into the ballots, disproportions in the structure and errors in the operation of election committees. The secret of voting was also impossible to observe due to big lines at the polling stations and so-called "family voting". Besides, at several polling stations which were just opened, the European observers saw filled ballots in the ballot-boxes. Dozens of candidates' names on the ballots were very difficult for the voters to read and disoriented a lot of senior people".²⁸

Public "Support" network observers, working all over Ukraine, stated in their post-elections declaration that at the local elections in Ukraine many violations of international standards and due practice of organizing and holding the elections were registered".²⁹

Similar judgment was passed by other public organization observers, working in different regions of Ukraine. For example, the activists of NGO's coalition in Kherson oblast', who kept vigil on the eve, and on the day of voting, noted that "this year election campaign in Kherson oblast' is a large step back with regards to adherence to electoral standards of transparency, legitimacy and fairness".³⁰ The leader of Donetsk oblast' branch of the Ukrainian voters' committee S.Tkachenko was even harsher in his judgment: "on election day we registered a large number of violations, which are absolutely contrary to the principles of democratic and free elections"³¹.

²⁷ Observers disagree in their assessment of Ukrainian elections — Liberty Radio — November 2, 2010 <http://www.radiosvoboda.org/content/article/2208552.html>

²⁸ "Ukraine needs election code" — European observers Liberty Radio — November 1, 2010 <http://www.radiosvoboda.org/content/article/2207627.html>

²⁹ "Support" NGO statement on local elections of October 31, 2010 <http://opora.org.ua/news.php?id=867>

³⁰ Kherson oblast' elections became a serious step back with respect to democratic electoral standards http://cvu.org.ua/?lang=ukr&mid=fp&id=2858&lim_beg=0

³¹ Ukrainian voters' committee is not going to legitimize all the disorder, registered on the voting day — November 2, 2010 http://cvu.org.ua/?lang=ukr&mid=fp&id=2820&lim_beg=0

3.2. ELECTION LEGISLATION ONCE AGAIN BECAME THE SOURCE OF ELECTORAL RIGHTS' VIOLATIONS

Drafting and adopting of the new Law on local elections reflected drafting and adopting of the new law at the time of presidential elections. The law was passed in defiance of international standards and recommendations, on the eve of election campaign; it changed dramatically election procedures, giving advantages to the powerful majority.

The new law was severely criticized even at the draft stage. Both experts and members of parliament expressed their discontent with the fact that it omitted the public hearing stage and its authors disregarded local self-governments', experts' and public opinion.

For example, people's deputy Y. Klyuchkovsky, speaking at the parliamentary hearing dedicated to local elections, said: "I am sure that the interests, voiced here (at the hearing — D. B.) by the local self-government's members will have nothing to do with the new law. So let's wait and see how the coalition performs its constitutional duty".³²

Second, this law gave serious advantages to the ruling political force. According to Maryna Staviychuk, Ukrainian representative in the Venice Commission, the new law "provides the opportunity for the ruling party to use all its administrative levers. Looks like the society is reverting — and not ten years into the past, but right back to the soviet times".³³

Third, this law contained a number of provisions narrowing the voters' rights. The head of political programs in the Ukrainian independent center of political studies S. Kononchuk, analyzing the election law, noted that "electoral rights of the public will remain as limited as before. I.e. the full scope of the constitutional right to be nominated and to participate in the local self-governance bodies through the deputy's mandate, is somewhat narrowed".³⁴

A provision prohibiting party branches, registered less than 365 days before the elections, to take part in the elections, caused a lot of controversy. Most significantly, this provision was introduced three months before the voting, thus banning substantial number of voters from participating in the elections. Head of the Ukrainian voters' committee O. Chernenko argues that this provision "specifically targets local elites, most popular public figures, who had worked with voters for many years, setting up local public organizations; now, they will, probably, have to look for some party center to nominate them as candidates".³⁵

Under the pressure from public and international community, the people's deputies had to amend the election legislation and remove most controversial provisions from it, among them the aforementioned provision, concerning the banning of party center, registered less than 365 days preceding the elections, from electoral process. These provisions, however, were removed only two months prior to elections, which created unequal conditions for the "young" political parties' nominees.

There were also some positive provisions in the new version of the law, i.e. changes in requirements towards setting up of territorial election committees. Specifically, the number of election committee members was increased to 18 persons; not only local branches of the political parties, represented in the Verkhovna Rada of Ukraine of current convocation, but also the local branches of all parties, registered in Ukraine, became entitled to nominate candidates to election committees.³⁶

³² Reforming Ukrainian Law on local elections for the benefit of territorial communities: record of parliamentary hearing May 12, 2010 http://www.rada.gov.ua/zakon/new/par_sl/sl120510.htm

³³ Staviychuk believes Ukraine is going back to soviet era — UNIAN — August 2, 2010. <http://www.unian.net/ukr/news/news-389429.html>

³⁴ New law on local elections contains a number of risks — UNIAN — August 3, 2010. <http://www.unian.net/ukr/news/news-389523.html>

³⁵ Ukrainian voters' committee Head: at these elections everything looks even worse than before — UNIAN — July 11, 2010

³⁶ <http://www.unian.net/ukr/news/news-393676.html>

Unfortunately the proposed amendments to the Law of Ukraine “On elections of members of the Supreme Council of Autonomous Republic of Crimea, local mayors and settlement and village heads”, removed only some of the controversial provisions; this law, in independent experts’ judgment, still does not comply with the accepted international standards or traditions of electoral processes in Ukraine.³⁷

Thus, the law nullified the principle of proportional representation of nominees and political parties in election committees. It introduced subjective principle in selecting election committees’ members and distributing senior positions between them. Collegiality principle of decision-making in election committees was also frustrated.

The law stipulates too short period of time for the local elections preparatory work, which led to the complete neglect of election procedures.

The law failed to ensure transparency of candidates’ information at the elections. The election legislation did not oblige the candidates to the local offices to submit their election program to the election committees.

The “mixed system”, proposed at the local level dramatically reduced the chances of free choice for the voters, who, in their majority, were disoriented by huge number of ballots.

Closed party lists and impossibility of self-nomination at the local elections impeded fair selection of candidates for public offices in the city councils, facilitated defeating the opponents by way of their removal from registration for minor or even made-up infringements and opened the door to falsifications in vote-counting.

Observers’ rights were significantly curtailed at the time of voting. They could only report violations in writing, if they noticed any during elections; they could be physically removed from the polling stations at the committees’ members’ discretion, while public observers had no right even to record the violations or to receive the copy of vote-counting protocols. Beside, the law stipulated restrictions for public organizations, depending on their status, i.e. only nationwide organizations were allowed to observe elections.

The election law also opened broad opportunities for the use of administrative resource by the authorities in the course of election campaign.

All these provisions dramatically frustrated the observance of citizens’ electoral rights.

3.3. PARTIALITY OF ELECTION COMMITTEES AS VIOLATION FACTOR

Public observers registered numerous facts of biased attitude of election committees towards political parties and candidates. This attitude became possible due to disproportionate representation of political forces in the election committees, caused by the disregard of proportionality and balance principle while setting up territorial, and then, district, election committees. The resulting imbalances were predetermined by the new law.

Public observers maintain that disproportionate representation of political forces in the election committees led to the ungrounded advantages for the parties in power and undermined public trust in the impartiality of their operation.³⁸

Under the law, territorial election committees are set up in two stages. At the first stage, the Central Election Commission on September 15 (on the motion from political parties) set up 669 TEC, 381 of which had the maximum allowed number of members –18. At the second stage the “first level” election committees formed territorial election committees of the “second level” — district committees in the cities, urban committees in raion cities, village committees.

As CEC member M.Okhendovsky stated at the press-conference, TEC were set up by CEC on parity principles for all the political forces. “Two thousand and ten persons were appointed to senior

³⁷ Yanukovych “blessed” the change of rules of the games at the local elections UNIAN –September 1, 2010. http://cvu.org.ua/?lang=ukr&mid=fp&id=2651&lim_beg=60

³⁸ “Support” NGO statement on local elections of October 31, 2010 Web-page: <http://opora.org.ua/news.php?id=867>

positions in the election committees. It is noteworthy that such political forces as Party of regions and BYUT were equally represented in the TEC leadership”.³⁹

M.Okhendovsky quoted the following data: 453 representatives from the Party of regions were appointed as heads, deputy heads and secretaries of the committees (22,54% of TEC senior positions) and 451 representatives from BYUT (22,44%). NU–NS block got 304 positions (15,12%), CPU — 247 positions (12,29%). Other extra-parliamentary parties occupied 190 senior positions in the TEC. Their candidates were included after the ballot.⁴⁰

Public observers and various political forces representatives report different data. Thus, “Support” activists calculated that “the representatives of 6 parties out of 47 occupied the majority of senior positions in the TEC. The majority of heads, deputy heads and secretaries were appointed from the members of parliamentary coalition (Party of regions, People’s party, CPU), who got 1042 positions in total. Meanwhile, the opposition parliamentary parties, belonging to BYUT and NU–NS blocks, got representation twice smaller than that”.⁴¹

The local observers confirm these data.

Thus, the Ukrainian voters’ committee representatives for Donetsk oblast’ reported that “parties belonging to the parliamentary majority in the Verkhovna Rada of Ukraine (Party of regions, People’s party, CPU) control 73% of the heads’ positions, 69% of the deputy heads’ positions and almost 67% of the secretaries’ positions”.⁴²

Analysis of political forces representation in 35 main election committees of Kharkiv oblast’ showed that “the overwhelming majority of TEC members is represented by political forces from the ruling coalition — 57% of the total number of TEC members. Opposition parties have 29%, and other political forces representatives -14%.

The same distribution was noted in the election committees’ leadership. 58% of senior positions in the TEC (heads, deputy heads and secretaries) were occupied by Party of regions, People’s party (Litvin) and CPU. Opposition political forces have 32%, and other parties — 9%. Among the TEC heads, ruling coalition has as many as 74%, 49% of which belong to the Party of regions.

Sampling analysis of village and settlement TEC showed the same representation ratio”.⁴³

A more detailed analysis of the political forces representation in the election committees shows that the opposition blocks’ shares were sometimes given to the ruling majority representatives. An open letter submitted by Kherson oblast’ political and public organizations representatives to OSCE⁴⁴ contains the alleged statements of leaders of raion branches of USDP, belonging to Yu.Tymoshenko’s block and having the right to representation, to the effect that they signed no documents, authorizing their representatives, who ended up representing BYUT, to participate in the election committees. Bizarre incident happened in Verkhnyorohachytsky raion (Kherson oblast’): Ukrainian peasants’ Democratic Party application to TEC was submitted by the leader of the raion party branch. As a result, says the letter, BYUT was represented by many people who worked for the Party of regions at the previous elections.

The situation repeated itself in the process of district election committees’ forming. TEC denied numerous opposition members the right to be represented in the district election committees, making reference to the election law, which completely disregarded the proportionality/party representation factor. Thus, according to Ukrainian voters’ committee observers for Cherkassy oblast’,

³⁹ Tymoshenko’s CEC speakers claim that party conflicts are its own problem. UNIAN — September 20 , 2010. <http://www.unian.net/ukr/news/news-396777.html>

⁴⁰ Ibid.

⁴¹ Support: Local elections: most serious violations, most significant threats. <http://opora.org.ua/news.php?id=610&>

⁴² Local elections in Donetsk oblast’: preliminary assessment and outcomes — Ukrainian voters’ committee (Donetsk oblast’ branch) report October 15, 2010 p.http://cvu.org.ua/?lang=ukr&mid=fp&id=2712&lim_beg=45

⁴³ Ukrainian voters’ committee (Kharkiv oblast’ branch) monitoring report on local elections in Kharkiv oblast’ in September 2010 — September, 30 2010 http://cvu.org.ua/?lang=ukr&mid=fp&id=2678&lim_beg=45

⁴⁴ Oppositional politicians seek protection from local administrative resource with OSCE — Polychna Kherson-shchyna October 11, 2010 p. <http://polit-kherson.info/publication/politic/7624-2010-10-11-06-29-48.html>

about 80% of candidates to district election committees from the opposition parties were denied registration on the pretext of their lack of experience.⁴⁵

Therefore, unclear principles of all levels' election committees' forming, spelled out in the local elections law, combined with lack of democratic traditions of compromising led to disproportionate representation of various political forces. This situation, in its turn resulted in numerous manifestations of election committees' partiality towards certain candidates and in violations of electoral rights of electoral process subjects. Such facts were often registered at the time of candidates' registration, election campaigning, voting, and, especially vote-counting.

3.4. OBSTRUCTING CANDIDATES' REGISTRATION

In the course of elections public observers registered an obsolete practice of making up various obstacles for the potential competitors of the ruling party representatives in their efforts to submit the needed papers and get registered in election committees.

Thus the Ukrainian voters' committee observers in their report noted that TEC were very meticulous and perfunctory in accepting the documents from the electoral process subjects and registering them. The majority of denials concerned representatives of "Svoboda" (Liberty), "Syl'na Ukraina" (Strong Ukraine), "Bat'kivshchyna" (Motherland) and "Front zmin" (Changes front) parties.

Although the Ukrainian voters' committee representatives assessed that the total number of denials did not exceed 1% of the total number of nominated candidates, they argued in their statement that "in some cases the denial of registration on formal grounds was related to hidden political agenda".⁴⁶

As early as at the stage of local elections' preparations the dubious facts of procrastination with regards to procedural steps were registered. Subsequently these delays led to serious consequences for some voters.

The facts of registration denial to "Bat'kivshchyna" members and candidates from the illegitimate local branches of this party were most common. They became possible due to the fact that the territorial justice departments used procedural errors to protract the process of renewed registration for the branches or for the changes in the party's leadership, so that "Bat'kivshchyna" central leadership lost control over the candidates to two oblast' and several local councils⁴⁷. As a result, unnatural formations, i.e. "clone parties" came into being. Yu.Tymoshenko classified this process as "raiding" of local "Bat'kivshchyna" branches".⁴⁸

Due to these developments, "Bat'kivshchyna" candidates were unable to participate in the local elections to Lviv oblast' and city councils, Luhansk city council, Ternopil city council, Olexandria city and raion councils and Novoarchangelsk raion council (Kirovohrad oblast'); Kiev oblast' council, and also in the elections which took place in 8 raions and 6 cities of Kiev oblast' — Bohuslav, Boryspil, Vyshgorod, Stavyshe, Fastiv and Yahotyn raion councils, Boryspil, Brovary, Obukhiv, Pereyaslav-Khmelnytsky, Rzhyshech and Fastiv city councils.

At these elections mainly the lists of candidates from "Bat'kivshchyna" clones were registered. Finally, yielding to the pressure from international organizations, opposition and public at large, the faked "Bat'kivshchyna" lists were removed by courts decisions in the majority of territorial/administrative units, virtually a couple of hours before the voting. In general, however, the situation never changed for "Bat'kivshchyna" representatives — its candidates were not allowed to participate in the elections.

⁴⁵ Ukrainian voters' committee (Cherkassy oblast' branch) monitoring report on preparations to local elections of October 31, 2010— Ukrainian voters' committee official site — October 29, 2010.http://cvu.org.ua/?lang=ukr&mid=fp&id=2786&lim_beg=15

⁴⁶ Ukrainian voters' committee assessed that registration denials do not exceed 1% of total nominees' number— October 13 2010 , <http://www.helsinki.org.ua/index.php?print=1286969831>

⁴⁷ Ukrainian voters' committee monitoring report on preparations to local elections of October 31, 2010 — October 11 , 2010 p. http://cvu.org.ua/?lang=ukr&mid=fp&id=2698&lim_beg=45

⁴⁸ Yu. Tymoshenko's open letter to V. Yanukovich with regards to the raiding of "Bat'kivshchyna" local branches — September 9, 2010. <http://www.tymoshenko.ua/uk/article/uw6cvu8z>

The representatives of this political force estimated that “the rights of hundreds thousands voters, deprived of the opportunity to support the political force they sympathize with, were violated”. As is well known, 42,29% of the voters (400 thousand) voted for Yu.Tymoshenko at the first round of elections. In Lviv oblast’ this figure constituted respectively 34,7% (512 thousand voters). The administrative units, where “Bat’kivshchyna” was denied participation in the elections, have the total of 4 mln 123 thousand voters (11.3% of total number) — and “Bat’kivshchyna” representatives argue that all these voters were deprived of their right to free choice, as the political force in question was not represented in the ballots.⁴⁹

“Bat’kivshchyna” central head-quarters claimed that as of the morning, October 31, 219 “Bat’kivshchyna” candidates were removed from the lists in the majority election constituencies.

According to the data provided by the head of “Nasha Ukraina” political council V.Nalyvaychenko, Khmelnytsky and Crimean organizations of the party were denied participation in the elections, while in Sumy, Volyn’, Poltava and Zaporizhzhya they were forbidden from having their representatives in the TEC or even district election committees. Dozens of candidates for various offices were not registered or removed from registration. Law enforcement units were pressuring primary candidates from many oblasts of Ukraine.

Conflicts and disputes caused by election committees’ decisions were registered by public observers in many regions. Here are some of them:

Dnipropetrovsk oblast’

In the city of Pershotravnevs, the list of “Yedyny Tsentr” (United Center) party candidates’ was removed from registration. It happened after a phone call from the city executive committee. The head of Pershotravnevs city election committee V.Petrov openly referred to this fact at the court hearing. Nevertheless, the board of judges from Dnipropetrovsk circuit administrative court ignored this fact and dismissed the claim from the Pershotravnevs local branch of “Yedyny Tsentr”.

Donetsk oblast’

Here a number of rather sensational denials of registration to political parties and majority candidates occurred. The biggest dispute arose in Mariupol, where the local election committee denied candidates’ registration to a number of local branches of political parties. After “Syl’na Ukraina” was denied its candidates’ registration, the party leadership complained of gross violation of the law by this election committee.

The local organization of “Yedyny Tsentr” in Donetsk also made public announcements concerning biased actions of district and city election committees with regards to its candidates’ registration.

Public observers in Dokuchayevsk, Kostyantynivka and Kramatorsk made notes of a special technique used either to obstruct candidates’ registration or to find cause for annulling the registration-related decisions.⁵⁰

On October 28, two days before the voting, the CEC, on the motion from Donetsk oblast’ “Syl’na Ukraina” organization ordered Yasynuvata local territorial election committee to register the candidates’ list from this party and the mayoral candidate Natalia Andriyenko.⁵¹

Luhansk oblast’

On the eve of election campaign, a conflict around the registration of “Syl’na Ukraina” candidates arose. The head of the party oblast’ organization O.Kobityev in September 2010 left his office,

⁴⁹ On large-scale violations committed in election campaign preceding local elections of October 31, 2010 — analytical report compiled by BYUT “Bat’kivshchyna” analysts — November 4, 2010, <http://byut.com.ua/news/4041.html>

⁵⁰ Local elections in Donetsk oblast’... — http://cvu.org.ua/?lang=ukr&mid=fp&id=2712&lim_beg=45

⁵¹ CEC ordered to register candidate Tyhypko in Yasynuvata — UNIAN — October 28, 2010. <http://www.unian.net/ukr/news/news-403418.html>

giving the pressure from the Party of regions as reason for his resignation. The Ukrainian voters' committee representatives argue that the claim, requesting the cancellation of "Syl'na Ukraina" in Luhansk oblast', filed with Luhansk circuit administrative court by a citizen V. L., was a part of this pressure, as the court's ruling practically banned the party from participating in the elections. After Kobiyev' resignation the candidates' registration issued was resolved.

According to the information from the Ukrainian voters' committee Luhansk branch, "Syl'na Ukraina" refused to nominate its candidate M. Kyrychenko for mayor's elections in Alchevsk, and, probably, some other candidates as well, due to the intervention from the outside. The candidates, consequently, had to seek support among PSPU members.

24 hours before the end of the election campaign, a mayor candidate in Severodonetsk V. Hrytsyshyn representing progressive socialist party of Ukraine, was removed from the list, despite the fact that he had the best chances to win. He was warned twice for alleged violation of the election legislation. It happened on October 28 about 11:30 pm at the meeting of Severodonetsk TEC. Repeated voting was held by election committee members on October 26 this year in compliance with decision of Donetsk court of appeals, which ruled for the local Party of regions organization. It is common knowledge that Mr. Hrytsyshyn had a long-time personal conflict with the Party of regions.⁵²

Poltava oblast'

On October 19 Kremenchuh city election committee removed "Bat'kivshchyna" candidate for mayor's office O. Babayev from registration.

Kharkiv oblast'

Leader of "Syl'na Ukraina" S. Tyhypko reported that his political force was denied registration in one of Kharkiv oblast' raions..⁵³

Kherson oblast'

On October 15 Kherson circuit administrative court on the motion from Kherson oblast' and city election committees removed from registration several hundred Ukrainian Maritime Party candidates to oblast', city and district councils and this party mayoral candidate A. Rotova. No election law provisions justified this action.

Under the rulings of Odessa administrative court of appeals these decisions remained in force. CEC classified the actions of Kherson oblast and city election committees as unlawful and obliged them to renew the registration of the UMP candidates. Kherson city election committee appealed the CEC (!) decision in Kiev administrative court of appeals. Meanwhile, this decision was also appealed by People's party representative (!). The final judgment was passed only overnight before the voting day, on October 30. The UMP candidates' registration lists were annulled at oblast' level, but renewed at the city level. In fact UMP had no time for election campaign.

3.5. USE OF ADMINISTRATIVE RESOURCE FOR THE BENEFIT OF ONE POLITICAL FORCE LED TO LARGE-SCALE VIOLATION OF THE CITIZENS' ELECTORAL RIGHTS

In contrast to other nationwide election campaigns of 2006–2010, the elections to local councils were characterized by systematic and diverse use of administrative resource by the authorities and law enforcement agencies for the benefit of the Party of regions' candidates.

⁵² Ukrainian voters' committee (Luhansk oblast') monitoring report on preparations to local elections in September 2010 in Luhansk and oblast' — October 11, 2010. http://cvu.org.ua/?lang=ukr&mid=fp&id=2697&lim_beg=45

⁵³ On large-scale violations in election campaign ... — <http://byut.com.ua/news/4041.html>

The authorities began using administrative resource before the election campaign. Namely, in summer 2010 the facts of collecting personal information concerning citizens' political preferences became known. The President's of Ukraine administration requested that oblast' state administrations collect information about the senior officers in local self-governments, militia, prosecutor's office, the CEOs of the companies, institutions and enterprises and members of the local councils in the region.

This information, among other things, had to contain data on party affiliation (political orientation); information on whom an individual supported in the presidential elections of 2010, rating among population, potential collaboration (?). Obviously, this practice is typical of security services in totalitarian regimes, and by no means is within the terms of governmental reference; besides collecting information on private citizens' life is unambiguously prohibited by the law.⁵⁴

This is a good example of the administrative resource usage with the goal of identifying loyal and disloyal members of society. Later on, at all stages of election campaign, we witnessed the use of the same technologies of defeating "disloyal" candidates and supporting the "loyal" ones all over the country. These technologies also included attempts to exercise control over election committees, the judiciary and the law enforcement entities, which shows systematic power attempts to influence the elections results, and, therefore, to violate fundamental electoral rights.

In mid-October, two weeks before the voting day, the public activists who observed the adherence to democratic standards and voters' rights, held a joint press-conference and made public the summarized report on administrative resource use against candidates.

Thus, coordinator of election programs for "Support" public network O.Aivazovska reported that the administrative resource as the main power tool, "efficiently combines provoking and humiliating the opponent. The voter's attitude towards a candidate can be frustrated by accusing the latter of bribes, or by launching criminal proceedings against him/her. It is difficult for a voter to judge whether the accusations are well-grounded. The campaign is very rapid, so there is no time to assess all "pros" and "cons".

The Secretary of Civil Assembly of Ukraine Andriy Kohut expressed an opinion that power sets up "predetermined unfair rules of the game" for the electoral process subjects. The public observers registered a lot of administrative resource manifestations.

They were most concerned with the use of law enforcement bodies, taxpayers and courts to discredit the candidates.

Altogether they quoted 15 examples of administrative resource use in various regions of Ukraine. According to them, a candidate A.Kharitonov was detained in Alupka, a candidate Y.Kolmytsev in Symferopol was subject to the property search, mayoral candidate O.Nechayev was arrested for the abuse of public office, a candidate and acting mayor A.Mamykin was detained in Livadia, acting mayor V.Hamal was subjected to pressure.

In Volodymyr-Volynsky (Volyn'oblast') prosecutor's office together with militia acted against a candidate for mayor's office F.Soroka, in Sumy a criminal lawsuit was filed against mayor H.Minayev, In Karlivka (Poltava oblast') S.Yakovenko was detained on the suspicion of corruption, in Lutsk (Volyn' oblast') a criminal lawsuit was filed against candidate for mayor's position and former oblast' administration head M.Romanyuk on professional negligence plea; in Cherkassy a criminal lawsuit was filed against candidate for mayor's position and acting mayor S.Odarych.

On September 20, 2010 Security service of Ukraine detained the acting mayor A.Nesteruk in Kamyanets-Podilsky (Khmelnitsky oblast').⁵⁵ As a result, the local TEC did not register A.Nest-

⁵⁴ Volodymyr Yavorsky: in preparation to election authorities collect data on everyone — Ukrainian Helsinki Union site— September 8, 2010 <http://helsinki.org.ua/index.php?id=1283967350>

⁵⁵ Local elections — 2010. Facts. Violations. Tendencise. — Ukrainian voters' committee official site — October 14, 2010. http://cvu.org.ua/?lang=ukr&mid=fp&id=2709&lim_beg=45

eruk, under the pretext, that being detained in Khmelnytsky remand prison, he could not submit registration papers in person.⁵⁶

Another vivid example of administrative resource use and of pressuring the candidates was reported by “Support” activists. They referred to the events in Cherkassy, where action was taken against the acting mayor and candidate for mayor’s office S. Odarych.

On September 30 Cherkassy oblast’ auditing commission froze bank accounts of communal and housing services department of Cherkassy executive committee, thus jeopardizing its operation. Odarych insisted that this decision was instigated by Cherkassy governor S. Tulub, the leader of local Party of regions branch. In Odarych’s opinion, it was the governor’s way to help his party comrade Ye. Vlizlo in his running for mayor.⁵⁷

The use of administrative resource was registered widely in Ukraine. We shall illustrate its popularity, referring to events that happened at the time of Kherson mayor elections. Then the law enforcement agencies were using all sorts of pressure against all the major candidates, competitors to their acting mayor, who represented Party of regions.

All these candidates and their supporters found themselves in the middle of various investigations, audits and other actions instigated by law enforcement and taxation agencies. Criminal suits were filed against former head of Kherson oblast’ state administration B. Sylenkov and against “Civil control” leader and member of city council S. Kirichenko.

V. Girin, well-known businessman and leader of the NGO “For fair administration” was nominated as candidate for Kherson city mayor. On the same day the tax inspectors confiscated documents from his companies, thus paralyzing their operation. The tax militia officers participated in the raid, wearing masks and carrying guns.

State tax administration imposed the fine of several million UAH (!) on a company, owned by a leader of political party “Tretya syla” (The third force), who nominated one of the most probable winners for city mayor A. Putilov as its candidate.

An administrative suit was filed against another candidate — a Ukrainian Maritime Party leader (Kherson branch), head of housing and communal services department under Kherson executive committee S. Pinkas. Later he was dismissed from office. A. Rotova, who was also a UMP candidate for mayor’s office, severely criticized the leader of local Party of regions’ branch V. Saldo.

In this study we are not questioning the legitimacy of law-enforcement or tax inspection officers’ actions; they can be, nevertheless, classified as pressuring and harassing the candidates for mayor’s and city council members’ offices in the local elections.

Here are some examples of administrative resource use, registered by the Ukrainian voters’ committee observers.

Donetsk oblast’

Makyivka mayor O. Maltsev openly announced that voting for specific political force is directly linked to budget funding. That’s what he told “Vechernyaya Makeevka” reporter in his interview of October 8, 2010: “First of all, I appeal to all the residents of our town — don’t remain indifferent, come and vote on October 31; our joint stand-point will be decisive for the further destiny of our town. Believe me, it’s not mere declaration. After last elections we got preferential treatment — 30 mln UAH for urban development, and we hope to obtain same benefits for the coming year as well, i. e. 90 mln UAH for social and economic development, as I mentioned earlier. We must earn this money at the elections. I am sure the voters will make the right choice.”⁵⁸

⁵⁶ V. Taranenko. Kamyanyets-Podilsky elections : when a vote doesn’t count. UNIAN — November 8, 2010. <http://www.unian.net/ukr/news/news-405320.html>

⁵⁷ Support: Local elections: most serious violations, most significant threats. <http://opora.org.ua/news.php?id=610&>

⁵⁸ Local elections in Donetsk oblast’... http://cvu.org.ua/?lang=ukr&mid=fp&id=2712&lim_beg=45

Odessa oblast'

Regional office of "Syl'na Ukraina" oblast' party organization revealed the facts of pressure imposed on party members by local bureaucrats from oblast' raions, who warned them that their staying in office depended directly on their immediate renunciation of their "Syl'na Ukraina" membership. The office registered 23 complaints from the party members and activists.⁵⁹

Ukrainian voters' committee observers for Odessa oblast' reported that an official from raion state administration was constantly present at Chervonoknyanska TEC, and no information was given to reporters and observers without his permission.

Town of Kotovsk has but one local TV channel (KET). It was rebroadcasting only speeches of the acting mayor and candidate for mayor's office A.Ivanov. Other candidates were denied air-time for their presentations by TV managers.

In Bilhorod-Dnistrovsky TV broadcasting company refused to give air-time to a candidate N. Cherbadzhy, despite the fact that it was already paid for.⁶⁰

Kharkiv oblast'

According to Kupyansk election head-quarters, director of railroad workers' cultural center (Kupyansk) refused to rent premises to K.Ukraintseva, a candidate, running for mayor, for her meeting with the constituents. He justified his refusal by alleged overloading of the center.⁶¹

Kherson oblast'

The disbandment of local "Bat'kivshchyna" organization in August 2010, by court decision, on the motion from Velyka Oleksandrivka justice department made big news. "Failure to submit operation reports to the tax inspection" was given as formal grounds for the suit and subsequent disbandment. The dispute was resolved only after the one-year restriction for party branches was removed.

Cherkassy oblast'

Ukrainian voters' committee observers registered the facts of campaigning for Party of regions in pre-school institutions and schools of Kaniv raion. It was organized by the head of Cherkassy oblast' pension fund department V. Bahriychuk and the head of Kaniv raion education department L. Nekrasa. A number of other senior officers of raion state administration also campaigned for the Party of regions during operational meetings in Katerynopil, Chyhyryn, Drabiv, Cherkassy, Chornobaivka, Horodyshche, Lysyansk raions).

Instances of pressure upon leaders and activists of both opposition and ruling political forces were registered in the oblast'. In particular, a criminal suit was filed against A.Bondarenko, leader of local "Bat'kivshchyna" organization; a number of criminal suits against the companies, headed by city mayor S. Odarych, a criminal suit against a housing company "Mekhbud" director V. Sapa with regards to "Golden horseshoe" program (linked, in fact, with "Nasha Ukraina" leadership) were filed. Prosecutor's office inspections, auditing certain candidates' to oblast' council operations, were carried out. In Katerynopil raion the head of raion state administration O.Bardachenko

⁵⁹ Odessa oblast' — 32 days before elections — Ukrainian voters' committee official site — September 29, 2010 http://cvu.org.ua/?lang=ukr&mid=fp&id=2677&lim_beg=45

⁶⁰ Odessa oblast' on the eve of elections: campaign lessons and threats on the voting day. Ukrainian voters' committee official site— October 29, 2010. http://cvu.org.ua/?lang=ukr&mid=fp&id=2784&lim_beg=15

⁶¹ Ukrainian voters' committee monitoring report on preparations to local elections in Kharkiv oblast, October 1–14, 2010. http://cvu.org.ua/?lang=ukr&mid=fp&id=2732&lim_beg=30

XIII. RIGHT TO FREE ELECTIONS AND PARTICIPATION IN REFERENDA

forbade the visiting head of People's party, people's deputy S.Tereshchuk to meet the constituents in village cultural centers.⁶²

3.6. PRESSURE UPON THE CANDIDATES AND THEIR FAMILIES, EXERTED BY THE OFFICIALS AND LAW ENFORCEMENT AGENCIES, TO COERCE THEM NOT TO PARTICIPATE IN THE ELECTIONS

The instances of such pressure are very common, although few of those "interviewed" by state administration officials and controlling bodies would muster the courage to tell about them. This time, however, the scale of pressure became so large, that many facts have been noted by observers or published in mass media. Here are some data published in information/analytical report of "BYUT-Bat'kivshchyna" analysts' service "On mass violations in the course of campaign related to local councils' elections on October 31, 2010".

Donetsk oblast'

Yielding to the pressure, exerted by their superiors, two candidates to Avdiivka town council from "Bat'kivshchyna" party were forced to remove their names from the candidates' lists. The head of the companies, belonging to the Party of regions, threatened their employees with dismissal if these latter don't remove their names from "Bat'kivshchyna" party lists. Thus, the director of Kirov mine requested that "Bat'kivshchyna" candidates to Makiyevka town council V. Melnikov and L. Oleynikov refrain from running for office, as otherwise they would lose their jobs. He also warned mining engineer V.Filimonchuk that his participation in the election campaign as "Bat'kivshchyna" representative could have negative consequences for him, quoting Director General of "Makiiv-vuhillya".

Zhytomir oblast'

On September 28 a school principal in Kovel raion was threatened with dismissal on the grounds that his son was nominated as "Za Ukrainu!" party candidate.

Eight public servants from various institutions, who were members of "Front zmin" party and intended to run for office in local councils, were offered to either become Party of regions' candidates (or V. Litvin's People's party candidates) or to resign from their offices. 12 persons were coerced to withdraw their candidatures. These facts were registered in Baraniv, Luhyn, Korostyshev, Chudniv, Radomyshl' and Narodychy raions). Businessmen — "Front zmin" candidates have been harassed by tax inspections and audits, at the time of which they offered to run for the Party of regions or for V. Litvin's People's party.

Poltava oblast'

In Hrebinka raion V. Tereshchenko, raion council candidate from "Bat'kivshchyna", was coerced into withdrawing his candidature, under the threat of terminating his lease for the premises where his store was located.

Sumy oblast'

The "Support" network observers reported that a candidate to raion council from "Za Ukrainu!" party O. Hurchenko wrote a request to withdraw his candidature under the pressure from the raion state administration.

⁶² Ukrainian voters' committee (Cherkassy oblast' branch) long-term monitoring report http://cvu.org.ua/?lang=ukr&mid=fp&id=2786&lim_beg=15

The leader of Krolevets branch of “Za Ukrainu!” party O. Kucheryavy was threatened with dismissal if he refused to support the Party of regions’ candidate for mayor . The head of local Party of regions branch O. Naumov was persuading him to sign an appeal in support of one of the Party of regions’ candidates. After O. Kucheryavy refused he was threatened with dismissal.

Ternopil oblast’

In Pidhaytsy raion raion council members-businessmen, belonging to BYUT, were forced to either withdraw their candidatures altogether or to run for the ruling party.

Chernyhyv oblast’

Acting member of Desnyansky district council in Chernyhyv, employee of Desnyansky district pension fund was forced to withdraw his candidature from the raion council list and to renounce his membership in “Bat’kivshchyna”.

Chernyhyv oblast’ council member and private company CEO M.Shumeiko was called by oblast’ state administration head V.Khomenko and threatened with negative consequences if he does not leave “Bat’kivshchyna”.

The oblast’ state administration head issued informal, but mandatory order to the head of oblast’ health care department to the effect that no chief physician would be nominated as a candidate from any political party but the Party of regions.

Cherkassy oblast’

Local officials in Drabiv in the course of “preventive negotiations” held on September 28, openly requested that raion council member from BYUT V. Tarasenko leaves the ranks of “Bat’kivshchyna” and withdraws his candidature for council member and village head of Nekhayki village.⁶³

Therefore, at the local elections mass and systematic activities of executive officials, local self-governance bodies, law enforcement agencies, tax inspections for the benefit of Party of regions’ candidates as well as fact of pressure upon the electoral process subjects with the goal of impeding their participation in the elections, were registered.

3.7. ACCESS TO INFORMATION, IMPEDIMENTS TO JOURNALISTS’ AND OBSERVERS’ OPERATION

Public observers registered significant regress in observing the voters’ and election participants’ rights to information with regards to electoral process. Current law, authorizing election committees to define the method of making their decisions public, had adverse effect on the public awareness with regards to elections.

The observers reported many instances when majority candidates could not get the election updates, because the TEC resolutions were not available to public.

Some election committees did not publish their decisions in timely fashion, delayed the signing of contracts with media which would cover their operation, or even openly and without any justification refused to share any information concerning this operation

These actions taken together negatively affected the candidates’ rights to protect their interests.⁶⁴

The fact that election committees, for the first time in elections’ history, restricted to the maximum the information on voting is really unprecedented. The election committees made public

⁶³ On large-scale violations in election campaign <http://byut.com.ua/news/4041.html>

⁶⁴ Local elections in Donetsk oblast’... http://cvu.org.ua/?lang=ukr&mid=fp&id=2712&lim_beg=45

only the lists of winning candidates. The data concerning number of voters, the distribution of votes among parties and candidates, remained virtually unknown. Dramatic increase in the attempts to hinder journalists and observers' performance of their duties became another serious issue.

The reporters were denied information on electoral process, access to election committees' premises or polling stations on the eve and on the day of voting.

On the day of voting journalists and observers experienced the pressure from the election committees and law enforcement bodies. Militia intervened more than once into the conflicts arising between the election committees and the observers, unfailingly taking the committee's side.

This situation could have been explained by incompetence of both election committees' members and militiamen, if the examples of appropriately organized elections had not been registered in Ukraine in the recent years.

Here are some typical situations.

ARC

October 31. Press-service of "Bat'kivshchyna" elections headquarters reported that after voting ended at polling station № 76 (Simferopol), the election committee members from the Party of regions chased away observers and Chornomorsky TV representatives with militia help, before starting the vote-counting.⁶⁵

Volyn' oblast'

October 31. Observers and authorized representatives were not allowed to enter polling station № 45 in Lutsk. The head of district election committee justified the decision by the allegation that observers had to register with the election committee overnight, and presently it was too late.

Similar situation was registered in Kovel at the polling station № 18008. The observers were not allowed to enter the building before 7:30.⁶⁶

Donetsk oblast'

On October 22 a reporter from "Tochka opory" newspaper took several pictures of information board in Mariupol city election committee. After that, unidentified persons started to threaten the journalist and to demand that he destroys the pictures.⁶⁷

A journalist from all-Ukrainian publication "Tochka opory" was prohibited from entering the premises of Druzhkivka town election committee. A committee member justified the denial by lack of appropriate documents — allegedly, the journalist's ID was not enough. The journalist was allowed into the building only after Donetsk oblast' territorial commission interjection.⁶⁸

Zhytomir oblast'

At the polling station № 10 in Malin official Ukrainian voters' committee observers were denied registration, on the grounds that there was no officially approved list of observers at the committee.

⁶⁵ On large-scale violations in election campaign ... <http://byut.com.ua/news/4041.html>

⁶⁶ In Volyn' observers were banned from polling station Volyn'sky novyny — October 31, 2010. http://www.volyn-news.com/news/volyn_na_volyni_na_dilnytsi_ne_puskaly_sposterihachiv/

⁶⁷ In Donetsk oblast' election committees harassed a journalist and obstructed his work — "Support" official site — <http://opora.org.ua/news.php?id=704>

⁶⁸ Current information on voting and electoral process violations in Donetsk oblast' — Ukrainian voters' committee official site — October 31, 2010 http://cvu.org.ua/?lang=ukr&mid=fp&id=2806&lim_beg=15

Sumy oblast'

The observers were not allowed at many polling stations, and denied registration if they failed to register between 6:45 and 7:00 am.

Transcarpathian oblast'

October 31. A TV journalist was forcibly driven out of the polling station № 42 in Uzhgorod, after he started taking pictures of voters who filled out the ballots on each other's backs and not in the booths.⁶⁹

Kiev oblast'

October 31. At the polling stations of Polissya, large number of journalists, observers and candidates' authorized representatives were pushed out of the premises. UNIAN received this information from "Pravda" (Truth) political party head, candidate to Kiev oblast' council S.Rybalko. According to him, journalists and observers were taken out immediately after the closing of polling stations. The candidate believed it might have been done to cover voting falsifications, "as the majority of election committees represented the ruling party".⁷⁰

The leader of regional branch of "Nasha Ukraina" party A. Nitsoy reported that opposition observers were prohibited from entering polling stations in Sofiivska Borshchahivka village (Kiev-Svyatoshyn raion), while coalition and Party of regions' observers entered them freely. Nitsoy quoted the election committee's explanations that the premises were too small to house so many people.⁷¹

Mykolaiv oblast'

October 31. At polling station № 123 (secondary school № 19) in Lenin district (Mykolaiv), before the vote-counting started, two TV journalists from "NIS-TV" crew were physically pushed out of the room on the order of election committee head. The premises then were locked for vote-counting. ⁷²

Polling station № 1407, village of Kovalivka Mykolaiv raion: committee members chased out all the observers and candidates during preparatory meeting.

Odessa oblast'

Bilhorod-Dnistrovsky. A TV channel "Tipa-TV" managed to broadcast only two episodes of "Sociopolis" program, hosted by a well-known local historian and sociologist Donat Sarana. After that some influential candidate, running for mayor, evidently unhappy with the sociological surveys' results, concerning him personally and divulged in the program, persuasively "asked" the TV channel owner never to let "Sociopolis" on air. His request was satisfied.⁷³

⁶⁹ In Uzhgorod TV reporter driven out of polling station — 3IK — October 31, 2010 <http://zik.com.ua/ua/news/2010/10/31/253458>

⁷⁰ Reporters are driven out of polling station — UNIAN — October 31, 2010 <http://www.unian.net/ukr/news/news-403920.html>

⁷¹ Yushchenko's party saw attempts of large-scale falsifications — Ukrainska Pravda — October 31, 2010 <http://www.pravda.com.ua/news/2010/10/31/5530904/>

⁷² In Nikolayev a journalist pushed out of polling station — Izbirkom — October 31, 2010 . <http://izbirkom.od.ua/content/view/3089/45/>

⁷³ Odessa oblast' — outcomes of the first month of elections: challenges and threats — Ukrainian voters' committee official site — October 13, 2010 — http://cvu.org.ua/?lang=ukr&mid=fp&id=2703&lim_beg=45

October 28. Odessa city election committee did not let mass media representatives to their meeting, which took place in “Chornomorya” publishing house, where the district election committees received the ballots. ⁷⁴

October 31. Numerous facts, concerning journalists’ and TV journalists banning from polling stations were registered. The election committees justified their actions by the fact that the journalists either did not have their passports with them, or their IDs were not in order. ⁷⁵

October 31. Observers were not allowed to participate in election committee morning meeting at the polling station, located in “INTO SANA” hospital.

After voting started, the Ukrainian voters’ committee observers arrived in Odessa city TEC and found several authorized representatives at its doors. No one could enter the building, because the guard denied them the entry making reference to the order, issued personally by TEC head, Mr. O. Akhmerov. By 10:00 nothing changed, although the head himself promised to grant entry to the journalists and observers, without specifying the reasons for the ban. ⁷⁶

Kherson oblast’

On October 16 Kherson executive committee security did not allow journalists representing three newspapers to be present at the Kherson city election committee meeting, on the grounds that Kherson deputy mayor prohibited strangers from entering the building. The city council members witnessing the incident did not intervene.

October 31, polling station № 21685 (Kherson). The head of district election committee, located in the premises of the school № 34, refused to register the “Tretya syl’a” observer. Only lawyers’ intervention made her comply with due legal procedure.

Polling station № 21755, located in the premises of the school № 51. District election committee ruled that an observer, an authorized representative and a candidate should be removed from the building, on the grounds that they had arrived at 11:00 am, while the election committee, according to its head, closed the registration for observers and others at 10:00 am.

When an independent Ukrainian voters’ committee observer with the ID, certified by CEC, tried to clarify the situation, the head of the election committee called militiaman and asked him to remove the observer from the building. Militia lieutenant, in defiance of the law “On militia”, refused to give his name and tried to take the observer out of the building, then called investigators. ⁷⁷

Chernivtsy oblast’

Polling station № 99, oil and fat factory — the committee head marked with chalk the place for the observers, placed a militia guard there and told the observers not to step outside the marked area. ⁷⁸

3.8. VOTING DAY BECAME A REAL TRIAL

A huge number of violations, pressure, biased attitude of election committees and authorities towards candidates, lack of adequate response from law enforcement agencies to complaints led

⁷⁴ Odessa oblast’ on the eve of elections: campaign lessons and threats on the voting day. Ukrainian voters’ committee official site — October 29, 2010 p. http://cvu.org.ua/?lang=ukr&mid=fp&id=2784&lim_beg=15

⁷⁵ “Journalist’s ID is not a document” or how Odessa media were thrown out of polling stations Izbirkom <http://izbirkom.od.ua/content/view/3141/45/>

⁷⁶ Ukrainian voters’ committee (Odessa oblast’ branch) statement — Ukrainian voters’ committee official site — October 31, 2010 . http://cvu.org.ua/?lang=ukr&mid=fp&id=2802&lim_beg=15

⁷⁷ In Kherson militia did not let Ukrainian voters’ committee observer to enter polling station. Politychna Khersonshchyna — October 31, 2010 <http://polit-kherson.info/new/mistcevi-vibory/7774-2010-10-31-14-54-12.html>

⁷⁸ Ukrainian voters’ committee registers first violations at local elections — Ukrainian voters’ committee official site — October 31, 2010 http://cvu.org.ua/?lang=ukr&mid=fp&id=2792&lim_beg=15

to the deepening of public distrust of the electoral process and election committees' capability to organize proper voting and vote-counting.

Issuance of ballots and control over their safe keeping became a serious trial of public trust in the authorities' capability to hold fair elections.

Issuance of additional ballots and tampering with ballots were observed and reported in various parts of Ukraine. Thus, political parties' speakers reported that additional copies of the ballots were found in Kharkiv, Ivano-Frankivsk, Khmelnytsky, Odessa oblast' etc.

Meanwhile, public observers noted the instances, when TEC submitted ballots with spelling and factual errors to the printing companies, so that later these ballots had to be destroyed and budget funds were wasted.

Under the circumstances, the law enforcement agencies failed to supply reliable information for the public, concerning the ballots issuance, election committees' adherence to the due legal procedure and control of the process, exercised by the said agencies.

On the voting day big lines at the polling stations, due to large number of ballots and ballots-related violations, created most serious problems. Some polling stations received larger or smaller number of ballots, than was actually needed. Some election committees failed to put the stamp "quit" for the electoral process subjects, whose registration was cancelled, before the voting. Spelling and factual errors in the ballots were common; sometimes the ballots for one polling station were delivered to another.

Alongside with this, public observers registered a number of isolated gross violations, i. e. attempts to bribe the voters, to "throw in" the ballots, to ban observers from entering the premises, to sign empty ballots. Many of these violations were stopped by the intervention of committee members, observers or law enforcement representatives.

The quality of voters' lists was somewhat better as compared to the lists in circulation at the time of the last presidential elections. Nevertheless, the data from the uniform registry need further amendments. Public observers noted that lack of possibility to introduce changes into the voters' lists on the voting day, even by court's ruling, led to serious violation of the voters' rights.

Ukrainian voters' committee observers revealed a number of violations in procedure and order of the vote-counting, as well as the facts of observers' banning from the stations, short circuits, deliberate spoilage of ballots.⁷⁹

Due to the numerous procedural violations and delays in vote-counting, the results, made public, caused a lot of doubts and controversy.

Public at large, electoral process subjects, journalists tried to draw law enforcement agencies' attention to outrageous facts. For example, Kharkiv human rights' protection activists made a statement concerning premature publication of voting results in Kharkiv mayor's elections.⁸⁰

These statements, in their majority, were disregarded by CEC, TEC and law enforcement agencies. Only in some cases CEC responded to gross violations of voters' rights by the election committees. Thus, on the strength of Kiev circuit administrative court ruling of November 5, 2010, CEC terminated the authority of Bila Tserkva city election committee before schedule, on the grounds of repeated gross violations of Constitutional provisions and Law, due to its members' negligence and subsequent falsification of election results in Bila Tserkva (Kiev oblast') and voters' declaration of will.⁸¹ However, it remains unknown, if the criminal suits against the culprits have been filed.

⁷⁹ Ukrainian voters' committee preliminary assessment of the outcomes of local elections in Ukraine on October 31, 2010 http://cvu.org.ua/?lang=ukr&mid=fp&id=2815&lim_beg=0

⁸⁰ Kharkiv human rights protection group statement with regards to mayor elections in Kharkiv — November 5, 2010 p. <http://helsinki.org.ua/index.php?id=1288968031>

⁸¹ CEC disbanded Bila Tserkva election committee — UNIAN — December 7, 2010 <http://www.unian.net/ukr/news/news-410188.html>

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3.9. APPEAL SYSTEM AND ACCESS TO JUSTICE

The Code of Good practice⁸², devised by Venice commission, stipulates an efficient system of appeals, as one of the procedural guarantees of the electoral rights.

The electoral process subjects are free to appeal against election law violations in the appropriate agencies, i.e. election committees or courts.

Current local elections in Ukraine demonstrated a somewhat bizarre practice of selective justice or election committees' failure to comply with... court decisions.

The information concerning judicial practice of resolving the disputes which arose in the course of local elections is not complete yet.

The journalists from "Dzerkalo tyzhnya" approached the largest parties, asking them to provide information on number of filed and satisfied appeals with regards to violations, committed on the voting day and during the vote-counting between October 31 and November 11.⁸³

Nine political parties offered the information requested (see table).

Their members filed 2375 claims with the court over the period under discussion.

The majority of claims were submitted by "Bat'kivshchyna" members — 2139. Only 14 or 0.7% of all claims were satisfied by the courts of different jurisdictions.

"Front zmin" ranks second as to the number of claims. This party filed 85 claims, 19 (22%) of which were satisfied.

Party of regions ranks third as to the number of claims. They filed 54 claims, 46 (85%) of which were satisfied.

"Syl'na Ukraina" members, subjected to a lot of official pressure in the course of election campaign, filed 21 appeals concerning the violations committed on the voting day and during the vote-counting. The courts allowed only 4 (19%) appeals.

Table. Number of appeals concerning violations committed on the voting day and during the vote-counting.

Party	Number of claims filed with the court by a political force between October 31 and November 11)	Including			Decision on the claim			
		Appeal against the voting procedure violation	Appeal against the vote-counting procedure violation	Appeal against election results	Admitted for consideration	Dismissed	Satisfied (allowed)	Executed by TEC
Party of regions	54	4	37	7		8	46	
Bat'kivshchyna	2139	2104	20	15	1836	1779	14	3
Syl'na Ukraina	21		6		10	4	4	1
Front zmin	85	27	35	23	85	46	19	*
Udar	1			1	1			
Svoboda	15				11	4	11	
Nasha Ukraina	48	2	5	2	6	19	3	
Hromadyanska pozytsiya	12	2	1	9	5	4	2	1
Total	2375	2139	104	57	1954	1864	99	5

* some claims were just submitted to TEC, while this table was compiled.

Source: I. Vedernikova articles "Gargoyle House" in "Dzerkalo tyzhnya" newspaper, № 42, October 13, 2010.

⁸² Code of good practice ... <http://www.venice.coe.int/docs/2002/CDL-AD%282002%29023rev-ukr.pdf>

⁸³ I. Vedernikova "Gargoyle house" "Dzerkalo tyzhnya" № 42 — November 13, 2010 <http://www.dt.ua/newspaper/articles/61463#article>

The data collected by “Dzerkalo tyzhnya” journalists show the correlation between the number of allowed appeals and proximity to (or remoteness from) power.

Oddly enough, the majority of Party of regions’ claims was satisfied, while the opposition parties’ claims were not.

The information presented above demonstrates one more tendency. Out of 99 claims, satisfied by the courts, only 5 were executed by TEC. All the rest were ignored (although the reporter I.Vedernikova maintains that some court decisions were considered by TEC at that time).

Hence, this information shows that election committees were trying to sabotage the courts’ decisions. Further we’ll refer to some facts, found by public observers and journalists.

Volyn’ oblast’

Lutsk city election committee refused to comply with the decision of Lviv court of appeal and to issue a notice to “Syl’na Ukraina” candidate M. Romanyuk, running for mayor, for the violation of election campaign rules.

Kiev oblast’

On October 25, in Fastiv, political parties’ members denied registration, picketed TEC. About 100 representatives of 5 un-registered parties took part in picketing, the opposition parties “Svoboda”, “Bat’kivshchyna”, “Front zmin” and others among them. They demanded the execution of court decision of October 14, i. e. the registration of 82 candidates from the parties denied registration earlier. TEC head O.Chumachenko (“Nasha Ukraina”) responded that she was not going to comply with the court’s decision and would by no means have the candidates registered. The upset picketers blocked the TEC premises. The head of the committee was taken to emergency room, allegedly with heart attack.

Earlier, the Fastiv city election committee on various grounds refused to register over 140 candidates to the local city council. They represented various, principally opposition parties. Incorrect service of documents was given as grounds for refusal.⁸⁴

Poltava oblast’

Kremenchuh election committee refused to comply with the decision of Kharkiv administrative court of appeals on renewal of registration for the candidate O. Babayev, running for mayor.⁸⁵

Kherson oblast’

During the vote-counting at the palling station 21655, numerous violations were revealed. A candidate, who lost elections, insisted on the new vote-counting. Kherson city election committee refused to count ballots a-new. The candidate for the city council and “Bat’kivshchyna” members of the election committee appealed the committee decision in Kherson circuit administrative court. On October 4, 2010 the court allowed the appeal and nullified the committee’s decision, i.e. its refusal to re-count the ballots. The head of Kherson city election committee appealed this decision in Odessa administrative court of appeals; in the meantime, the voting results were made public, and the candidate who won the elections in this area, became a member of city council. Odessa administrative court of appeals ordered the committee to re-count the ballots.⁸⁶ On January

⁸⁴ Unregistered candidates in Fastiv responded by picketing and rallying in front of election committee building — “Support” official site <http://opora.org.ua/news.php?id=728>

⁸⁵ “Support” NGO Interim report on the results of nationwide monitoring for the period of October 10 — 28, 2010 poky — “Support” official site <http://opora.org.ua/news.php?id=744>

⁸⁶ Local elections 2010: shall the votes be recounted at the disputable palling station? — “Politychna Kherson-shchyna” — December 2, 2010 <http://polit-kherson.info/new/mistcevi-vibory/7922---2010-----.html>

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24, 2011 Kherson city election committee finally convoked a meeting and decided to take notice of the court's ruling. It was never executed, however, due to the completion of elections.⁸⁷

3.10. CONCLUSIONS CONCERNING OBSERVANCE OF VOTERS' RIGHTS AT THE LOCAL ELECTIONS OF 2010

1. Local elections in Ukraine involved violations of international standards and non-adherence to due practices of elections' organization and holding.
2. The new law on local elections, adopted on the eve of the voting day without preliminary public hearing, became a source of numerous violations of electoral rights.
3. Disproportionate representation in the election committees gave unfair advantage to the ruling party in all election committees and created unequal conditions for the election process subjects.
4. Discretionary application or total neglect of the law by territorial election committees created additional obstacles for the candidates' election campaigns.
At the registration stage territorial election committees created additional impediments for some candidates and parties. Despite the fact that some election process subjects managed to appeal election committees' actions in court, these candidates remained in disadvantage, due to the transient nature of election process, and failed in their election campaign.
5. Some committees openly made decisions of non-compliance with courts' rulings.
6. Broad use of administrative resource and pressure upon the election process subjects, candidates' and committees' members' harassment led to large-scale electoral rights violations.
7. Law enforcement agencies failed to deal efficiently with numerous violations of election law, pressure, threats and harassment.
8. Lack of election committees' control over the ballots printing and their inappropriate safe-keeping opened the door to abuse.
9. Insufficient preparation of the voting day led to the violation of the principle of individual and secret declaration of will.
10. Violations of law requirements towards vote-counting and summarizing results led to the distortion of elections outcomes in some communities.
11. For the first time some improvement in voters' lists was registered. Nevertheless, the "doubles" and "dead souls" still occurred on the lists, while some citizens who came of voting age (18 years), were not included.
12. Lack of provisions allowing adding voters' names to the lists on the voting day on court's decision led to the violation of voters' rights to participate in the voting.
13. Electoral process was characterized by limited access of election process subjects to information, consistent restrictions of observers' and journalists' rights, and numerous facts of obstructing their operation.
14. Mechanism of appeals proved inefficient at the local elections and failed to ensure the reinstatement of election process subjects and voters in their rights.

4. REALIZATION OF CIVIL RIGHTS TO INITIATE AND PARTICIPATE IN NATIONWIDE AND LOCAL REFERENDA

The observance of civil rights to initiate and participate in nationwide and local referenda still remains a serious problem. Traditionally political forces try to use the referenda as means of achieving their own political goals.

⁸⁷ D. Ilchenko. An infinite story//Vecherny Kherson. Saturday — 2011 — № 8 — January 29, 2011

Meanwhile the earlier attempts to hold all-Ukrainian referenda brought no tangible results. Thus, in 2006 a referendum on Ukraine membership in NATO and participation in Unified Economic Space was to be called. 109 task forces were set up; 4.6 million people in 27 regions of Ukraine expressed their wish to hold the referendum. The President of Ukraine must make this initiative public and announce all-Ukrainian referendum. However, it still hasn't been done, and the citizens are denied their constitutional right to declare their will at all-Ukrainian referendum. The Verkhovna Rada of Ukraine also abstained from passing an unambiguous legal judgment with regards to public right to direct democracy through all-Ukrainian referenda.

Instead, the politicians were trying to use the referendum mechanism in mobilizing their electorate.

Thus, "Front zmin" leader A. Yatsenyuk called for a referendum on the issue of Constitutional amendments, presidential elections, prolongation of the Verkhovna Rada competences.⁸⁸

In August-September task-forces in charge of preparing the all-Ukrainian referendum, were set up all over the country.

All the registration documents were submitted by relevant local self-governance bodies to CEC. However, just as it happened two years earlier, CEC denied registration to initiative groups for all-Ukrainian referendum. In its decision CEC made reference to the Constitutional court decisions № 3-rp/2000 of March 27, 2000 (on all-Ukrainian referendum, convoked on public initiative) and № 6-rp/2005 of October 5, 2005 (on people's exercise of power), namely, that the issues in question cannot be resolved by way of all-Ukrainian referendum on public initiative, as they do not allow to establish the exact meaning of the electorate will.⁸⁹

This situation was possible, among other things, due to an obsolete legislation on referenda, still in force in Ukraine. For several years now the law-makers have been trying to change this Law. As of today they managed to get things moving. As people's deputy L. Orobets' put it, "presently, two main areas of legal amendments have been defined — the nationwide and the local. This definition stands to reason — each of them has its own terms of reference and implementation specifics which are not to be mixed".

⁸⁸ Task forces formulated the questions concerning the referendum in different ways. Sometimes they looked like this: "1. Do you agree that the presidential elections procedure in Ukraine can be changed exclusively by passing the draft law on amending the Constitution of Ukraine by way of popular referendum, pursuant to which article 71 of the Constitution of Ukraine will look as follows: "Elections of the President of Ukraine, state power bodies and local self-governance bodies are free and held on the basis of general, equal and direct electoral right by means of secret ballot"? 2. Do you agree that the Verkhovna Rada and the President's term of office, defined by the Constitution of Ukraine, cannot be prolonged otherwise than by means of popular referendum, pursuant to which article 6 of the Constitution of Ukraine shall be amended with part three reading as follows: "The Verkhovna Rada and the President's of Ukraine term of office can be prolonged exclusively by popular referendum (except for the extraordinary situations and martial law)? 3. Do you agree that the Constitution of Ukraine can be amended with article 156-1, reading as follows: "Draft law on amending the Constitution of Ukraine can be adopted directly by nationwide referendum on people's initiative, which is announced by the President of Ukraine. The results of nationwide referendum on people's initiative are compulsory for all and do not require any decisions or actions from public authorities or officials"?"

Another scenario offered another version of questions offered for the nationwide referendum:

"1. Do you approve (support) the new version of article 71 reading as follows:

"Elections of the President of Ukraine, People's Deputies of Ukraine, members of Supreme council of the Autonomous Republic of Crimea, heads and members of local councils are free and held on the basis of general, equal and direct electoral right by means of secret ballot"?"

2. Do you approve (support) part one of article 90 of the Constitution of Ukraine, reading as follows:

"Terms of reference of the Verkhovna Rada of Ukraine are terminated on the day of the beginning of the first meeting of the Verkhovna Rada of Ukraine of new convocation. The term of office of the Verkhovna Rada of Ukraine can be prolonged only in case of extraordinary situation or martial law"?"

3. Do you approve (support) part two of article 154 of the Constitution of Ukraine, reading as follows:

"Changes and amendments to the Constitution of Ukraine can be adopted directly by nationwide referendum. Changes and amendments, adopted by such referendum, are compulsory for all and do not require any decisions or actions from public authorities or officials"?"

⁸⁹ CEC Resolution № 213 of October 29, 2009 <http://www.cvk.gov.ua/pls/acts/getd?id=24460&ptext=>

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According to the people's deputy, the regulations concerning local referenda should go hand in hand with all-Ukrainian referenda reforming, regarded by some as a mechanism of strengthening the presidential vertical. "We are running the risk of losing local self-governance completely, if the local communities are unable to control the authorities, if courts are the centers of corruption and the closed proportional system of representative power remains omnipotent. On the other hand, if local communities have a simple and comprehensive mechanism of expressing their distrust of city or village authorities by means of referendum, then both council and mayor will be obliged to take public interests into consideration, instead of acting for their own benefit only or on the instructions of their political patrons", said the deputy.⁹⁰

By the end of 2010 four draft laws, two of which addressed all-Ukrainian referendum, one — referenda in general, and the last one- local referenda — were registered.

The draft law on all-Ukrainian referendum № 6278 of April 29, 2010, prepared by the people's deputy from the Party of regions D. Shpenov, was remanded for the second reading in July 2010, while the draft law on local referenda, submitted by the Cabinet of Ministers of Ukraine to the Verkhovna Rada in September 2010, has not been considered yet.

LOCAL REFERENDA

Unfortunately, summarized open statistics on the local referenda initiatives is not available. It makes monitoring of the local referenda practices and exercising of public rights to participation in this expression of direct democracy, difficult.

In early 2009 the Ministry of Justice, within the framework of drafting the law on local referenda, attempted to summarize the practice of referenda organization in Ukraine and collected the relevant information for the years 1991 — early 2009. These data show that over this period of time 150 local referenda have been held in Ukraine: 55 — concerning the issues of administrative and territorial structure; 36 — concerning the issues of changing the name of a territorial unit; 34 — concerning the institutional issues, including the termination of office for the representative bodies in local self-governments; 12 — concerning the issues of the residential areas' gentrification; 12 — concerning land issues; 9 — concerning other issues.⁹¹

This statistic did not take into account the referenda proposed by territorial communities, but never held due to the opposition from the local power. In general, we can conclude that the citizens' rights to local referenda have been observed very poorly over the recent years. The citizens initiating local referenda are subjected to constant violations of their rights and unable to fully implement all the procedures stipulate by the Law.

In our estimates, at least 15 local referenda should have taken place in 2009–2010; at least three did not happen because of the official opposition to them.

Let's illustrate this statement with the most dramatic story, which shows the gravity of the problem and complete indifference of power with regards to public rights to referenda. This story started in Lviv oblast' and lasted for three years.

In December 2007 residents of the villages Murovane and Soroky Lvivske, located in Lviv suburbs, decided at their general meeting to call a local referendum on early termination of village head term of office and village council dissolution. Another agenda issue was the prohibition of village land expropriation. Village head refused to register the task-force. On December 28 2007 the task force appealed this decision in court. The trial lasted for 7 months . Only on July 23, 2008 the raion court obliged the village head to register the task-force and issue an appropriate registration certificate.

⁹⁰ Orobets': Legitimizing local referenda will empower citizens and balance power structure — Lesya Horobets' official site — June 11, 2010 — <http://orobets.org.ua/ukr/politika/orobets-unormuvannya-mistsevih-referendumiv-dodast-gromadyanam-vladi-a-vladi-balansu-6>

⁹¹ Local referenda in Ukraine: theoretical and legal aspects: round table materials — Kiev, 2009 — p. 6.

The village head appealed the local court's decision in Lviv administrative court of appeals. Nine months later, on April 2, 2009 Lviv administrative court of appeals passed the ruling in favor of the earlier court decision. Four months later, on August 31, 2009 Pustomyty raion department of justice submitted a motion to Pustomyty raion court on filing a criminal law-suit against the said village council head on the strength of article 382 of the Criminal Code of Ukraine (failure to execute the court's decision). Task force also filed the claim with the prosecutor's office. The prosecutor's office rejected the claim, as no petition from the state executive body, concerning the violations of article 382 of the Criminal Code of Ukraine was received by the office. The task force waited for the prosecutor's office decision for several months.⁹²

Therefore, despite the fact that the group had complied with all the requirements and met all the court procedures, it could never exercise its right to the local referendum.

We can argue that local referenda as the expression of direct democracy at the local level is now one of the risk zones due to substantial number of human rights' violations in this area. In fact, there is no control over the adherence to this public right to direct democracy.

5. CONCLUSIONS

Years 2009–2010 became crucial in the context of adherence to electoral rights of the public. With deteriorating social and economic crisis, voters' disappointment in the electoral institutes, change of power, the situation with regards to rights and freedoms seriously deteriorated in the course of elections.

The judiciary branch of power refused to take into consideration international recommendations concerning amendments to election law. The changes are introduced behind the scenes, without open public hearings. The law-makers are driven exclusively by political expediency in reforming election legislation.

The isolated facts of political corruption, use of law enforcement agencies to support certain political forces during election campaign, transformed, after the presidential elections, into common practice of using administrative, law enforcement and judicial resources for the benefit of the ruling political forces.

In late 2010 we witnesses dramatic restrictions in election process subjects' rights, suppression of freedom of speech, violation of fundamental electoral rights of our citizens.

6. RECOMMENDATIONS

We have to conclude that the prevalent majority of recommendations from previous years have been disregarded by the authorities. That's why, taking into account the experience of election campaigns of 2009–2010 we maintain that current legislation on elections and referenda does not comply with the internationally accepted standards, failing to meet the needs of elections' organizers, election process subjects or voters, and became a source of voters' rights violations.

The practice of discretionary passing of new election laws on the eve of the coming voting, on the basis of political expediency and tactical advantages for the ruling majority is unacceptable.

That's why the nearest task at hand is broad public discussion on all the disputable issues around the past election campaigns, summarizing the experience and adopting the election code, which would bring isolated and controversial election laws to uniformity.

⁹² Murovane and Soroky communities (Lviv oblast') defend their right to referendum Yurist NGO site <http://www.lawngo.net/index.php?itemid=1372>

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It is important to involve not only politicians, but also the election process subjects, scholars and NGO specialists into drafting of the election code.

The election process norms, proposed for the election code, should be realistic. Combination of unrealistic legal provisions with incompetence of election committees' members, who failed to implement these provisions, resulted in serious violations of electoral rights.

Establishing different dates, with some time between them, for different types of elections is a positive development, which should be strengthened at legislative level.

Restricting local observers' rights is an error. They should be reinstated in their rights. An efficient public control is a reliable safeguard against violations of electoral rights.

Mechanism of appeals against violations of electoral rights needs further improvement. The election committees and courts should be forbidden to remand the complaints to election process subjects on technical grounds, if the essence of the matter is clear from the submitted claim.

The law-makers should devise an appropriate mechanism for supplying information on election campaign and voting results. This information should be available for all.

The restrictions imposed on mass media should be banned. Instead of serving exclusively as a campaigning instrument and showcase for political advertising, media should organize public dialogue, guide open public discussions and debates, involving election process subjects, cover socially significant topics.

The concept of "election break" should be strictly defined. The restriction of campaigning before election campaign is launched should be banned, as it is used as reprisal means. Campaigning on the voting day and on its eve, though, should remain forbidden.

CEC should be composed of professionals, selected for their competence and not for political affiliations. Thus it shall be a really independent body in charge of organizing electoral process, and not a hostage of political intrigue.

Circuit and district election committees should include professionals with relevant certification. Time frame for setting up an election committee should be sufficient for careful selection of its members. The term assigned for the preparation to voting should be prolonged. Election committees' members' wages should be significantly increased.

A pool of election committees' professionals should be set up.

Current voting and vote-counting procedures are falsification-proof. However the workload of committees' members exceeds physical capacities of an average human. So, it is expedient to consider the possibility of centralized vote-counting in the circuit election committees. The district election committees shall just ensure the due voting process, while the counting shall be done by qualified specialists, monitored by the election process subjects, public and mass media. Another option would be establishing work shifts for the election committees' members.

Improvements in the State registry of voters are a positive phenomenon. It should be amended further. Besides, it is very important that the voters, who, for whatever reason, were not included into the lists, have an opportunity to exercise their constitutional right to vote on the strength of a court's decision.

Due attention should be paid to the law enforcement agencies' operation. Militia is not an election committees' private guard or dutiful servant. It should be aware of the voters' rights and respect all the subjects of the electoral process.

The laws on referenda should be passed in the nearest future. All the referenda-related issues should be regulated by the law and not depend on the current political environment.

XIV. PROPERTY RIGHTS¹

1. OVERVIEW

The right to peaceful possession of one's own property is defined in the Convention for the Protection of Human Rights and Fundamental Freedoms is of extreme importance creating backgrounds for authentic economic freedom of every person and is also important for the development of the nation aiming at building European state.

The right is of vital importance for the state protection of rights in a period, when every accession to power of a new political force is accompanied with a redistribution of property in the state. Under deficient system of property rights registration and weak legal protection for property rights it results in legal ambiguity and uncertainty concerning the state capability to ensure stable property rights. Consequently it may lead to social tension in the state and undermine the system of state management.

Unfortunately again it is needed to stress that the condition of respecting these rights in Ukraine remains on a low level. Last two years did not become a breakthrough in the area, and the measures taken by the state were unable to considerably improve the situation.

Also need mentioning problems caused by the absence of unique and effective system of property right registration in Ukraine. In fact today none of owners may be sure of stability of his rights. Existing system does not provide sufficient property rights guarantee yet.

The reliable system of property rights protection is not created as well. Court rulings concerning property collection are not fulfilled in many cases and the problem of long-lasting court rulings non-fulfillment and lacking the means of legal protection from its non fulfillment is widely spread and complex. To date certain reforms in legislation and administrative practice to solve the problem remain not carried out.

Also there are considerable difficulties in corporate rights protection and property rights in construction segment, making barriers for business development in Ukraine favoring to decrease of country competitiveness. Also it happens because of valid moratorium on redemption of lands for agricultural use and absence of the required legislation for operation on the market. As a result on one hand there is the impossibility for the peasants to enjoy their property right, on the other hand — various shadow schemes exist and develop to buy the required land for a song.

Within the context of provision by the state of a right for peaceful possession of one's property the adoption of the Law of Ukraine "Law on Alienation of Land Plots and Other Objects of Immovable Property for the Social Needs and on the Grounds of Social Necessity" should be mentioned. The law includes considerable drawbacks both regarding the definitions and legal regulation of the relations and, taking into consideration these drawbacks, may become a substantial threat to rights of owners.

¹ Prepared by M. Scherbatiuk, UHHRU.

Provided these and many other problems it is necessary to emphasize the general need for reforms in area of securing property rights. These measures require time fast decision making and high quality decisions at the same. It is, in turn, impossible without the systemic approach to the issue by all branches of power, the necessity for certain consensus in the society in order to elaborate and implement reforms in the field.

2. SAFEGUARDS OF PROPERTY RIGHTS

2.1. STATE REGISTRATION OF THE RIGHT TO REAL ESTATE

An important guarantee to secure right for peaceful possession of one's property is the establishment of such a system for real estate rights registration that would become a reliable and efficient mechanism to protect property rights.

In spite of actions by the state for these two years Ukraine is still far enough from reaching the aim.

According to the evaluation by the Minister of Economy only 5 to 10% of property in Ukraine (depending on calculation methods), is formalized by duly legal documents.

As the Minister says, the rest of property may be fully considered as "sub-property". As far as the amount of rights and economic opportunities for those, whose property is not formalized or under-formalized is considerably reduced, and the certainty of property inviolability is absent per se.²

Precisely the "phenomenon of sub-property" determines unique peculiarities of political and economic landscape in our state. Business brutally interferes in politics aiming at control over state law enforcement bodies to have opportunity to protect its own "sub-property" and to seize the "sub-property" of the competitors.

This problem is the biggest obstacle for growth of Ukrainian economy. Acquiring property in Ukraine is a complicated and risky process resulting at the best in a right for person to use the acquired asset for only a certain time, unless somebody stronger and more influential keeps his eye onto it. Honest owners are under constant threat of becoming victims of corporate raids and in reality their right for property is a mere illusion.

Numerous cases of legal documents theft from state bodies confirm the complicated situation. It is necessary to remind of robbery of Obukhiv District Division of the Center of State Land Register (DZK) near Kyiv. Also we remember disappearance in January 2008 of land documents from the archive of Brovary District State Administration. And, at the end of March, 2010 in the center of Kyiv an SUV was stolen containing the privatization documents in the capital for 2006–2010.

Thefts of land documentation made nervous the owners of land lots. There are backgrounds for disturbance — there had been cases when different people were issued two or even three state property right acts for the same land lot. Or it could happen, that land borders passed through already build-up territory of the neighbors. Nevertheless the risk to lose property as a result of documents theft or fraud is only a top of iceberg of problems existing in Ukraine in area of property rights registration.

It is needed to mention that in real estate an absurd situation is observed. In Ukraine multiple bodies are involved in real estate registration. Acts on land property rights are issued by the Center of the State Land Register (DZK), subject to the State Committee of Land Resources.

And the registration of property rights for houses and flats located on that land is issued by Technical Inventory Bureaus (BTI), — municipal enterprises subject to local powers.

An important part of the information is possessed also by the Ministry of Justice holding the register of real estate property rights (part of the BTI contribute to the registry) and the mortgage

² Operation "Formalization", V. Tsushko. // Internet media "Ukrainska Pravda" <http://www.pravda.com.ua/articles/2010/03/30/4898698/>

register. Access to information regarding to property owners is limited and the information itself may be incomplete and non precise.

Limits of the land plots are not defined even on the level of local government units, not mentioning agricultural lands or near-house territories in cities. Often the land belongs to one person and buildings on that land — to another. As far as legally that issue is not regulated, the first are in conflict for years with the second and vice versa, either in courts or by means of physical confrontation.

Another “sub-property” phenomenon is connected to flats in multi-apartment buildings. A person may use a flat or even dispose of it but he/she is not a full co-owner of his/her multi-apartment building because proper mechanisms of interaction and resolution of conflicts between the neighbors are absent.

Problems in state system of real estate property rights registration are confirmed with the fact that in the rating “Doing Business 2010” concerning convenience of property rights registration Ukraine is on 141st place (among 182 states). Thus in Ukraine to re-register real estate property rights 10 procedures should be passed, spending 93 days and 2, 6% of property value. Instead for example in neighboring Belarus there are only 3 procedures, five times less time is spent to complete them and the cost of the agreement preparation is 0%.³

To date in the state the old-fashioned and non efficient Act System is valid. That is the state is only involved in the registration of the juristic act. During the registration the state registration body does not take a decision on legality and/or validity of the juristic act and, in fact, does not hold any responsibility in front of honest acquirers that remain unprotected from the swindlers.

As a result in Ukraine approximately a third part of references to the courts and law enforcement bodies works on conflicts concerning legality or validity of juristic acts.

Thus all this state machinery operates in vain — to solve conflicts that a priori should not emerge.

In this context it is very important to work in order to create real estate property rights registration system based upon “one stop principle”. The subject of the system registration should become the right of property, or rather all rights, pledges and limitations related to determined object. The record on all possible rights and duties concerning the object in public register certifies its availability and guarantees them.

It is needed to stress here that the publicity of the register is crucial. If you have property rights for certain object, these rights are guaranteed by the state and acknowledged by the society.

In order to achieve transparency in the process it is necessary to introduce the unified and automatic system of title state rights registration. Besides, it is necessary to create the mechanism of electronic data exchange between the bodies involved in rights registration, organs (organizations), carrying out state account and technical inventory of real estate objects, tax authorities.

Also it is important that the state would become a guarantee of accuracy for rights and pledges registration and in case of inflicting losses resulting from incorrect title records would compensate them from the special fund.

Certain activity in this direction is carried out by the state. According to experts related to the Ministry of Economy of Ukraine, the Law on Creation of Open Public Register and Property Rights Register should be implemented already in IV quarter of 2010.⁴

Ideas of reforms in area of property rights registration were available in acting legislation too. In particular, in May, 2009 the law № 1066-VI “On Making Amendments to Certain Legislative Acts of Ukraine Concerning Documents Certifying the Right to the Land Plot and the Order of Sharing and Joining the Land Plots” came into force simplifying the land title transfer.

In February, 2010 the Verkhovna Rada of Ukraine adopted the Law of Ukraine “On Making Amendments to the Law of Ukraine “On State Registration of Property Rights for Real Estate and

³ I have a right. K. Kravchuk. Ukrainian business weekly “Kontrakty” / № 17 dated May 06, 2010 <http://kontrakty.com.ua/show/ukr/article/12310/17201012310.html>

⁴ Ibid.

Their Limitations”, in accordance with which the Ministry of Justice of Ukraine must create unified Ukrainian register of real estate property rights — both to land and to houses.

But the law coming into force was postponed by people’s deputies. It should come into force only on January 1, 2012.

Also, according to the Resolution of the Cabinet of Ministers of Ukraine № 646, dated July 28, 2010 interagency task force on coordination of measures for creation of state system of real estate property rights registration was created.

Already in 2003 the World Bank granted to Ukraine a loan of \$195, 13 million for issuing state land acts and unified register creation. But work in this direction is very slow. To the end of 2009 the state used only \$25 million out of the credit. And half of the amount issued was rejected by Ukraine. As far back as in 2008 the Cabinet of Ministers of Ukraine did not manage to decide what state body would take care of the creation of such united land register. There was a struggle for this task between State Committee for the Land Resources and Ministry of Justice of Ukraine. It is necessary to stress that in the end of 2009 the World Bank representative Gavin Aldington stated that under existing rhythm finishing of work will be postponed to 2014–2015.

Proceeding from the aforesaid it is possible to state that the problems existing in real estate property rights registration also remained in 2009–2010. Although it is necessary to mention attempts by the state to improve the situation in the field, but for some improvement it is required to apply all the effort in order to overcome the resistance of numerous clerks and create transparent system of real estate property rights registration. Many businessmen and other people not willing to loose their assets are interested in property protection. At the same time there are those for whom it is beneficial to preserve further semi-legal redistribution of property.

2.2. SAFEGUARDING OWNERSHIP OF CORPORATE RIGHTS

As in previous years it is needed to mention serious problems in state guarantees for proper property rights protection both for physical bodies and juridical persons, producing direct influence on competitive strength of the entire nation. In particular, international economic organizations define this serious problem in Ukraine every year. As an example it is possible to cite data of Global Competitiveness Report prepared by World Economic Forum for 2010–2011 again providing Ukraine with the worst positions among 139 countries included to the document.

Thus Ukraine occupied 135th place in the rating of protection of property rights, 134th place concerning courts independence and 138th in legislation effectiveness.⁵

An important role in improvement of corporate property right protection was given to the adopted in 2008 Law of Ukraine “On Joint-Stock Companies”, changing considerably “rules of the game” in joint-stock field. By many experts the changes were related to more reliable legal protection of stock-holders and joint-stock companies against corporate raids.

The law determined that two years from its adoption date were in fact the period of transition, when the joint-stock companies had to bring in correspondence with it their organization structures and make the required amendments to statutory documents. The end of April, 2011 is a certain moment of truth for the market participants.

At the same time the transition period showed rather considerable problems in law application. In particular it turned out that it did not provide full protection from unlawful joint-stock companies and/or stock holders property seizures, known as “corporate raids”.

The law contains many positive regulations that could provide additional protection for joint stock companies and/or stockholders, but due to its imperfection these regulations do not provide such protection to the full.

⁵ (Global Competitiveness Report) for 2010–2011 <http://www.weforum.org/documents/GCR10/index.html>

One of the new and key regulations of the Law should have become regulations on the order of important juristic act conclusion⁶ and also of the juristic act, where there are interests involved.

Respective regulations are aimed at protection of joint stock companies from the removal of assets to men of a straw and protecting stockholders from their shares depreciation resulting from such activities. Thus, according to Article 70 of the Law, a decision on important juristic act conclusion is taken by the supervisory board if the market value of the assets or services being its subject (according to the last yearly joint stock company financial report) consists of 10 to 25% of the assets value.

If the market value of the assets or services is more than 25% of the joint stock company assets value, the decision on conclusion of such a juristic act is taken on a general meeting of stockholders, registered for the participation in the meeting and possessing shares voting on the issue.

If the market value of the assets or services being subject of the juristic act consist of 50 and more per cent of the joint stock company asset value, the decision is taken by three fourth of votes of stockholders out of their general amount. It is forbidden to divide the subject of the juristic act with the aim of avoiding the order of decision making on important juristic act conclusion provided by the Law.⁷

At the same time the Law of Ukraine “On Joint Stock Companies” does not determine how should the stockholders act if an important juristic act is concluded in general without its discussion on the meeting of stockholders. Most probably such juristic act should be (and must be) acknowledged as invalid, as one concluded against the Law requirements. But the issue is who would lodge the respective suit.

Ukrainian legislation, in particular the Law of Ukraine “On Joint Stock Companies” does not provide directly such rights for the stockholders (participants). As a rule, courts deny to stock holders in satisfying respective suits proceeding from the absence of the indicated rights. In this sense rather unpleasant is an explication of the Resolution of Plenum of Supreme Court of Ukraine dated October 24, 2008, № 13 “On Practice of Court Trials on Corporate Disputes”.

In clause 51 of the Resolution, the Plenum indicates that the Law does not provide a stockholder (participant) of the economic company with a right to lodge a suit on protection of rights or protected by the state interests of the company beyond the relations of representation; on this background Commercial Courts should deny to the stockholders (participants) of the economic company in satisfying a pledge on conclusion, modification, termination or acknowledgement as invalid of the agreements and other juristic acts, concluded by economic company.

In practice courts tend to apply the clause of the Resolution of Plenum of the Supreme Court of Ukraine depriving the stockholder of an opportunity to protect value of his shares, being depreciated as a result of deliberate property removal from a joint stock company. Thereafter having attempted to protect the stockholders and/or joint stock companies from the illegal property removal, the Law did not provide ways to implement such a protection.

One more potentially dangerous moment is the fact that in Article 50 the Law of Ukraine “On Joint Stock Companies” provides right to appeal the decisions of stockholders meetings in court in case the decision of general meeting or the order of taking the decision violate regulations of the Law, other legislative acts, statute or clause on general meeting of the joint-stock company. Besides there is a short appeal term established — 3 months (before, general limitation of action terms had been applied once for three years). On one hand establishing such a short appeal term the law-makers tried to protect joint stock companies from unfair appeals resulting in long term interruption of joint stock companies’ activity. On the other hand, taking into consideration complica-

⁶ Important Juristic Act (укр. значний правочин). — According to the Law of Ukraine “On Joint Stock Companies” — “The important juristic act — is a juristic act (except for juristic act of proper stock floatation by the company) performed by the joint stock company if market value of property (works, services) consisting its subject is 10 and more per cent of company assets value according to the last yearly financial report”.

⁷ Current issues of the implementation of the Law of Ukraine “On Joint Stock Companies” in context of counteraction to corporate raids activity <http://www.justinian.com.ua/article.php?id=3285>

tions present in the Law concerning information about the meeting, the stockholders simply will not be able to know on time about such a meeting that may be “advantageous” for raiders.

Also dangerous is the restriction in Article 50 of the Law; in compliance with this restriction the court has a right, considering all the circumstances of the case, to leave valid the decision appealed, if the violations allowed are not related to legal rights of a stockholder making an appeal. The reduced terms for restriction of action mentioned and last restriction concerning violation of stockholder rights in future may considerably reduce rights of stockholders for judicial protection from corporate raid seizures.

Unlike the Law of Ukraine “On Economic Companies” the Law of Ukraine “On Joint Stock Companies” makes an attempt to regulate the issue of priority right of private joint stock company and the company itself for purchasing shares of the company offered by its owner for sale to a third party. According to the Part 2, Article 7 of the Law of Ukraine “On Joint Stock Companies” such a “priority right” is provided not by the Law, but by the company statute. In case if statute provides such a priority right, it is fulfilled in compliance with Parts 6–7, Article 7 of the Law of Ukraine “On Joint Stock Companies”.

At the same time in the form, indicated “priority right” is guaranteed in the Law, in fact it does not protect the stock holders from the unwanted “companions”, making the shares circulation much more difficult. The way of judicial protection for the priority right chosen by law-makers is unsuccessful. According to Clause 5, Article 7 of the Law of Ukraine “On Joint Stock Companies” in case of violation of priority right for shares purchase indicated in the article any stockholder of the company and/or the company itself (if the statute provides priority right for purchase of shares by the company) has a right during three months from the moment of stockholder or the company got to know or had to know on such a violation, to demand in court rights and duties of shares the buyer transferred to them. It is necessary to state that very often the transference of rights and duties of shares buyer to other persons is a way of corporate raid seizure regarding property rights to shares. Applying analogy of Article 362 of the Civil Code of Ukraine previous owners had certain guarantees, in particular concerning the requirement of depositing by the plaintiff the value of purchase-sale object to the court. In this redaction of the Law of Ukraine “On Joint Stock Companies” such a requirement is absent, providing a danger of property withdrawal without compensation. Besides, it is not clear, why do law-makers allow transference of rights and duties for one stockholder (the plaintiff) and to what extent will the rights of other stockholders be taken into consideration.⁸

In such a way the Law of Ukraine “On Joint Stock Companies” having made certain steps in direction of joint stock companies protection from corporate raid seizures left unsolved several problems and did not exclude future critical corporate disputes. So, the practical application of the Law will depend rather much on how attentively will the stockholders elaborate and adopt a company statute and also on law enforcement practice.

Available problems in protection of property rights and non-transparency of privatization processes in Ukraine are confirmed by numerous corporate conflicts taking place in Ukraine. In particular, the conflict around Arcelor Mittal, the owner of one of biggest enterprises in Ukraine — “Kryvorizhstal” should be named. In this case the General Prosecutor’s Office initiated the trial on fulfillment by the owner of the investment liabilities. It was perceived by Arcelor Mittal as an attempt for enterprise reprivatization.⁹ Although later on as a result of international pressure in this particular case the General Prosecutor’s Office revoked its claim, such situations confirm weak level of owner’s property rights protection in Ukraine depending more not on strictly defined legal clauses but on the fact what political force is at power today.

⁸ Current issues of implementation of the Law of Ukraine “On Joint Stock Companies” in a context of counteraction to corporate raids activity <http://www.justinian.com.ua/article.php?id=3285>

⁹ ArcelorMittal: “situation around the enterprise in Kryvyi Rih — a bad signal to all the investors” <http://www.dw-world.de/dw/article/0,,6078690,00.html>

Another example of weak property rights protection in Ukraine is a conflict between Illichivsk port and stevedore company “Ukrtranskonteiner”. In 2009 Illichivsk port canceled an agreement with private enterprise “Ukrtranskonteiner” on common activity, considering it to be leonine and non efficient. The agreement was concluded in 2005 for 30 year term. The lawsuit on canceling the agreement was started in interests of the state. It was submitted by the prosecutor’s office together with the port and the Ministry for Transportation and Communication. Economic Court of Odessa region satisfied the demands of plaintiffs: cancelled the agreement on common activity. Later, the Higher Economic Court of Ukraine (HECU) renewed the action of the agreement. But the Higher Court of Ukraine (HCU) annulled the ruling by HECU and left in force resolution of the first instance court.

The peculiarity of the situation is that investor was driven out from the moorings but the investment remains not returned. Illichivsk port, acquiring the management over container terminal continues using property of “Ukrtranskonteiner” (modern container transfer machines, other mooring equipment) and earning money with it.¹⁰

Private company “Ukrtranskonteiner” exhausted all the ways of its rights protection within the country and in April 2010 went to the European Court of Human Rights with the declaration against Ukraine on property right violation.

Similar problems with property rights protection occurred with other stevedore company “Agro-class” operating in Berdyansk Sea Trade Port. In this case there was an attempt of corporate raid seizure of the company by a private structure being one of the company stockholders.¹¹

Drawbacks of the legislation and in many cases its plain non-fulfillment lead to violation of owners’ rights at transference of companies’ property belonging to the state. Here it is possible to mention a conflict of 2010 related to Kyiv company “Kyivmiskbud”¹², where part of shares belonging to the territorial community of Kyiv-city first were given to a private company and than were turned back to state property.

These and many other conflicts appearing in connection with the absence of precise and efficient system of property rights registration and also weak owner’s rights protection demonstrate considerable problems in the field. Efficiency of Ukrainian economy and its investment attractiveness depend on resolution of these problems.

On December 22, 2010 the Parliament adopted the Law “On Making Amendments to the “Law on Joint Stock Companies” obliging the stockholders owning minor amount of shares to sell their shares to a big stockholder or joint stockholders group owning in sum more than 95% company shares.

According to the Constitution of Ukraine the forced alienation of objects of private property right is allowed only as an exception, because of social need, on grounds and in order established by the law and under condition of prior and full compensation of its value. And in this law we have identification of corporate interests concerning concentration of 100% of shares by one stockholder with the social need, which is unacceptable. Actually the amendments to the Law mentioned violate articles 13, 22 and 41 of the Constitution of Ukraine. Obviously big business aims at concentrating all the property of enterprises and in a way at preventing minor stockholder from protecting his/her property.

The state, declaring its support to middle class, acts in a way leading to its elimination, increasing already big gap between the rich and the poor already existing in Ukraine.

¹⁰ Illichivsk port against “Ukrtranskonteiner” losses are incurred by the state // Dzerkalo tyzhnia № 36 (816) October 2–8, 2010 <http://www.dt.ua/2000/2245/70490/>

¹¹ Forced partnership. In spite of the Higher Economic Court rulings a partner is holding under arrest the property of the model stevedore company of Ukraine // Dzerkalo tyzhnia № 36 (816) October 2–8, 2010 <http://www.dt.ua/2000/2245/70501/>

¹² “Kyivmiskbud”: everything was stolen before (for) us // Dzerkalo tyzhnia № 36 (816) October 2–8, 2010 <http://www.dt.ua/2000/2060/70492/>

2.3. NON-ENFORCEMENT OF COURT RULINGS PROTECTING PROPERTY RIGHTS

Non-enforcement of rulings by national courts in part of property levy protecting the property remains one of the most acute problems in providing the right for peaceful possession of one's property.

According to the Minister of Justice of Ukraine O. Lavrynovych, for the years of independence there formed the arrears of Ukraine on court rulings implementation concerning human rights violations in the dimension of 130 billion of UAH and, as he says, the arrears grow every day and will continue growing if there is no mechanism for solution of the problem will be found.¹³

The problem was pointed out for many times by both international and Ukrainian organizations. Thus on October 15, 2009 the European Court of Human Rights for the first time applied the procedure of "pilot judgment" against Ukraine in case of Yuriy Ivanov. The court underlined the problem of constant non-enforcement of court rulings established already in more than 300 rulings of the Court against Ukraine. In particular the first case dealing with impossibility to obtain payments of judgment, related to the finishing military service was solved by the Court as far back as in 2004 (*Voytenko against Ukraine*).

The case of Yuriy Nikolaevich Ivanov raising the same issues "demonstrated that the problem of long-term non-enforcement of court rulings that had come into legal force and the absence of efficient national ways of protection remained unsolved within the Ukrainian legal system, in spite of understandable decisional practice, appealing to the Government to carry out necessary measures to solve these issues".

The systematic character of problems in the field is also confirmed by the fact that only in the beginning of 2010 in the Court about 1400 declarations against Ukraine dealing fully or partially with such problems wait for consideration. And the amount of such declarations is continuously growing.

Whereas mentioned above the Court came to conclusion that facts of non enforcement of national court rulings are not related to separate cases or particular events of the case, but result to be consequence of defects in regulatory and administrative practice of state power bodies concerning fulfillment of national court rulings they are responsible for. Respectively, the situation in the field is defined by the Court as resulting from practice non compliant with regulations of the Convention on Human Rights Protection and Fundamental Freedoms.

It became one of the main backgrounds for the Court to apply regarding to Ukraine the "Pilot Judgment" procedure. Within the judgment the Court obliged the Government during a year after the date when the judgment would acquire definite, to introduce efficient way of protection or the combination of such ways capable to provide adequate and sufficient compensation in case of non-fulfillment or delay in fulfillment of national court rulings.

Case of Yuriy Nikolaevich Ivanov against Ukraine (application № 40450/04)

In October 2010, the applicant dismissed from the Armed Forces of Ukraine. He had a right for dismissal pay at retiring and pecuniary compensation for the material property not received, but these sums were not paid to him at dismissal. In July 2001 the applicant lodged a civil suit with a military court of Cherkassy garrison against military unit A-1575 demanding paying out the arrears mentioned. On August 22, 2001 the court satisfied his suit to the full and obliged the military unit to pay the applicant a compensation for non received material property.

The executive procedure on court ruling dated August 22, 2001 was opened on August 24, 2002. During the procedure the bailiffs informed the applicant that although bank accounts of the debtor had been arrested, there were no funds available on the accounts. In the letter dated November 12, 2002 the Ministry of Defense informed the applicant that

¹³ Ukraine already owes to the victims of human rights violations 130 billion. http://www.hreuc.com/ukr/news/news_349.html

action of legal provisions providing his right for pecuniary compensation for military uniform was stopped and that in budget there were no funds provided for these payments.

By the letter dated April 06, 2004 the Bailiff's Service informed the applicant that military unit A-0680 had no funds to pay out to the applicant arrears according to the decision from August 22, 2001. Also they indicated that forced sale of property belonging to military units is forbidden by the law. In fact they acknowledged the impossibility to enforce court ruling.

Being not agree with such arguments the applicant addressed the European Court of Human Rights and on January 15, 2010 the Court issued a ruling in favor of the applicant, but the most important is that the Court applied the procedure of pilot judgment regarding to Ukraine in the case.

It was declared that structural problems indicated by the Court in this case were wide scale and complex. Judging from information available they require carrying out comprehensive measures, possibly of legislative and administrative character, attracting different national bodies.

The Court favorably stated that issues on implementing measures to overcome structural problems of long-lasting non enforcement of rulings and absence of national juristic protection means had already been considered in detail by the Committee of Ministers in cooperation with authorities in Ukraine. But the analysis of the conclusions the Court came to in the case and other similar cases against Ukraine together with other corresponding materials available to the Court confirm that the state — defendant demonstrated almost complete lack of will to solve the problems mentioned.

At that the Court declared that it was necessary to introduce urgently defined legislation and administrative practice reforms in order to bring them in compliance with Court conclusions in this ruling and with the requirements of Article 46 of the Convention. The Court left it to the Committee of Ministers to determine which way of overcoming the problems mentioned would be the adequate one and to indicate one or another general measure to take by the state-defendant.

In any case the state defendant must urgently — no later than in one year from the date the decision becomes final, — introduce within the national legal system corresponding measure of juristic protection or a complex of such measures and provide theoretical and practical correspondence of these measures to key criteria established by the Court in its practice, indicated in the ruling. Besides, Ukrainian authorities should properly take into account the recommendations by the Committee of Ministers concerning states-participants of the Agreement, on improvement of national legal protection measures.

This problem is also acknowledged by the supreme state bodies of Ukraine. In particular, the Cabinet of Ministers of Ukraine approved the resolution № 222-p, dated February 11, 2010 affirming the plan of primary measures to eliminate systemic defects resulting in non-enforcement of rulings by national courts.

But it is necessary to mention that in fact all the measures provided by the resolution had not been implemented by the state.

According to the Resolution in 2010 it was planned in the Draft Bill "On State Budget of Ukraine for 2010" to provide funds, required for payment of compensation in compliance with the "pilot judgment" of the European Court of Human Rights in the case *Yuriy Nikolaevich Ivanov against Ukraine*.

At the same time in the Law of Ukraine "On State Budget of Ukraine for 2010 (dated 27.04.2010 № 2154-VI) adopted by the Verkhovna Rada of Ukraine the expenses indicated above were not considered.

In particular it is indicated by departments of the Ministry of Labor and Social Policy, stressing on the fact that in budget, approved for 2010, expenses for enforcement of court rulings, where the defendant is the state represented by the ministry are not provided. Besides, the ministry stressed on need to provide additional funds for the enforcement of court rulings issued in favor of citizens

while making amendments to the Law of Ukraine “On State Budget of Ukraine for 2010”, but the amendments had not been approved.

Also, according to the Resolution of the Cabinet of Ministers of Ukraine it was determined the necessity to provide maintenance in Verkhovna Rada for the Draft Bills “On Making Amendments to Certain Laws of Ukraine on Limitation of Moratorium Action for Forced Sale of Debtor’s Property”, “On Making Amendments to Certain Legislative Acts of Ukraine concerning Protection of Pre-Trial Proceeding, Legal Investigation by Court Body of Executive Proceeding in Fair Term” before their adoption. At the same time draft bills submitted in 2009 on March 11, 2010 were revoked by the new Cabinet of Ministers of Ukraine.

Also it was planned that the Cabinet of Ministers of Ukraine had to elaborate and submit before March 2010 draft bills on the order of enforcement for the rulings of national courts, where the state is the defendant, state authorities, state institutions and organizations, bodies of local self-government and enterprises subject to the Law of Ukraine “On Introducing Moratorium for Forced Sale of Property” and also draft bills on protection of creditors’ rights in time of liquidation of state and communal enterprises and other enterprises subject to the Law of Ukraine “On Introducing Moratorium for Forced Sale of Property”.

Unfortunately to date there are no such draft bills yet, also there is no such an important special law for Ukraine concerning compensations in case of crime. The Civil Code of Ukraine requires such a law. According to the Article 1177 of the Code the property damage caused to the property of physical person as a result of crime is indemnified by the state if there is no person having committed a crime established or if a person involved is insolvent. Conditions and the order of property damage compensation caused to property of physical person — victim of crime is defined by the law. But once there is no such Law, than the damage caused by criminal actions of insolvent employees of the state and other persons is not indemnified.

In the same way there are several moratoriums existing to date. In particular there are moratoriums on forced sale of property for state companies, companies of fuel and energy complex, pipeline transportation, companies of Ukrudrom (Ukrainian Ore Industry), shipbuilding sector.

At the same time European Court of Human Rights in multiple cases against Ukraine related to non enforcement of national court rulings on payment of wages, compensations related to loss of health, other labor payments stated that infringement by Ukraine of its commitments to the right for fair trial and right for peaceful enjoying once property is related to existing corresponding moratoria.

The problem is acknowledged by state authorities too. Minister of Justice of Ukraine Oleksandr Lavrynovych declares the necessity to solve the issue of moratorium for property sale not allowing to bodies of State Bailiff Service to enforce the court ruling only because the state has a 25% share of company property.¹⁴ In spite of all this there are no changes for the best on the issue. As it was mentioned above, the draft bill “On Making Amendments to Certain Laws of Ukraine on Limitation of Moratorium for Forced Sale of Debtor’s Property”, submitted by the Cabinet of Ministers of Ukraine was later revoked by it. As before part of companies remain in privileged condition in comparison to companies of other sectors.

It is necessary to stress that laws on establishing moratoria are non-constitutional. Granting any privileges to certain owners or introducing privileged economical activity modes infringes directly Article 13 of Constitution of Ukraine.

Another reason for non enforcement of national court rulings is imperfection of liquidation procedure for the companies and their acknowledgement as bankrupts. It is connected to the fact that in many cases liquidation procedures related to companies, institutions and organizations in fact make it impossible to collect wages, social payments, damage to property and moral damage arrears from the defendant by court ruling.

¹⁴ Ukraine already owes to the victims of human rights violations 130 billion http://www.hreuc.com/ukr/news/news_349.html

In the middle of 2007 the draft bill №1105 was submitted to the Verkhovna Rada of Ukraine dated December 04, 2007 “On Making Amendments to the Law of Ukraine “On Renewal of Solvency of the Debtor or its Declaration a Bankrupt” (on the sequence of satisfaction of the demands at arrears in wages)”, aimed at resolution of the problem.

But the draft bill was several times sent by the Verkhovna Rada of Ukraine for improvement. As a result of its consideration in second repeated reading the draft bill was voted down. Thus the problem remains unsolved and keeps on causing the non enforcement of rulings by national courts.

2.4. SAFEGUARDING THE PROPERTY RIGHTS OF INVESTORS IN THE AREA OF CONSTRUCTION

From the fall of 2008 Ukrainian economy following the world economy experienced financial crisis. Due to lack of liquidity the banks stopped to credit both construction developers and potential investors wishing to purchase real estate on primary market.

As a result large amount of people who had invested their funds in order to receive the dreamed square meters spent all their savings and for long years put themselves into dependence becoming bank debtors.

For sure the function of control over the fulfillment of rights of investors and fair risk distribution between the participants of the investment process in competitive environment should be performed by the state. But, to our regret, we have to ascertain that the state, declaring its assistance and control in area of construction in reality withdrew itself from the resolution of this global problem. Even more, some state authorities by their inactivity and sometimes by their actions take sides and “cover” unfair developers, leaving investors face to face with their problems.

As a rule the situation around the construction stopped is as follows. The company-developer having obtained the rights for the land plot to carry out construction and having invested small compared to cost of the object amount of money in siting and project (often only in its draft), starts to attract funds either by “direct sale of apartments” or by receiving line of credit for construction of the object.

In case of “direct sale of apartments” investors who contribute funds acquire property rights defined by the mechanism of such funds attraction (right to demand from the developer). At the same time developer’s duty to return the amount of credit received also as a rule is envisaged by means of mortgaging property rights of the developer for the apartments mortgaged.

Thus in connection with obtaining funds from the third parties the developer acquires certain liabilities and in fact submits part of his rights to the object to third parties — the creditors.

The following scheme on construction market is widely applied: the first building is finished at the expense of funds, attracted for the construction of second house; the second is finished at the expense of funds for the third and so on.

Under such construction conditions often there is a situation when the developer does not have possibility to continue financing the construction of the object and the construction is stopped. It becomes impossible for the developer to attract funds by means of “direct sale of apartments” or by obtaining credits under conditions acceptable for him. Investors, anxious about non fulfillment of developer’s liabilities start to appear; they are in panic and ask the developer to give them back funds received from them.

Suits to the court appear demanding to return funds also follow arrests of property and funds on accounts of the developer. Declarations to law enforcement bodies appear (sometimes criminal files are initiated, documents are withdrawn), panic spreads among the investors.

Signing agreements with developer companies, investors in most cases planned immediately after the indicated term of building commission to repair apartments and live there. Instead of it today as a result of developers’ actions attracting private investors funds and violated terms of building commissions, they are obliged to pay out credits to the banks for the apartments non received, to pay rent and to bear considerable losses.

Today the investors who had invested in residential construction do not acquire property rights for the object of investments; it results in fraudulent actions by owners of construction companies. It is the situation when objects are not commissioned, investors can not own them, neither dispose of it and at the same time developers illegally own, dispose of and use funds of private investors.

In this connection several loud construction scandals took place last years in Ukraine. Among them there are conflicts around group of companies “Elita-Tsentr”, “Agrobudpererobka” company, “Kyivvysotbud” company, “Smarteh Systems” company and the other. According to law enforcement bodies total amount of funds received from the investors by swindlers only in “Elita-tsentr” consist of about 400 million UAH.

As we can see the amount of situations similar to the one described increases every day, resulting in multiple investors’ property rights violations, growth of social tension among the population, extends distrust to authorities.

To date there are many examples of attempt to solve and cover problems that appeared recently in residential construction field.

In such a way the Verkhovna Rada of Ukraine created Interim Inquiry Panel on clarification of circumstances for establishing high prices of housing in the city of Kyiv, other cities of Ukraine and also on non fulfillment of their commitments on residential construction investment agreements by the developers. The Commission was commended to clear up the reasons for non fulfillment of liabilities, for inactivity of the authorities of the executive bodies and local self government bodies resulting in such consequences. Based upon the results the Commission had to submit for consideration by Verkhovna Rada of Ukraine proposals on improvement of the Legislation of Ukraine in order to create efficient mechanism regulating relations on housing market, fulfillment by the developers their commitments regarding agreements on residential construction investment, mechanism of the protection for investors’ interests. But the Commission existed for only half a year, than its work was stopped by Verkhovna Rada of Ukraine. Probably, from the point of view of people’s deputies everything is fine in construction field and Commission’s work is not necessary anymore.

On December, 2008 the Law of Ukraine “On Preventing of World Financial Crisis Negative Impact on Construction Sector Development and Housing Construction” was adopted, aimed at overcoming of crisis phenomenon in construction sector and regulation of legal relations related to housing construction. The Law was adopted in order to stabilize construction field, increase purchasing capacity of the population, implementation of housing rights for citizens requiring state assistance, stipulation of the development of construction and interfacing sectors under world financial crisis conditions.

But there are rather contradictory evaluations as regard to the Law effectiveness. Thus, in opinion of many authors, in connection with crisis aggravation the Law today is applied more by the developers to avoid accountability to investors and local government. In their opinion the initiators from construction lobby that “promoted” the anti-crisis law had their aim to deprive developers from any responsibility for the funds collected when the construction is not finished. As a result construction companies in spite of their liabilities on housing construction may not be accountable to those whose money they had taken. Thus, in Clause 4, Article 3 of the Law it is said directly that until January 1st, 2012 physical and juridical bodies can not break the agreements with construction organizations, even if those fail to meet the obligations. The prohibition is not extended only on construction projects of the objects, where term of the commission is postponed for more than 18 months. In other words unfair founders of construction companies are given 18 months to withdraw funds from the project to bring the developer to bankruptcy.¹⁵

Many examples of infringements private investors’ rights in construction may be cited. For example a conflict situation appeared between the investors of the house № 2 on Khmelnytsky str. in the town of Bucha, Kiev Region and “Kyivmiskbud” holding company. More than a year passed

¹⁵ Position of the Association on conditions of rights protection regarding investors to residential construction in Ukraine. <http://investhelp.com.ua/poziciya-asociaci%D1%97-shhodo-stanu-zaxistu-prav-investoriv-v-zhitlove-budivnictvo-ukra%D1%97ni/>

since the date of the official moving in date for the residents, but the house is not commissioned yet. According to residents, the funds for the construction were collected fully 18 months ago but it is not finished yet. “Kyivmiskbud” uses a crisis as a cover, but the building has no relation to the crisis because the planned commission date was May 31, 2008. “Kyivmiskbud” officials keep on promising “to do everything in two weeks”. These two weeks last already for a year. “Entire volumes of declarations were written including ones to the President of Ukraine, to core ministries and to other controlling bodies. But the situation has not changed” investors claim, adding that 250 families remained on the street.

Here there is another example. In the beginning of March 2009 a group of investors of multi-apartment buildings “Troyeshinski Lypky” in connection with their property rights infringement started permanent rally and hunger strike near Secretariat of the President.

In the city of Donetsk another construction fraud takes a turn for the worse. The investors can not divide the apartments, and the developer company disappeared. People who had invested in aspired square meters cherished a hope to move into new house as far back as in 2007. The house on Polotska Street has not been commissioned yet, and in proper house erect four people pretend on each apartment. It turned out to be that “Dontechlisprom” Ltd —the contractor company guaranteeing house to investors, sold every apartment two times to different people. In such a way almost all the apartments in the new building today have several owners. Also, as soon it was found out by the investors of the house, the third pretender for apartments appeared — the bank. The house had to be commissioned in second quarter of 2007. Investors filed a declaration to the prosecutor’s office to initiate criminal file on the fact of fraudulent scheme of the apartment’s sale.

It is necessary to state that today people who became victims of developers’ actions in fact remain alone with their problems. State authorities that should occupy with their rights protection more often protect interests of the developers and not of investors.

Actually until the present day several measures aimed a struggle with these problems offered by the President V. Yuschenko¹⁶ as far back as in 2008 remain not implemented.

They include:

- improvement in the norms of current legislation regulating urban construction work, for example, the creation of mechanisms by which a specific investment project for potential construction is put to auction or tender. Only those economic players who have the relevant financial, technical and production capacity for its implementation would be able to bid to be chosen as builder or subcontractor;
- envisaging in legislation mechanisms for ensuring enforcement of the contractual conditions for the construction of a multi-apartment building via mortgage of the land site granted in ownership or use to the builder, or guarantees from solvent members of the market;
- ensuring proper monitoring in the construction area, increasing liability of the local authorities though the obligation to keep a register of investment contracts and agreements on construction of multi-apartment buildings;
- introduction of registers for builders and building objects where private investors are involved;
- mandatory reporting by construction companies and investment funds on money obtained from individuals during the implementation of the construction or assembly work;
- carrying out a thorough analysis of money obtained in the regions from members of the public for the construction of housing and observance by builders (developers) and investment funds of the conditions of their agreements;
- where circumstances arise to institute bankruptcy proceedings against a builder, only procedure for readjustment of a debtor should be applied, for example, through the participation of individual investors or local authorities;

¹⁶ “Yuschenko embarrassed Tymoshenko with construction frauds”// “Glavred” Internet Media. <http://ua.glavred.info/archive/2008/03/03/131529-6.html>

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- prohibition of advertising and announcements about the sale of flats by builders (developers) before building permits have been obtained;
- creation of proper conditions for carrying out effective public control over developers and investment funds.

2.5. PUNISHMENT OF THOSE INFRINGING PROPERTY RIGHTS

It should be mentioned that recently in Ukraine increased the amount of crimes aimed against property rights. Thus, according to the First Deputy Minister of Internal Affairs Serhiy Popkov, there has been growth of one third of crimes registered, increase of criminal cases amount occurred in all the regions of the country. It has happened because of 2,5 times growth of thefts registered.¹⁷

In order to react on these circumstances the Ministry of Internal Affairs together with General Prosecutor's Office prepared proposals on elevating the limit of damage caused resulting in criminal liability for theft of property belonging to others.¹⁸ Later also it was coordinated the norm of bringing to criminal liability for property theft regardless amount of stolen if the theft had been committed in a socially dangerous way.¹⁹

It should be mentioned that in June, 2009 the Verkhovna Rada decreased the minimal value of property stolen resulting in criminal liability from 907,50 UAH to 60,5 UAH.

The Verkhovna Rada established that the theft is considered minor if the value of property stolen does not exceed 0, 2 exemption limits (60,5 UAH). Such thefts result in administrative liability and the theft of property its value exceeding the sum mentioned results in criminal liability.

In such a way on one hand theft classification as criminal offence brings to imposing enormous fines on persons who commit it. These persons most probably will not be able to pay it out because most often a person steals due to lack of money, so he/she will be imprisoned. And the state will have to spend considerable amount out of state funds for custody of a person who had stolen for example 100 UAH and also for maintaining of prisons because they will be overcrowded with such delinquents. It may improve statistics on disclosure of minor thefts but it will not be able to change the situation radically.

At the same time on the other hand considerable elevation of limit for criminal liability regarding property theft may result in further growth of minor crimes against property rights, as far as administrative responsibility does not stop the delinquents. And this in turn will result in considerable decrease in securing property rights.

In compliance with the international standards every offender must obtain proportional punishment. Usually in democratic countries criminal offences are divided into two or three groups depending on social danger. In our legislation a concept of administrative offence is applied. There is a notion of "criminal misdemeanor". Introduction of criminal misdemeanor and its separation from criminal offence is one of elements in reform of criminal justice. Then, definitely, minor theft becomes criminal misdemeanor. But there is a big difference for the person convicted. The responsibility for criminal misdemeanor does not lead to deprivation of liberty. In our system only administrative and criminal offences exist. If the first does not stop the offenders, a crime as socially dangerous action provides either very big fines or deprivation of liberty.

World experience proves that in order to decrease minor thefts it is more efficient to increase level of wages and pensions, decrease unemployment and not to introduce higher level of legal responsibility.

¹⁷ Ministry of Internal Affairs: results of internal affairs bodies work for the first half-year. http://www.kmu.gov.ua/control/uk/publish/article?art_id=243524810&cat_id=35884

¹⁸ Ibid.

¹⁹ At Medvedko's they declared that Mass media interpreted wrongly position related to minor <http://news.liga.net/news/N1020596.html>

3. ACTIVITY OF THE AUTHORITIES IN RESTRICTING PROPERTY RIGHTS

3.1. PURCHASE OF PRIVATELY OWNED LAND FOR PUBLIC NEEDS

The problem of privately owned land plots purchase for social needs remains valid in relation to limitation of property rights.

Especially pressing the problem became in connection with the adoption on November 17, 2009 by the Verkhovna Rada of Ukraine the Law of Ukraine “On Alienation of Land Plots and Other Objects of Immovable Property for the Social Needs and on the Grounds of Social Necessity”.

The author of the legislative initiative was former Prime-Minister of Ukraine Yulia Tymoshenko. In general it is necessary to acknowledge the need for legislative definition of legal, organization and financial backgrounds for these relations regulation. The Document was submitted to the Parliament on January 30, 2009. It was adopted as a background in the Parliament on March 18 and was fully adopted on June 25. But the norm of the Law does not guarantee the constitutional principle of right for private property inviolability.

That is why on July 24 the President offered to vote down the draft bill as such “not providing at resolution of the issues included the real protection of private owner property right, observation of constitutional guarantees for right to private property”.

Nevertheless on November 17 presidential veto was overcome on the second attempt and 326 votes.

Ukrainian Helsinki Human Rights Union stood against the adoption of the Law in its present redaction. Undoubtedly social needs should dominate over individual needs, in particular in land field. But there is an impression in regard to the Law that it secures not social need domination over private interests but rather domination of private interest over somebody's property rights.

The Law determines social need as “conditioned by all-state interests or interests of territorial community. The exclusive need allowing forced alienation of a land plot, other real estate objects located on it...” And the social want — is “conditioned by all-state interests or interests of territorial community want in land plots including those with real estate objects located, the redemption of those is carried out in the order established by the law”.

The difference is that in the case of social need your property may be withdrawn in forced way through corresponding judgment of the court, also mentioned in the Law. And the social want provides owners agreement with his property buy-out.

Social want is considered by the Law as need for land plot to build roads, oil and gas pipelines, transmission lines, transportation facilities, state parks, nursery schools, sports grounds, stadiums, etc. the list does not include definite types of objects for those a land may be alienated.

List of the objects presenting a social need in a considerable way duplicates the previous one. In particular it mentions: objects of national security and defense; line objects, transport and energy infrastructural objects and objects required for their maintenance; objects related to mining operations of state importance; objects of nature reserves fund; cemeteries.

And now let's model a situation. Let's say there is a land plot in rural area in favorable location or in a picturesque place. And somebody having money and influence (physical or juridical person) has an idea to obtain the land plot. There is no need to deal with the owner on land sale for a market price (and it is not obvious that the owner wants to sell it because of his/her subjective motives). The next step of the influential raider will be a visit to village council where, for certain motivation the deputies will raise an issue of social need — to locate on your land an object for example of nature reserve fund. There is no doubt of positive decision. The next step — you will be offered to give the land on your own free will for the price determined by the expert, appointed by the same village council. If you resist, the court will interfere issuing a ruling on forced confiscation of the land plot and determining the amount of financial or material compensation for the property alienated. Besides, market principles in the issue of compensation for the property lost are not mentioned at all.

After all, local authorities become the owner of the land mentioned. And further nothing impedes to change the destination of the land plot say for construction and submit it to corresponding hands.

Besides, the law does not divide strictly social need and want. For example if the authorities did not agree with the owner the buy-out price of real estate withdrawn for the social need, than, on one hand the law declares that the real estate remains with owner and on the other hand it gives the right to the authority to prove in the court that there is a social need for the real estate object mentioned, following the forced buy-out.

Everything mentioned also gives backgrounds for the conclusion on the possibility of application of the scheme of buy-out (forced alienation) for social wants (in connection with social needs) from private owner for the most attractive land plots, other real estate for further transfer of such property to other persons, creating the background for abuse while buy-out (forced alienation) of land plots from private owners.

Obviously the model mentioned is rather conditional and real alienation ways “for a song” will be much more sophisticated. As an argument the fact may be mentioned that, despite the direct and exhaustive prohibition of agricultural land market circulation, agricultural land has been already sold for a long time on a black market.

The Law mentioned offers gives rather wide powers both to the court (administrative branch of judicial power) in the issue of redistribution of property rights on land plot, definition of its value, and to municipal powers in the issue of forced alienation of property.

It is obvious that the law is raw and ambiguity of its terms and conditions provides wide opportunities for different legal maneuvers and ambiguous interpretations. It is improbable that the law-makers and more than 300 deputies who voted to overcome veto failed to notice those.²⁰

The Ministry of Justice of Ukraine also mentioned considerable problems of the Law. Thus, Deputy Minister of Justice Valeria Lutkovska at the end of 2009 declared that the Law on Forced Alienation of Land for Social Needs had to be sent to the Constitutional Court of Ukraine as one containing disputable issues.

“I think that there will be an address to the Constitutional Court anyway... I agree that the definition “social need” is not present in the legislation today” — Lutkovska declared. Also she added: “The Law will remain dead until the time when the explanation of what it is will appear in the legislation. The explanation must be very precise not to violate human rights” .²¹

The same is declared by practicing lawyers who say that the Law may become a considerable threat to guarantees of property rights in Ukraine.²²

3.2. MORATORIUM ON THE SALE OF AGRICULTURAL LAND

In 2009–2010 the state did not manage to adopt corresponding laws on state register, on land market, on management of state property lands, on national infrastructure of geo-spatial data and the other. These are extremely important legislative acts for implementation of owners’ property rights on land plots.

Instead of it on January 19, 2010 the Verkhovna Rada of Ukraine again prolonged the moratorium on sale of agricultural land. At this time the moratorium was prolonged until January 1, 2012 having overcome the veto by the President of Ukraine Viktor Yushenko. Besides, in November 2009 the Verkhovna Rada of Ukraine did not support the improved draft bill “On State Land Register” with the proposals of the President of Ukraine.

²⁰ “Social need” will easily deprive anyone of his private property” // Dzerkalo Tyzhnia № 48 (776) 12–18 December, 2009 <http://www.dt.ua/2000/2675/68014/>

²¹ The Law on forced alienation of the land for social needs will be appealed against in the Constitutional Court of Ukraine — Ministry of Justice. http://www.rbc.ua/ukr/newsline/show/zakon_o_prinuditelnom_otchuzhdenii_zemli_dlya_obshchestvennyh_potrebnostey_budet_obzhalovan_v_ksu_minyst_03122009

²² The land may be withdrawn !? <http://ukr-advokat.org.ua/?p=1022#more-1022>

Despite the assurance from the President of Ukraine V.F. Yanukovych²³, and his team²⁴ of the desire to create transparent land market as soon as possible, necessary laws are not adopted yet. Although in the program of economical reforms presented by Yanukovych in June, 2010 it was planned to introduce free agricultural land market before the end of 2012.

Although some steps in the field are made (there is a discussion regarding necessary draft bills on the level of ministries, projects and programs of reforms are being prepared in the field)²⁵, but they had not changed the situation for the better yet.

3.3. NON-RETURN OF DEPOSITS

As it is known the resolution by the National Bank of Ukraine “On Additional measures on banking activities” dated October 11, 2008 № 319 prohibited early termination of fixed deposit agreements and early return of deposits, provoking mass indignation of the citizens, as far as the resolution mentioned contradicted to common sense and to norms of the Civil Code of Ukraine. In particular it violated the right of person to receive his or her deposit from the bank on first request, which is inviolable and provided by Part 2, Article 1060 of the Code mentioned.

Under pressure of criticism the National Bank of Ukraine soon issued a resolution “«On particular issues of banking activities” dated December 04, 2008, № 413, annulling to the full the resolution № 319. It seemed that finally one could retrieve deposit from a bank. But the good news turned out to be premature, because in new resolution also there was a prohibition of early termination of deposit agreements and payments. It was proved by citation in the paragraph 5, clause 2 of the document mentioned: “...Apply all the necessary measures to provide positive dynamics the deposits amount (first of all in national currency of Ukraine) in order not to allow early return of funds allocated by the depositors”.

In such a way the National Bank of Ukraine shifted all the responsibility for deposits no return on banks, having mentioned in Clause 5, Resolution № 413, that the Direction of Banking Regulation and Control of the National Bank of Ukraine had to establish control over fulfillment by the banks of Clause 2 of the Document and if required to take prompt action to banks — violators.

Ukrainian Helsinki Human Rights Union at that time was in charge of several cases concerning protection of rights of owners in order to return their deposits. And in many cases of those result positive for the dilatants was reached. In particular in the case of citizen B. where the applicant was not returned the deposit from the commercial bank OJSC “Ukrzazbank”. The bank in the case rejected from breaking the agreement and returning the amount of the deposit and corresponding interest, having sent on December 12, 2008 the written answer, founding its rejection by the Resolution of the National Bank of Ukraine № 413 dated December 04, 2008 “On particular issues of banking activities” and also by the letter of the National Bank of Ukraine № 22-310/946-17250 dated December 06, 2008. The applicant did not agree with that and filed a suit to the court on protection of her property rights. With the assistance of Ukrainian Helsinki Human Rights Union²⁶ she was returned the deposit and the interest related. But, unfortunately, it was not possible in the case to acknowledge as illegal the clauses of the Resolution of the National Bank of Ukraine allowing banks not to return deposits.

Rather soon in connection with “consolidation of certain positive tendencies related to renewal of depositors’ trust to the banking system”, the National Bank of Ukraine with its resolution dated May 12, 2009 № 282 annulled clauses 2 and 5 of the Resolution № 413, raising in fact the moratorium on early return of the deposits and allowing clients of financial organizations to demand return of the deposits regardless its term of return.

²³ The Law on land market is prepared by the fall. <http://www.epravda.com.ua/news/2010/06/25/239756/>

²⁴ Akimova stands for early termination of moratorium on agricultural land sale. <http://ukranews.com/uk/news/economics/2010/07/23/23386>

²⁵ State Committee for Land: Before the end of the year it is necessary to adopt five laws on land market. <http://news.bigmir.net/business/313388/>

²⁶ The case was supported by the Strategic Litigation Fund of the UHHRU.

At the same time there remained a problem with return of the deposits in banks where temporary administration had been introduced. According to the Law of Ukraine “On Banks and Banking Activity” in case of serious threat to the solvency of a bank the National Bank of Ukraine has a right to assign the temporary administration, that is part of introducing the moratorium on meeting the demands of the creditors (the depositors). The Law of Ukraine “On Making Amendments to Certain Legal Acts on Special Measures for Financial Sanitation of the Banks” № 1617-VI reduced the term of the moratorium from six to three months, but allowed to the Regulator to prolong its action in banks where the temporary administration was working at the time of the Law approval.

From January, 2009 the National Bank of Ukraine introduced temporary administration in several big banks (“Nadra”, “Ukrprombank”, “Rodovid”, “Volodymyrsky”, “Dialog-bank”, “Imprombank” and the other). For the first quarter of 2009 thousands of depositors could not return their deposits, although term of their agreements already was over. As a rule bank officials explained that temporary administrations declared moratoriums on return of deposits, that is deferment of payment under liabilities of the Bank as regard to clients was applied.

It should be said that introduction of the moratorium as regarding the demands of creditors (depositors) by the temporary administration does not provide a bank with a right not to pay the deposits.

The National Bank of Ukraine in its letter № 44-020/1357-2796 dated February 02, 2009 stressed that in Article 2 of the Law of Ukraine “On Banks and Banking Activity” it is determined that moratorium is — suspension by the bank to fulfill property liabilities and liabilities related to payment of taxes and fees (compulsory payments), subject to fulfill prior the introduction of the moratorium and suspension of the measures aimed at provision of these liabilities and liabilities related to payment of taxes and fees (compulsory payments), applied prior the decision on introduction of the moratorium.

According to Article 85 of the Law mentioned the moratorium does not apply to current operations performed by the temporary administrator, neither to the claim for payment of wages, alimonies, reimbursement of damage caused to life and health of citizens, royalties and satisfying claims of creditors related to the bank liabilities during the introduction of the temporary administration. Apart it is necessary to stress that the Article of the Law states directly that moratorium does not apply to the claims, related to payment of wages. At the same time neither term of the claim, related to payments, nor creditor’s person are defined.

Taking into consideration all mentioned above the National Bank of Ukraine declared that claims related to the deposit agreements, ending after the introduction of the temporary administration do not apply to the moratorium and must be satisfied by the banks in terms defined by the agreements. At the same time it was mentioned that failure to meet the demands with a term after the introduction of temporary administration by the banks, may be caused only due to lack of funds on bank’s correspondent account. At the same time all the declarations related to return of the deposits, ending after the introduction of the temporary administration should be registered and satisfied upon the availability of funds in the order of queue.

It should be mentioned that to date several problem banks still do not return deposits expired, others pay out the deposits limiting the money give out, transfer the deposit to debit card account explaining it with a lack of funds and in fact continue in such a way to enjoy other’s property.²⁷

4. RECOMMENDATIONS

1. Create a transparent and efficient system of State registration for real estate property rights;
2. Improve safeguards of the ownership rights of land shares, create mechanisms for combating forced seizure of this land, pass legislative acts to regulate the fundamental aspects of the functioning of the land market;

²⁷ “Sick banks non returning deposits and blocking cards” <http://news.finance.ua/ua/~2/0/all/2010/04/30/195483>

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3. Carry out reform of the Bailiffs' Service to ensure unfailing fulfillment of all its functions, including judicial control over enforcement of court rulings, and also lift the moratorium on compulsory sale of property from State enterprises to retrieve money owed. Also carry out other measures to implement "Pilot Judgment" by the European Court of Human Rights in case "Yuriy Nikolaevich Ivanov against Ukraine".
4. Contribute to the transparency of residential construction and also provide protection for rights of investors in the field.
5. Improve legal regulation of privatization processes and joint stock companies operation in order not to allow illegal seizure of companies and organizations in Ukraine and emerging corporate conflicts in privatization process and post-privatization activity.
6. Carry out regulation for the problem of land and housing withdrawal because of social need in strict correspondence with the Constitution and international commitments taken by Ukraine.
7. Provide efficient mechanism of property rights protection in "problem" banks where the temporary administration is introduced.

XV. SOCIO-ECONOMIC RIGHTS¹

1. OVERVIEW

International Covenant on Economic, Social and Cultural Rights provides that the ideal of free human beings may only be achieved if conditions are created whereby everyone may enjoy his/her economic, social and cultural rights, as well as his/her civil and political rights.

Unfortunately, Ukraine is still far enough from the conditions under which everyone could implement their socio-economic rights in full. European standards in the field of socio-economic rights provision remain inaccessible for Ukraine so far.

Over the last two years living standards of the majority of people in Ukraine have decreased. There are many reasons for it, in particular, real income reduction for the population, rise in prices and rates on food, likewise transportation and housing and utilities services. And although the State has taken some measures to overcome these phenomena, they were unsystematic and ineffective.

Thus, the improvement by the State of subsidy system for housing and utilities aimed at socially vulnerable groups of population has not become yet an efficient response to a considerable growth of rates in this sector due to a number of formal, as well as subjective reasons.

There remains a problem with inadequacy of subsistence minimum set below minimal requirements for survival of a human being. Up to date, this index, fundamental for the whole social security system is being calculated on the basis of consumer basket of goods (list of food, goods and services) approved back in 2000.

In Ukraine there is still in use such an index as “a guaranteed level of subsistence minimum” which contradicts Ukrainian legislation and illegally restricts the level of social assistance payments. The use of this “surrogate” index reflects the State’s inability to implement basic social standards and ensure the increase of living standards for the population.

The right to adequate housing is not realized at a proper level, since the state has not been able to provide housing for the most vulnerable groups of people for many years. Nowadays there are above 1,3 million people waiting in the housing queue who have illusory chances to ever get a flat.

Social security system is ineffective in Ukraine, in particular, due to a declarative character of many benefits established by the legislation, lack of a system in its establishment and also in many cases of their full budget financing. It is also worth noting the absence of division between legal norms establishing social guarantees and legal norms granting privileges. As a result, there is an actual impossibility to carry out efficient state regulation in this field.

Reforming of the pension system has been one of the most urgent aspects of safeguarding social security for the elderly people for many years. Certain activity is carried out constantly in this field but, unfortunately, up to date it has not found implementation in specific measures aimed at making

¹ Prepared by Maxim Shcherbatyuk, UHHRU.

indispensable legal and organization changes. In particular, implementation of a contribution rate to the mandatory funded pillar within a multi-pillar pension system has been delayed once again.

2. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

2.1. SAFEGUARDING THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Global financial and economic crisis, together with domestic political and legal discrepancies, economic collapse, price growth have caused a decline in living standards of the Ukrainian citizens.

It is obvious that poverty is not an exclusively Ukrainian issue but is global in nature (from figures of the international experts, about quarter of all population of the planet eke out a miserable existence). But poverty in Ukraine is characterized by the following peculiarities:

- low living standards of the population in general;
- excessive social and property differentiation;
- poverty widespread amid working population;
- high share of people who regard themselves as poor.

In recent years there have been elaborated and implemented certain measures to overcome and prevent poverty among the population. It is proved by a range of legal documents adopted by the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine. One of them is the long-term (until 2010) Poverty Reduction Strategy (approved by the Decree of the President of Ukraine dated August 15, 2001 p. № 637) determining principal directions of politics of struggle against poverty by means of:

- creation of economic and legal conditions for raising household incomes;
- enhanced economic activity of working citizens;
- enhanced efficiency of social assistance by reforming the social security system.²

The analysis of data on assessment of poverty rates in Ukraine, carried out by the National Security and Defense Council of Ukraine in order to follow the implementation of Poverty Reduction Strategy and other measures against poverty taken in 2001–2009 proves that there remains a range of unsolved issues. Quantitative indexes of poverty monitoring prove that Ukraine belongs to a group of countries with consistently high level of poverty. Thus, as of 2008 the level of poverty in Ukraine was 27,0 %, that is 11,0 % more than in the EU countries (10,0–16,0 %). The poverty severity index increased by 0,3 % in 2008 and was 23,4 %. The President of Ukraine, Victor Yanukovich, also said that Poverty Reduction Strategy was not being implemented in 2009–2010.³

High rates of poverty in Ukraine are accompanied by increase of regional discrepancies in this socio-economic phenomenon as proved by the ILO surveys. Thus, the level of poverty is 38% in the Lviv region⁴ and it is also high in Crimea.⁵

The issue of poverty of the Ukrainian population acquires even more severity under financial and economic crisis which has had a considerable impact on social and economic conditions in Ukraine. Economic issues inevitably lead to wage reductions, rise in wage arrears and in a number

² Syvak A.D. “Realities and perspectives to overcome poverty in Ukraine//*Center for Perspective Social Research* http://cpsr.org.ua/index.php?option=com_content&view=article&id=108:2010-06-24-05-27-39&catid=26:2010-06-13-21-43-34&Itemid=31

³ Yanukovich: The observance of human rights in Ukraine will improve in one or two years <http://ey2010ukraine.wordpress.com/2010/10/22/presidentasks/#more-358>

⁴ “Deficit of well-beng”. The problem of poverty in Ukraine <http://www.radiosvoboda.org/content/article/1330751.html>

⁵ “Deficit of well-beng”. The problem of poverty in Ukraine <http://www.radiosvoboda.org/content/article/1330751.html>

of feeders due to the fired and unemployed that all results into household incomes reduction and increased share of the poor.

It is further supported by the figures from a survey conducted by the Razumkov Center, according to which 83,2% of Ukrainians believe they have been affected by the economic crisis. Only 13,2% of the respondents said they were not affected by the crisis and 3,6% could not answer this question.

According to the same survey, the principal manifestation of the crisis has become price and rates rise. Its impact was experienced by 82,3% of responders. 53,9% of the polled stated their incomes reduction, 52,5% became less confident in the future, 47,3% ascertained deterioration in the quality of food which their family can afford, 21,4% claimed wage or pension arrears⁶

All the above mentioned proves actuality and severity of the poverty issue, the Decree of the President of Ukraine “On Urgent Measures to Overcome Poverty” № 274/2010 dated February 26, 2010 is an official recognition of it.

To implement this Decree, the Draft Law of Ukraine “On Adoption of the State *Poverty Reduction and Prevention Program 2010–2015* in Ukraine” has been elaborated.

Among goals of this Program are the following: to develop a system of measures aimed at poverty reduction, overcoming chronic poverty, poverty among those who work and among households with children, in particular, with many children.

Among the principal trends of the Program are revival and stipulation of the economic growth. Main tasks set for this trend are the following: to implement new mechanisms for production revival; encourage economic growth and social progress; create conditions for provision of the consistent development of industries. These aspects are crucial for solving the issue of poverty, since it is possible to exert an effective impact on poverty only on the basis of economic growth.

At the same time it should be noted that general economic growth will not result automatically in poverty reduction as it was proved by discrepancies between growth of the Ukrainian economy and dynamics of basic poverty indexes during previous years. As experience of other countries has demonstrated, no one manages to solve the poverty issue without appropriate measures and reforms in the field of distribution relations, without well-founded politics in social and labor sectors.

In order to resolve the issue of poverty in Ukraine, it is necessary to develop a system of integrated, scientifically based approaches which should take into consideration poverty's profile, specificity and particularities of its origins and expansion⁷.

According to many experts, the main problem is not even the amount of the poor. Last public poll by the Ukrainian Center for Economic and Political Studies named after O. Razumkov shows that over half of the respondents relate themselves to a middle class by income level and 31% called themselves poor.⁸ The key problem is the widening gap between the rich and the poor.

It is obviously almost impossible to find out real sizes of salaries and bonuses of our high-level officials or executives of domestic companies and banks. According to the controversial data which appear in the media from time to time, one can make only an indirect analysis. Besides, amounts of bribes taken not exclusively by the officials cannot be calculated even approximately. However, almost nobody argues today that there isn't such a gap.

And regarding the gap between the rich and the poor, one can remember the events of 2005. Then, according to the resolution of the Cabinet of Ministers of Ukraine, rates of work remuneration for high-level officials and regular employees of public institutions instantly increased almost tenfold. Since that time ministers earn almost 15 thousand UAH with different charges and fees. The rate of work remuneration for the Prime Minister and President has exceeded 20 thousand

⁶ Survey: Above 30% of Ukrainians barely make both ends meet <http://tsn.ua/groshi/opituvannya-bilshe-30-ukrayintsiv-ledve-zvodit-kintsi-z-kintsyami.html>

⁷ Syvak A.D. “Realities and perspectives to overcome poverty in Ukraine//Center for *Perspective Social Research* http://cpsr.org.ua/index.php?option=com_content&view=article&id=108:2010-06-24-05-27-39&catid=26:2010-06-13-21-43-34&Itemid=31

⁸ “Deficit of well-beng”. The problem of poverty in Ukraine <http://www.radiosvoboda.org/content/article/1330751.html>

UAH. People's deputies earn about the same. And it is without taking into consideration allowances of many thousands, annual as well, as retiring payouts⁹

It is while basic social standards and norms such as subsistence minimum, minimum wage and minimum pension do not meet European standards. According to the regulations of the European Social Charter (revised), minimum wage is to be no less than 2,5 out of subsistence minimum. Obviously, people do not have it in Ukraine.

At the same time, the fact that at last, in 2010 the size of minimum wage in Ukraine was set equal to the size of subsistence minimum should be considered among the state's achievements.

However, this fundamental index set by the State for the whole social security system is calculated on the basis of basket of goods standards (list of food, goods and services) approved yet in 2000. But in accordance with Article 3 of the Law of Ukraine "On Living Wage", minimum set of food and non-food products and services necessary for an individual is determined not less than once per 5 years.

The need to determine a renewed set is also envisaged in the Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Action Plan to Implement Poverty Reduction Strategy in 2009" dated February 18, 2009 № 192-p. But up to date the situation has not changed and as a result there is an illusion of growth in social standards which pretend growing but indeed do not provide a minimum, necessary for survival.

The Cabinet of Ministers of Ukraine has not abandoned the term "a guaranteed level of subsistence minimum" which contradicting the Constitution of Ukraine, the Law of Ukraine "On State Social Standards and Social Guarantees" and illegally restricting the level of social assistance. The use of this "surrogate" index reflects the State's inability to implement basic social standards and ensure the increase in living standards of the population.

2.2. THE QUALITY AND SAFETY OF FOOD ITEMS

It should be mentioned that the current system of state control over safety of food items in Ukraine does not correspond to the European and international practice in general, in particular, to the World Trade Organization requirements. There is no clear organizational structure at the national level (due to duplication of controlling authority functions), fragmented and inconsistent legislation. The efficient and comprehensive system for tracking products has not been created in Ukraine yet and the system of safety regulation of food items does not guarantee high health indexes of Ukrainian citizens.

As an example, one can take the situation with monitoring for the presence of antibiotics in food products. According to food safety expert from the IFC Ukraine Food Safety Project, Yuriy Zvazhenko, nowadays there are two valid documents which regulate the content of antibiotics in products of animal origin: "The Medical and Biological Requirements and Sanitary Norms of Quality of Raw Food Materials and Food Products" and "Minimum list of raw materials, products of animal and plant origin, mixed feeds and component raw, vitamin medicine, etc. subject to mandatory inspection". The first is used by State Sanitary and Epidemiological Service, the second — by the State Committee of Veterinary Medicine. But these "dogmas of the law" are morally outdated: the first document was approved yet in the USSR and the second indeed duplicates the first one.

Nowadays Ukrainian legislation defines 5 antibiotics (penicillin, streptomycin, tetracycline, grizin, zinc bacitracin) its content is being inspected, although the number of such medicines in Europe exceeds 20.

Though, the chemical industry is developing. "Nowadays producers can use antibiotics of new generations, not regulated in the indicated documents, consequently, they cannot be controlled efficiently", underscored Y. Zvazhenko.

⁹ The rich and the poor: world experience <http://project.ukrinform.ua/news/14814/>

Concerning bringing Ukrainian standards in line with European ones, according to the IFC Senior Legal Analyst, Kateryna Onul, the harmonization process of national legislation on food safety is slow. The integrated approach “from field to table” has not been implemented in Ukraine yet ... “The efficiency of producer’s self-control system raises doubts due to a lack of clearly defined responsibility for producing dangerous products”, states K. Onul.¹⁰

The problem with safety and quality of food items has been also recognized by public authorities. In particular, the First Deputy Head of the Administration of President, Iryna Akimova, informed that Ukrainian legislation on technical regulation, products safety and certification would be considerably improved soon.

According to her, an appropriate package of bills has already been prepared by the Committee on Economic Reforms. Akimova specified that three bills are planned, in particular, the bill on general products safety describing how the products safety inspection would be made. According to Akimova, it includes criteria of inspection and rules for application of these criteria, extent of safety information and mode of access to it.

The second bill — “On Market Surveillance and Border Control of Imported Goods Entering Ukraine” — also will regulate products safety control without reinforcing administrative obstacles for business.

The third bill deals with amendments to the laws on standardization and mandatory certification. It is planned to divide the technical regulation system and the system of State regulation and safety control of products, mainly food items¹¹

At the same time, none of these bills has been submitted to the Verkhovna Rada of Ukraine.

As regards using GMO (genetically modified organisms) in food, on December 17, 2009 Verkhovna Rada of Ukraine introduced an obligatory marking of food items for GMO content having adopted correspondent amendments to the Law of Ukraine “On Quality and Safety of Food Products and Food Raw Materials”.

The adopted law bans circulation of food items where the label does not contain any information on GMO content or its absence. Thus, a product label must display an inscription “with GMO” or “without GMO” appropriately. Before that the Verkhovna Rada of Ukraine had introduced a penalty of 10–50 non-taxable minimum incomes of citizens for false information concerning GMO content in food items. According to the Resolution of the Cabinet of Ministers of Ukraine dated July 1, 2009 the content level of genetically modified organisms in food items obligatory for marking was risen from 0,1% to 0,9%.

At the same time, experts consider an absurd the decision of obligatory “with GMO” or “without GMO” marking of absolutely all products, even those which cannot contain these components in the main, such as mineral water, beer and other products without proteins.

Ukraine is the first European country which has introduced “without GMO” marking as obligatory. In the EU such a label is a kind of privilege and only some manufactures, which have passed a specified certification, have the right to mark their packages with this label. It means a very high level of raw materials and factories control. There is no such a thing in Ukraine. In our country this label has just become a marketing strategy for some companies.

The introduction of additional GMO analyses caused a rise in products price — producers passed corresponding expenses on to consumers. However, the nutrition has not become more comprehensible for Ukrainians. Food items whose labels would indicate transgenic content often cannot be found on the shelves. Producers might not seek to exhibit such information. Apparently the law does not function if one has an impression that all our products are without GMO. But indeed it is not so. According to Director of scientific-research center for products testing of SE “Ukrmetrteststandard”, Semenovych Volodymyr, genetically modified organisms were detected in 101 out of 154 tested

¹⁰ ATTENTION, food! Our “strength” is in antibiotics... <http://economics.unian.net/ukr/detail/43450>

¹¹ Akimova promises three bills on products safety <http://www.epravda.com.ua/news/2010/04/29/234286/>

food products. They tested confectionary, sausages, biological active additives, food mixtures, etc. Genetically modified soy was detected even in flour and powdered milk.¹²

2.3. ENSURING PROPER QUALITY OF WATER

The issue of drinking water provision is one of the crucial issues in ensuring the right to appropriate living standard. Experts in this field state that there is a serious problem with quality of drinking water supply. Its solution belongs to the sector of public administration^{13,14} — modernization of water supply infrastructure, rate policy and adherence to the criteria of quality of water supplied to the population are to be done.

In Ukraine there is an adopted law on drinking water based on the State Program “Drinking water of Ukraine” but it is not being observed. By quality of water sources Ukraine has occupied last positions among European countries due to a lack of appropriate quality control of basins, water intakes and irredeemably outdated water supply networks. Not only in the European countries and USA, but also in Russia the question of quality of water supply is ranged among primary state tasks.¹⁵

The solution to the problem with drinking water quality requires a complex approach with the participation of different departments of the central government, bodies of local self-government and public organizations. It is important to direct the efforts towards elaboration of a complex program showing the ways out of this problem but also taking into consideration political and economic realities of Ukraine, lobbying of budget financing to ensuring the quality of drinking water, questions of rate-formation for the population and water utility enterprises and the technological solution of rising drinking water quality up to European and world standards.

2.4. THE RIGHT TO ADEQUATE HOUSING

In accordance with Article 47 of the Constitution of Ukraine every citizen has the right to housing. Citizens in need for social protection are provided with housing by the State and bodies of local self-government, free of charge or at a price affordable for them, in accordance with the law.

Citizens on social housing register have a right to social housing and wait in the queue to get it. They are provided with social housing free of charge on the basis of the contract for rent for a certain period of time and without the right to its privatization.

Also Ukraine has assumed obligations concerning the right to adequate housing as these are defined in the International Covenant on Economic, Social and Cultural Rights, European Social Charter (revised) and other international agreements.

In Ukraine there is a range of varied programs for provision of housing to certain groups of citizens adopted by the Cabinet of Ministers of Ukraine: **State Program** for Provision of *Housing to Youth in 2002–2012*; State concessional lending of individual rural developers (*program “Own house”*); **Complex program** for provision of housing to military servicemen, command staff and junior enlisted of internal affairs bodies, criminal-executive system, customs employees and their family members: *those transferred to the reserve or in retirement; citizens who suffered from Chornobyl catastrophe*; judges; people with hearing disabilities and visually impaired; resettlement and rehabilitation of the

¹² Dangerous food products: not by GMO alone... <http://economics.unian.net/ukr/detail/47741>

¹³ “The problem of ensuring the quality of drinking water is a question of national security and in Ukraine its solution belongs to the sector of public administration”, said Grygoriy Semchuk <http://new-ukraine.org.ua/news/477/>

¹⁴ HEALTHY DRINKING WATER — NEW APPROACH TO ITS PROVISION http://www.fpsu.org.ua/index.php?option=com_content&view=article&id=3233%3A2010-09-22-07-17-21&catid=18%3A2009-07-14-18-15-30&Itemid=39&lang=uk

¹⁵ “The problem of ensuring the quality of drinking water is a question of national security and in Ukraine its solution belongs to the sector of public administration”, said Grygoriy Semchuk <http://new-ukraine.org.ua/news/477/>

deported Crimean Tatars and other nationalities who returned to live in Ukraine; scientists of the National Academy of Sciences of Ukraine.

But even public authorities acknowledge that the above indicated measures do not provide a solution to the problems of improvement of housing conditions for those who need it according to the legislation. Small number of the population provided with housing remains one of the most urgent issues in Ukraine.¹⁶

Inefficiency of some programs is further confirmed by the Accounting Chamber of Ukraine. In particular, this public authority has acknowledged that the Ministry of Finance and the Ministry of Economy did not ensure the commitment of effective management actions to implement the **Complex program** for provision of housing to military servicemen approved by the Resolution of the Cabinet of Ministers of Ukraine № 2166 of 29.11.99.

The Accounting Chamber further states that the existing system of provision of housing to military servicemen and law enforcement officers requires improvement and attraction of additional funding sources (besides budget financing). Spending by force agencies of budget funds of 1433,6 million UAH over last three years has been ineffective and has not allowed to come nearer to the solution of an urgent social issue, that is provision of housing to military servicemen and law enforcement officers¹⁷.

In Ukraine, in general, there are above 2,5 million households, out of above 14 million households, living in difficult material conditions. To great extent it is due to the notorious “flat issue”. According to official figures, 1,3 million Ukrainians wait in the housing queue, 400 thousand have the right to accommodation from the housing fund for social purposes. About the same number of Ukrainian citizens are ready to independently solve the flat issue in case there is a supply of affordable accommodation on the real estate market. The dimensions of housing issue in Ukraine are too striking to continue ignoring it or using as a pretext for empty political debates¹⁸.

In Ukraine the concepts of “social” and “affordable” housing are often confused. Whereas social housing is legally defined by the Law of Ukraine “On the Housing Fund for Social Purposes”, the status of affordable housing has not been settled yet. The term “social housing” should be understood as housing premises of all types of ownership from the housing fund for social purposes that are provided free of charge to Ukrainian citizens who require social security based on the contract for rent for a certain period of time.

From the practical point of view, affordable housing means residential houses and apartments built or being built with the state support. The state partially compensates the construction of affordable housing or provides individuals with concessional loans on mortgage agreement from a delegate bank for its purchase. People who require the improvement of their living conditions have the right to this kind of housing.

Nowadays social housing is hardly being built in Ukraine. There is a single mechanism when an apartment house is built on commercial basis and then 15–20% of flats are taken from the developer and given free of charge to the people on social housing register. It is often called rather pompously “the housing fund for social purposes”. Local authorities are responsible for distribution of social housing and cases aren’t rare when corruption “levers” are involved in this process.

Over last five years real data have not been collected concerning the current state of social and affordable housing construction by the state, effective variants of problem solution have not been elaborated at the level of state and local authorities. Instead, during this time legislative work was in full swing: laws and government resolutions with declarative promises were cloned. The Presidential Decree “On measures for construction of affordable residential housing in Ukraine and improve-

¹⁶ The conception of Nationwide program for provision of housing to the citizens in 2009-2012 (project) http://www.kmu.gov.ua/control/uk/publish/article?art_id=97605929&cat_id=32395

¹⁷ On the results of audit on efficiency of spending budget funds on construction (buying) housing to junior and command staff, likewise to law enforcement officers and military servicemen of the armed forces of Ukraine <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16726534>

¹⁸ Social and affordable housing: task for the authorities <http://ua3000.info/blogs/2010-06-26719.html#>

ment of provision of housing to the citizens” was adopted. Then the Law “On Preventing the Impact of the Global Financial Crisis on the Development of the Construction Sector and Residential Construction”, “Procedure for state aid granting aimed at provision of affordable housing to the citizens” were adopted and, at last, the Law “On Amendments to Some Legislative Acts of Ukraine concerning Provision of Housing to the Citizens”. The general content of the above indicated legislative acts could be reduced to the following “sweet” promises:

- annually 0,5% of GDP will be dedicated to the construction of affordable housing;
- buyers will be granted one-time state aid;
- to those who are unable to buy housing straight away, this will be leased for a period of time up to 30 years with the right to purchase;
- developers must be chosen exclusively on a competition basis and land for building will be provided free of charge.

But good-looking legislative norms have remained only on paper. Instead, the favorite method to solve the “flat issue” and, concurrently, local and state officials’ PR has remained a fragmentary distribution of flats into property of those on the social housing register.

As it has already been indicated, as long ago as in 2006 the Law of Ukraine “On the Housing Fund for Social Purposes” was adopted. In 2008 Procedure to realize the rights of socially vulnerable groups of people to get housing from this fund was approved by the Resolution of the Cabinet of Ministers. This right is granted to the citizens whose average monthly income (per family member) does not exceed the size of subsistence minimum established by the legislation. But the unique effort to implement the above indicated Law and the Government Resolution has become the approval of the decision of Kyiv City Council “On Creation of the Housing Fund for Social Purposes” in early March, 2010. This document states that the Fund of social housing will be filled with apartments and hostel rooms which are not liable to privatization. Queues for getting flats will be formed by district state administrations. But it just points to the same corruption driving force. The temptation of the district state administration officials to enlist their relatives or straw men as those who require social housing is too high. Besides, Kyiv officials report happily that social housing will not be liable to privatization, citing that such a practice is widespread in many countries. But foreign experience is directly the opposite. Most European countries allow the residents of social housing to purchase it in the future with discount and on condition of having lived in it for a certain period of time. This practice is very successful but the Kyiv authorities ignore it.

So far, the draft bill of Ukraine “On Provision of Affordable Housing to the Citizens” passed on the first reading. It was introduced to the Parliament in early 2010 during presidential fights. Unfortunately, this draft bill has a completely declarative character and in its present form cannot solve the problem of construction of affordable housing.

There remains an urgent problem of eviction of hostel residents. This group is among most socially vulnerable groups of the population whose right to housing is safeguarded by the Constitution of Ukraine but is constantly ignored in real life. Especially it happens if a businessman or an important official puts his eye on the hostel. As an example, one can cite the eviction of residents of the hostel in 132 Zabolotnogo Str. On May 24, 2010 right in broad daylight. People who did not have where to stay had to spend the night in the street. This situation has been given publicity in the media.

Circumstances of this case strike by a number of changes of ownership, abound in infringements of legislation and, as a consequence, present day owners acting along with The National Complex “Expocenter of Ukraine” and with the support of the *State Affairs Department have actively begun to evict residents of the hostel: people were turned off heat, electricity, water and gas supply*¹⁹.

¹⁹ Residents of a hostel were evicted into the street <http://kiev4you.org/index.php/pisateli/45-rasskaz/540-2010-05-26-17-07-21>

5 residents who had worked at the company over 20 years were offered to move into the hotel in 101 40-richcha Zhovtnya (40th anniversary of October) Avenue but just for a time they kept working for The National Complex “Expocenter of Ukraine”. Moreover, into the rooms already occupied by other people. It is known that hotels do not belong to the housing fund and these people can be evicted at any time. Residence in them does not permit neither residence registration, nor assignment of a living space to the residents. And it was offered only to 5 people and only for a time they kept working for The National Complex “Expocenter of Ukraine”. At the same time, their family members who had been living in the same hostel for many years (inclusively with their minor children and grandchildren who were born in this hostel and did not have nor had ever had any other housing) were offered to leave the hostel without provision of any other accommodation. That is, to remain without any residence.

On May 24, 2010 the owner took advantage of the situation when all residents were outside and changed the guards, brought about two dozens of huge guards of criminal appearance who just did not allow them and their children back in, so the residents became homeless and spent the night in the street dressed in what they had on.

Besides, there are considerable difficulties with safeguarding the right to adequate housing for vulnerable groups of people, in particular, for children.

To perform a juristic act concerning the real estate owned or in use by children, it is required to have a prior agreement from the bodies of guardianship and custody. Officials from the bodies of guardianship and custody bear personal responsibility for protecting the rights and legitimate interests of children when they grant their agreement to perform a juristic act concerning the real estate which belonging to children (Article 12 of the Law of Ukraine “On the Fundamentals of Social Protection of the Homeless Citizens and Homeless Children”).

However, the reality is slightly different. According to data provided by the prosecutor’s office in Odesa region, during the inspection of implementation of the legislation of Ukraine on protection of rights of minors, it was detected that the heads of boarding institutions did not perform their statutory functions of guardians and custodians as regards social security of the pupils appropriately. It was established that heads of some institutions did not control inherited property of the pupils and did not take measures to formalize the inheritance²⁰.

For instance, a minor pupil, 1996 year of birth, whose father died in 2006 has been in Fontan Comprehensive School since 2006. After his father’s death the minor inherited a flat situated in the town of Artsyz. However, the school officials have not taken any measures to formalize the inheritance over the two years while the child stays in this institution.

In Odesa boarding school № 5 there lives a 13-year-old child on full state maintenance. In 2009, after the mother’s death, which had been deprived of parental rights by court, a legacy was opened in reference to the child — housing in the city of Odesa. But there is no data as regards obtaining a certificate of inheritance or the child’s representative appeal to a notary office.

In Izmayil Boarding School there stay five children-orphan from the Tarutyn district. During the inspection it was revealed that those children have the right to the inheritance of land parcels with total area of 2,93 hectares which remained after their parents’ death. But at the time of inspection an application to state authorities to formalize the ownership by inheritance or the state acts on land were not submitted by the boarding school administration.

The Office of Children’s Issues of Odesa City Council sent a disabled 6-year-old girl to the infant home “Perlynka”. However, any documents which confirmed this child’s ownership of real estate are not provided. Only a reference about the lack of housing is given from the Office of Children’s Issues, although the child’s mother deprived of parental rights has residence registration in the city of Odesa. Inspection of the status of this a housing is not accomplished, measures to assign it to the child in case of inheritance fact in order prescribed by Article 17 of the Law of Ukraine “On Protection of Childhood” are not taken.

²⁰ State of implementation of the legislation of Ukraine on protection of the rights of minors is amid primary directions in the activity of prosecuting authorities of the region http://www.od.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=47626

Officials do not exercise an appropriate control of accommodation assigned to children. The prosecutor's office cites a crying fact. The prosecutor's office of the Cominternivskyi district detected that in 2002 three minors of age — two sisters and a brother — were sent to a state boarding institution by decision of the Novomykolayivka village council, by the same decision the right of residence in a house in the village of Novomykolayivka was confirmed. Though, in 2006 this house was written off as unsuitable for living by decision of the same village council and further sold to a citizen for construction of a grocery. Only after the district prosecutor's office injunction the children's rights to housing were restored by the village council and another accommodation was assigned to them²¹.

The Accounting Chamber of Ukraine confirmed existing problems in this field. It noted that at the moment there remains such an urgent social issue as homeless children. Moreover, under economical crisis there appeared a new category of children in the children's social security institutions — children from families that do not have means for subsistence.

In 2006 the Government approved the State Program on overcoming children's homelessness for 2006–2010. The State Department on Adoption and Protection of Children's Rights was created under the Ministry for Family, Youth and Sports.

The audit of efficiency of state budget funds usage aimed at overcoming children's homelessness conducted by the Accounting Chamber showed that the Ministry for Family, Youth and Sports and the above indicated State Department did not provide an appropriate performance of these measures which were implemented unsystematically and with violations of statutory requirements which regulate the usage of budget funds on these purposes in 2006–2009. It had a negative impact on accomplishment of the State program and solution of the issues of children in difficult living conditions.

Consequently, nowadays there are no records of homeless and derelict children, monitoring of their problem solutions is not being conducted and an optimal network of social security institutions for such children has not been created. Although solving of these issues was among principal goals of the State program.

Another goal of the State program — to complete the establishment of a network of social security institutions for children — has not been met either. It was expected to reorganize orphan asylums into centers of social and psychological rehabilitation of children during accomplishment of the State program. The optimal network of institutions for children deprived of a possibility to live in a family of full value has not been created. Orphan asylums for minors are occupied by 56–76 per cent. However, the need of children who found themselves in difficult living conditions for services of centers of social and psychological rehabilitation of children is not being met, especially that of the rural children²².

Data from the prosecuting authorities also indicates to non-accomplishment of “State Program on overcoming children's homelessness and dereliction for 2006–2010”. In particular, the Prosecutor's Office of Odesa region says that this Program, envisaging temporary solution to housing issues of the youth from the number of children-orphan and children deprived of parental care, graduates of boarding institutions is not being implemented in the region.

Up to date there have been created only two such hostels, in the Kotovsk and Tarutyn regions, with the capacity of 15 and 28 children respectively.

At the same time, only on the housing register there are 83 children-orphan and children deprived of parental care who do not have accommodation. There are even more children from this category who graduate from educational institutions in 2009–2010 academic year and require being enrolled on the housing register.

²¹ State of implementation of the legislation of Ukraine on protection of the rights of minors is amid primary directions in the activity of prosecuting authorities of the region http://www.od.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=47626

²² “Homeless” tomorrow of Ukraine <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16727728>

However, as inspections of the prosecutor's office proved, children are not being enrolled on the housing register on time against the requirements of Article 25 of the Law of Ukraine "On Protection of Childhood".

Such events take place on the territory of some village councils of the Lubashivka, Ivaniv regions, of district state administrations of the Bilgorod-Dnistrovskyy, Suvorovskyy districts of the city of Odesa²³.

There are also problems with provision of physical accessibility to buildings for the disabled. The Law of Ukraine "On the Fundamentals of Social Security of the Disabled in Ukraine" envisages that planning and building of settlements, forming of living districts, development of project decisions, building and reconstruction of houses, constructions and their complexes without adaptation for use by the disabled shall not be permitted.

Also this law envisages that living buildings, occupied by the disabled or families with a disabled person, porches, staircases of a building where the disabled live have to be equipped with special facilities and devices according to the individual program of rehabilitation, likewise with telephone communication. The equipment of the above indicated living buildings is carried out by bodies of local self-government, enterprises, institutions and organizations under whose jurisdiction the housing fund is.

In case of inadequacy of the disabled's accommodation to requirements set by the conclusion of the medical and social expertise and impossibility to adjust it to the disabled's need, a change of living area can take place. It should be noted that new building standards are defined as regards buildings for living purposes which envisage consideration of the disabled's needs. But the majority of existing living buildings where the disabled live do not meet these standards.

The legislation envisages free of charge access of the disabled to state housing but it is not provided. Thus, in particular, the Conception of the Complex State Program "Housing to the disabled", approved by the Resolution of the Cabinet of Ministers of Ukraine № 994-p dated December 31, 2004, expected by the end of 2010 to have provided with housing about 75 per cent of the disabled of all categories who were on the housing register as of January 1, 2004. Since 2005 the financial support of the Program has been minimized or totally absent, that is, it bears an exclusively declarative character. Besides, Programs of social housing construction for the disabled do not function at all in the regions of Ukraine.

Moreover, any guarantees to get different kinds of state crediting or loans on mortgage by the disabled are not set. The principal reason for credits unavailability lies in a lack of financial opportunities²⁴.

3. THE RIGHT TO SOCIAL PROTECTION

3.1. THE SYSTEM OF BENEFITS AND PRIVILEGES

The Constitution of Ukraine, adopted on June 28, 1998, declares our state as social. But the current economic situation in Ukraine, the lack of balance and not sufficient development of the present system of social protection do not allow making the declaration a reality.

Not transparent system of privileges and social payments remains dominating both in social protection sphere and in social security. Instead of real social security for the population a bulky network of state and municipal bodies of social protection and social services is being maintained.

²³ State of implementation of the legislation of Ukraine on protection of the rights of minors is amid primary directions in the activity of prosecuting authorities of the region http://www.od.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=47626

²⁴ Rights of the disabled. Report based on the results of public monitoring. National Assembly of Disabled of Ukraine. Kyiv 2008–2009.

At the same time to support the most socially unprotected groups the system for social protection and social security provides numerous privileges and social guarantees according to professional identifiers. In accordance with valid legislation in Ukraine there are about 120 categories of people entitled to benefits, out of those only 45 categories are entitled privileges according to social criterion, and 57 — according to professional one.

Often such social protection measures and social security measures for the representatives of certain professions are absolutely not justified, because the employment in certain branch should be stipulated not through granting some privileges but through increase of wages for the employees as it happens in the developed countries.

A dominant feature of valid legislation in social protection and social security area is its lack of system together with inconsistency. Thus, in certain legislative acts there is an influence of radically different concepts and approaches, among those the soviet model is the dominant one (social service and social work domination aimed at support of the most vulnerable categories and persons who are in difficult conditions). Even after the approval of the Law of Ukraine “On Social Service”, declaring in fact changeover to European model, the lawmakers repeatedly turned back to traditional soviet methods and approaches, introducing new types of privileges and social payments.

Introduction of privileges, social and compensation payments in several cases is out of constitutional standards, as far as on the level of laws of Ukraine the list of categories for those who receive various forms of social assistance has considerably increased. It results in diffusion of social function of the state and in loss of addressness of social protection, premises for which are provided on the level of Constitution of Ukraine.

The majority of constitutional social standards remain mere declarations because of obsolescence and non effectiveness of current mechanisms for social protection, non addressness, leveling character and non correspondence with the real needs of Ukrainian society of the current social protection and social security system and also due to non effectiveness and non transparency of the system for budget financing of state social payments.

A considerable problem in implementing of the constitutional right to social protection and other social rights of citizens is an absence of the unique codified act (the code or basic legislation). In the act general approaches to regulation of social protection and social security system would be established together with comprehensive list of criteria and backgrounds providing a right for social protection from the state and defining character and volume of state social guarantees.

Another important aspect is that one of important constitutional guarantees of rights and freedoms of person and citizen is non-admission of their abolition or narrowing its content and volume by adopting new laws or while making amendments to valid laws. According to legal position of the Constitutional Court of Ukraine, as far as for most of Ukrainian citizens privileges, social and compensation payments and other social guarantees provided by current legislation are additional to basic means of subsistence, the necessary component of constitutional right for provision of sufficient level of life (that at least may not be lower than the minimum of subsistence established by the law), it is not allowed narrowing of contents and volume of the right by means of new laws adoption or through making amendments to current laws. Its stoppage is possible only under introduction of state of emergency.

Unfortunately the Verkhovna Rada of Ukraine for several times infringed the principle during consideration of the Laws of Ukraine on state budget for corresponding year. It obliged the Constitutional Court of Ukraine in different years to acknowledge as non constitutional several norms of the Law of Ukraine “On State Budget of Ukraine for 2001” and of the Law of Ukraine “On State Budget of Ukraine for 2004” and also many clauses of the Law of Ukraine “On State Budget of Ukraine for 2007” and of the Law of Ukraine “On State Budget of Ukraine for 2008”.

And, although the Law of Ukraine “On State Budget for 2009” and the Law of Ukraine “On State Budget for 2010” do not contain amendments to the laws establishing social guarantees for people, until present we still experience the consequences of previous violations of the legislation. Thus, to date there are some legal clauses providing certain social guarantees, as far as their limitation is acknowledged as non-constitutional. But to protect one’s right a person is obliged to defend

it in the court. And even having obtained the positive resolution in the case, such ruling remains not fulfilled due to lack of budget funds for these purposes and due to lack of correspondent procedure.

But the backgrounds of social protection and social security system emerge not only from the legislative acts of Ukraine but also from its international legal commitments. Ukraine is a participant of several basic international agreements in area of social rights.

Here the serious problem is the implementation of international legal commitments of Ukraine in national legislation. In most cases the laws on ratification of international agreements are adopted without simultaneous amendments to the laws of Ukraine, adoption of new or cancellation of valid laws not corresponding to the international commitments of the state.

The practice of application of international agreements norms (that, according to the Constitution of Ukraine are equal and even have the priority over laws of Ukraine) as direct action norms has not been established yet. Also the court practice based upon the international agreements is almost not present too. Together both of these issues could become the background for the creation of additional mechanisms for implementation and protection of social rights for Ukrainian citizens.

A considerable obstacle for further integration of Ukraine to European Union may become its mostly declarative joining to European system of social standards and its rejection to acknowledge even formally (ratification) of the most part of European law concerning social human rights, in particular several provisions of the European Social Charter (revised).

The complete transition of Ukraine to European model of the development of social protection and social security system depends upon resolution of these problems.

The analysis of the legislation in area of social protection and social security, carried out by the Center of Civil Expertise determined that different privileges, social payments and social services in Ukraine are directly provided in 58 laws and in more than 120 by-laws legal acts. In different periods of Ukrainian independence the law-makers applied to the development of the national system of social protection and social security different approaches and models, thus legal acts adopted in different times have considerable contradictions and provide different dominating forms and types of social protection.²⁵

Complex analysis of valid legislation in area of social protection and social security confirms that higher state bodies do not apply single concept while adopting new legislative acts and trying to fill existing gaps.

Also it is stated that valid legislation in area of social protection and social security is not systemic and not consecutive: adopting new legal acts concerning introduction of new types of privileges, establishing new social and compensational payments often already valid regulation is ignored, and coordination of the act with already valid acts in other fields of legislation is not made.

Considerable part of valid legislation acts regarding social protection and social security or certain clauses in present are outdated or have never been applied in practice, but remain formally valid.

According to the analytical report of the Center of Social Expertise the majority of privileges, social and compensation payments provided by the current legislation do not reduce negative consequences of economic transformations in Ukraine for the most socially unprotected categories of population, but they are introduced on the backgrounds of political declarations and are aimed at introduction of additional social guarantees and preferences for certain social groups.

Among all forms of social protection applied today in Ukraine the dominant ones are privileges and social payments. Such measures of social protection are recreated from one legislative act to another, but mostly are not targeted and do not fulfill the function of social protection and social support to the most socially unprotected categories of population.

The majority of the privileges, social and compensation payments established by the current legislation are merely declarative and it's financing from the state budget or from the state non

²⁵ The system of social protection and social welfare in Ukraine. Real state and prospects of reform. — K.: Center of civil expertise, 2009. — 104 p. http://www.irf.ua/files/ukr/programs_law_areas_publ_2028_ua_law.pdf

budget funds have either never been made or it was made in not sufficient volume or not systematically.

It is needed to mention that the general amount of Ukrainian citizens who have a right to use certain privileges established by the valid legislation is about 15 million people. According to various experts estimates general value of the privileges declared in valid legislation varies from 3,8 to 5,8 billion USD a year, but in reality only small part of those is funded.

In many cases it provides backgrounds for a person to protect his or her rights to social payments provided by the law but not fulfilled by the government. As an example it is possible to mention the case on acknowledgement as non legal of several provisions of the resolution of the Cabinet of Ministers of Ukraine depriving the Ukrainian fire fighters a compensation for the uniform not received, provided by other laws.

The case on the cancellation of certain provisions of the resolution by the Cabinet of Ministers of Ukraine № 319, dated April 08, 2009.²⁶

The Cabinet of Ministers of Ukraine deprived illegally the Ukrainian firefighters a compensation for the uniforms not received. Such a ruling was approved by the District Administrative Court of Kyiv,

To protect the rights violated the former sergeant of the civil protection service went to the court.

From 1992 to 2009 the firefighter was obliged to buy the uniforms at his expense. When according to health conditions he was dismissed and went for compensation of his expenses, he obtained the answer that he would not receive money. Because the Cabinet of Ministers in order to save funds on firefighters adopted the resolution # 319 dated April 08, 2009.

There it was indicated that for personnel of rank and file and command staff of the civil protection dismissed under health conditions the uniforms not received to the moment of dismissal were not granted and the monetary compensation was not to be paid. As a result the purchase of the uniforms turned out to be private expenses of a person receiving small salary above all.

The resolution was acting about for a year in spite of the fact that its provisions contradicted to the Code of Labor Laws, to the Law of Ukraine "On Legal Backgrounds of Civil Protection", the Law of Ukraine "On Social and Legal Protection of Military Servicemen and their Family Members".

In July 2010 the court annulled the resolution mentioned. According to the lawyer Vyacheslaw Yakubenko representing the interests of fire fighters in the court: "A desire of the authorities to save budget funds may not be an argument for infringement regarding firefighters who buy for years military jackets, service caps, boots. Although the resolution appealed had been adopted by Tymoshenko's government, the present Cabinet of Ministers defended it in the court as their own" — the lawyer said.

Authors of the research come to the conclusions that:

- within the valid legislation related to social protection and social security some citizens groundlessly use certain types of privileges and receive social payments as far as it is complicated for the state to control provision of social assistance while there are so many its types and receivers. Such non transparency of the current system allows citizens to abuse some types of state social protection with impunity without having sufficient backgrounds;
- Social needs of the most socially non protected categories of population in Ukraine are satisfied in a non sufficient manner: high poverty level, especially in families with children and families with disabled persons or with not working persons of the able-bodied age,

²⁶ The case was supported by the Foundation for Strategic Cases of the UHHRU <http://helsinki.org.ua/index.php?id=1278409519>

- gives evidence of non sufficient efficiency of social support mechanisms by the state to the most socially not protected categories of the population;
- The system of privileges provided by the current legislation, of social and compensation payments, social services is mostly not correlated to the valid system of budget funding, based mainly upon the “formula” approach, not taking into consideration the real need for material provision of socially unprotected categories of citizens and also the real value of privileges and services.²⁷

3.2. HOUSING AND COMMUNAL PRIVILEGES AND SUBSIDIES AS ELEMENT OF SOCIAL PROTECTION

Recently in Ukraine housing and communal services rates have considerably increased. Thus gas price for population in Ukraine grew 50%, heating and water supply rates in Kyiv grew 30–40%, also prices for housing and communal services in other regions increased.

State authorities that, according to the legislation are responsible for prices and rates management in housing and communal area in fact do not control issues of rates formulation. That is why there are considerable fluctuations of cost and level of its compensation through rates approved — maximum index of one type housing service cost exceeds the minimal in Ukraine 2,5–4 times. It proves different approaches to definition of service cost and determination of rates for the population often without taking into consideration solvency of citizens. To January 1, 2010 the cost of heat energy in Uzhgorod was 3,7 times bigger than in Kyiv; the cost of water draining in Poltava was 4,2 times higher than in Simferopol.²⁸

In such a way it is possible to put a question on fairness and good reasons for establishing rates for housing and communal services.

All these circumstances have considerably influenced on the fact that level of life in Ukraine for the period decreased. The arrears of payments for housing and communal services increased and keep on growing constantly. In particular to January 01, 2008 the arrears consisted of 7,2 billion UAH and to July 1, 2010—10,5 billion UAH.

In connection with that it is of crucial importance the protection of socially vulnerable groups that are unable to pay for housing services. Provision of subsidies from the budget for payment of housing and communal services is rather effective element of social reaction to the challenge in many countries.

In 2010 the Cabinet of Ministers of Ukraine introduced simplified order of receiving subsidies compensating a part of expenses for communal services. Payment by the citizens for housing and communal services at appointing of housing subsidy was decreased from 20 to 15 per cent of average monthly total revenue.

At the same time, as the Accounting Chamber of Ukraine states, in Ukraine the mechanism for the provision of subsidies and privileges to population and of compensation to service providers for non received profits is not transparent and complicated. Also it was declared that the Ministry of Labor and Social Policy of Ukraine and the Ministry of Finance of Ukraine did not create the effective system of fund management for subventions from the state budget to local budgets for provision of privileges and subsidies for payment of housing and communal services, capable to secure social protection principles, equality at distribution of social welfare, provision of high quality services for population at reasonable rates.²⁹

²⁷ System of social protection and social security in Ukraine. Real condition and reform prospect. — K.: Center of civic expertise, 2009. — 104 p. — p. 104. http://www.irf.ua/files/ukr/programs_law_areas_publ_2028_ua_law.pdf

²⁸ Stefaniuk I. Provision of housing and communal privileges — the need and the problems// Finance Control (Фінансовий контроль) № 7 (60) 2010. PP. 8–13.

²⁹ Stefaniuk I. Provision of housing and communal privileges — the need and the problems// Finance Control (Фінансовий контроль) № 7 (60) 2010. PP. 8–13.

Many of those requiring social protection will not be able to obtain subsidies because of formal obstacles, in particular related to the non-transparency of the economics and also of incomes received by many Ukrainians.

Besides there are considerable problems with compensation for the services and subsidies for housing and communal services provided to population. In particular there is a problem in the city of Lviv. The arrears of Social Protection Department of Lviv City Council to the companies providers of communal services and the privileges, respectively, to June 2010 consisted of approximately 2 million 300 thousand UAH. At the same time the subvention that had come from the state budget for compensation was only 15% out of the need.

Deputy Chair of Regional Social Protection Department N. Kuziak stated: "Mostly we receive monthly cash about 15–18% out of what we need. For the half of the year it was not more than 20 % out of the need." She also commented: "I personally made phone calls to the directions of social protection in different regions — to Kharkiv, Odesa, Donetsk, Rivne, Vinnytsia to clear up the situation with the compensation of privileges and subsidies. It turned out to be the same everywhere. It is all over the state. About 10-20% out of the need for the compensation is received".³⁰

The problems with funding are also mentioned by the Chair of Budget Commission of Rivne Region Council, the member of Rivne Executive Committee Oleg Khomych. "The government officials say that there would not be any issues on subsidies and privileges and instead no financial support in regional budget on subventions is provided, and also probably soon we will face the rates increasing".³¹

And although lack of funding affects by now the companies, service-providers of housing and communal services, the arrears is being formed, it is clear that in case if the problem is not resolved, it will affect in future people directly receiving subsidies and privileges.

The simplified order of obtaining subsidies does not work always as well. Thus back in the beginning of mass subsidies to the population the officials told that it would be the most simple for the retired, they would not even need to leave homes. But even there problems appeared. It is not easy to teach every potential subsidy receiver, especially in the age of the retired to fill out the documents correctly. For example, almost one thousand of envelopes received by the retired of Rivne region for the processing of subsidies were already sent back to the direction of labor and social protection and the majority of those contain inaccuracies.

Even the representative of the authorities, the Deputy Chair of Rivne Regional State Administration Yuriy Kichatyy stressed that it was necessary to approach the process attentively and to think over the information requested to write down in each column.³²

It is important to mention the problems appearing while providing privileges on payment of housing and communal services. In particular for many categories of the privileged there is no regulation that would determine provision of the privileges within the established (average) norms for services consumption. As far as privileges are not limited to objective consumption norms, it results in the fact that a privileged person consuming more housing and communal services (as a result of bigger family, apartment area, utility rooms' availability, etc.) is subsidized by the state in a bigger scale.

For instance in regions of Dnipropetrovsk and Kharkiv while exceeding the level of pensions provision for the retired judges and prosecutor's office investigators in relation to retired pedagogues and doctors 6 times, the categories mentioned are granted practically identical volume of privileges (table 1).

³⁰ The government compensates only up to 20% of the subsidies granted to the residents of Lviv <http://www.zaxid.net/newsua/2010/8/4/150013/>

³¹ Is it real to obtain the subsidy? <http://www.reporter.rovno.ua/current/1382>

³² Is it real to obtain the subsidy? <http://www.reporter.rovno.ua/current/1382>

XV. SOCIO-ECONOMIC RIGHTS

Table 1³³. Comparative analysis of the provision of privileges to certain categories of citizens and the amount of pensions paid out in 2009

	Judges retired (50% discount)	Retired prosecutor's office investigators	Retired pedagogues in rural areas (100% discount)	Retired doctors in rural areas (100% discount)
<i>Dnipropetrovsk region</i>				
Privileges provided per 1 person UAH	927	932	1041	1165
Average monthly pension UAH	5183	5087	722	748
<i>Kharkiv region</i>				
Privileges provided per 1 person UAH	741	1331	1041	1042
Average monthly pension UAH	4757	5187	723	726

3.3. GUARANTEES OF SOCIAL SECURITY FOR THE ELDERLY

We got used that the pension is a payment earned by the hard labor and the state is obliged to provide it on a level guaranteeing at the least to live one's life with dignity. It is hard to deny such a statement in a civilized state in the XXI century. On the other hand all political research point out that the crisis of pension system gets worth, impacting all the state finance and creating a threat for economic development of Ukraine.

All the professionals coincide in opinion that domestic pension system is in critical condition and requires urgent reform. There are two complaints by the experts regarding the present pension system. First of all it is unable to provide decent level of life for the retired. Secondly even taking into consideration present miserable level of pensions it is an impossible burden for the state budget covering the deficit of Pension Fund. In other words the demands of the retired attract funds aimed at other social needs: education, science, healthcare, army, etc.

The generally adopted indicator of the pension level is the rate of substitutability, i.e. the relation of average pension to average wages. According to the norms of the International Organization of Labor it should be no less than 55%. For the last several years the rate in Ukraine was increasing in general and reached for example in 2009 49%. To compare: in Italy and Spain it is 90%, in Sweden and Germany — 65, in France, Japan and The USA — 50%. In other words, although Ukraine has a lower rate index, but it is absolutely comparable to other's rate.³⁴

But the retired are not too much interested in different rates. They are interested in real dimensions of pensions. While the average salary in 2009 was 1906,0 UAH, the average retirement pension size was 942,7 UAH. And even if it had reached say 1340,0 UAH and the rate would become 70%, would it have changed the situation radically? For sure it would have not. Even if the notorious rate would have been made 100%, the Ukrainian retired would have not been able to consume the same amount of material welfare as, for example, the Swedish one.

³³ Stefaniuk I. Provision of housing and communal privileges — the need and the problems// Finance Control (Фінансовий контроль) № 7 (60) 2010. PP. 8–13.

³⁴ It is necessary to increase not the retirement age but the official wages. Pension reform through the eyes of an interested party. Koval O. // Dzerkalo tyzhnia (Дзеркало тижня) № 33 (813) September 11–17, 2010 <http://www.dt.ua/2000/2650/70348/>

The reason is in calculation mode. The level of official salaries is extremely low, and out of them the insurance payments are made. The problem of pension system is one and only: it is possible to pay shadow salaries, but it is impossible to pay shadow pensions. The nature of pension is transparent and official.

Most of experts do not have illusions related to eradication of shadow economy. Yes, it is possible. But the previous governments did not want to make it; the present government does not want it too. Probably the following governments will not want to make it either. There are too many interests involved in shadow sector. This specific branch was cultivated for two decades and has very deep roots. Correspondingly the efforts for its elimination should be enormous and supported by the respective amount of state will.

Also we have to indicate that the Pension Fund fullness under other equal conditions depends on the relation between the amounts of the retired and the payers of insurance contributions. Here the realities are sad in Ukraine. The aging of population in Ukraine, as in other countries result in systematic worsening of the relation between the able-bodied population and population in the age of retired. According to the present demographic forecasts of the Institute of Demography and Social Research of the National Academy of Science of Ukraine, all the population of Ukraine in able-bodied age that has not reached the age of retirement will decrease from 27,2 million in 2009 to 22,9 million in 2025 and 17 million in 2050.³⁵

At the same time if there is no reform of the pension system the amount of the population in the age of retired will increase from 11,7 million in 2009 to 14 million in 2050.

The practical amount of the payers of contributions is much less than the amount of the able-bodied and the amount of the retired is much bigger than the amount of people in the age of retirement. In 2009 per 100 people who paid superannuation contributions there were 88 people receiving pensions. In 2025 there will be 100 retired per 100 payers of the contribution and in 2050 there will be 125 retired per 100 payers of the contribution.

Out of demographic tendencies it results that without radical reforms of the pension system future retirees will be in much worse situation than the present ones. Average pension in 2009 consisted 40% out of average wage and in 2050 it will consist only 28%.

Both negative factors (low level of official wages and demographic situation) in present have become systematic, i.e. they can not be corrected by local measures. Problems of these factors removal are of different level of complexity and of different time limits. The turning point of demographic situation is the most complicated task and will bring results at the best after 20 years. But in any case it is necessary to realize that the radical solution of the problem of life level for the pensioners is out of the limits of the pension system.

Main ways of the reforms discussed in scientific, legislative, official, trade union and other circles are beyond any doubt. These are the modernization of the solidarity pension system, introduction of the accumulation system and stipulation of the voluntary component of the pension system.

As regard to solidarity system it is offered most often to remove the disproportions in size of pensions, eliminate pre-term and privileged pensions, introduce prohibition or limitation to receive pensions for the working pensioners, etc. There is no doubt that under present conditions all these measures are necessary and important at least because most of them consolidate the belief of the population in social justice. Although it is worth mentioning that at the best these would contribute to more fair (from the point of view of the majority of the population) "distribution of the pie", not increasing its size in any manner. In other words those are capable only to decrease partially the deficit of the Pension fund. To decrease the deficit, meaning even no to make it one without the deficit.

Apart it is necessary to mention the problem of the increase of the retirement age. It is the requirement from the International Monetary Fund. Yes, it does correspond to the worldwide prac-

³⁵ Correction of the pension system. M. Sviencicki // *Dzerkalo Tyzhnia* (Дзеркало тижня) № 17 (797) April 30 — May 14, 2010. <http://www.dt.ua/2000/2650/69370/>

tice. But at the same time we should remember that this step has only one “pro” argument — partial decrease of notorious Pension Fund budget deficit. And temporary at that, taking into consideration scale of state policy.

The option proposed by the Program of Economic Reforms of Ukraine for 2010–2014 (increase of the retirement age for women up to 60 years gradually, half a year every year in 2012–2021) from the financial point of view is the less efficient out of all discussed among the experts. In case of its implementation Pension Fund budget deficit decrease even at the height of the reform will not exceed 20% of its dimension.³⁶

The other argument in favor of retirement age increase (more complete implementation of labor potential, growth of life level for the pensioners, decrease of the lacking workforce problem, GNP growth, etc.) should be considered no more than putting a brave face on a sorry business.

So there is a logical question — is it worth doing at all? It is extremely hard to answer the question, what is more important for the state and for its citizens — partial decrease of budget deficit of Pension Fund or the entire complex of negative demographic, social and other consequences. Among those there is an inevitable growth of the disabled pensioners, additional pressure on a labor market. And all this without mentioning of the political consequences related to increasing retirement age.

Mostly, all the steps aimed at modernization of the acting solidarity system are aimed in all possible manners at postponing further decay of the Pension Fund and nothing else. So they are hardly to be considered a reform literally, because they do not change radically the principle of the system.

In general context a really breakthrough measure could be considered an introduction of the multi-pillar component. In the same way as solidarity system, the multi-pillar system is mandatory, contributions are made not optionally, they are mandatory. But there is a significant difference. Solidarity system does not provide the accumulation of funds on the individual account.

At the same time the introduction of mandatory multi-pillar system is constantly postponed by the government. This time it was postponed until 2012.

It is important to mention that to date there have been no legislative acts adopted implementing the tasks of the pension reform, so it is hard to analyze its efficiency or its lack of efficiency.

Unlike the solidarity system, the multi-pillar system provides personification of pension contributions that is individual accumulation of funds during working life on an individual account. These funds would be the principal source for pension in the old age.

Solidarity system provokes abstract-alienated attitude to it by the worker as to a certain tax. The multi-pillar system according to its economic nature is a postponed income. In fact it is an individual pension fund and a person may see direct relation between his/her wages in present and the amount of pension in the old age.

Here the ideology is radically different. Within the solidarity system a person is obliged to expect something from the future generation of his compatriots, whose amount is constantly reducing. And within the multi-pillar system a person may rely only on himself or herself: the amount of accumulation is determined by the legal wages, total length of service and the quality of pension assets management.

The multi-pillar system is transparent and clear. It has no sophisticated formulas, concepts of normative and over normative length of service and many other features of the solidarity system hard to understand. Besides, from the technical point of view its implementation is not a very complicated task.

But it has two peculiarities, caused by the fact that an employee makes contributions to the system during his or her entire labor activity, without opportunity to withdraw it before the age of retirement. Here there is a first peculiarity — a need for strict control over provision of duly man-

³⁶ It is needed to increase not the retirement age but the official wages. Pension reform through the eyes of an interested party. Koval O. // *Dzerkalo tyzhnia* (Дзеркало тижня) № 33 (813) September 11–17, 2010 <http://www.dt.ua/2000/2650/70348/>

agement. Even if we assume that the retirement age remains on a level of 60 years, future generations will pay the contributions from the beginning of their labor activity. These contributions will be accumulated in the system during minimum of 35 years. And the contributions will have to be managed somehow.

So the requirement to the system is the strictest control by the state. The control based upon enhanced powers, accompanied with real and not declared responsibility. Keeping the pension assets in the multi-pillar system and impossibility of abuse by the authorities must be guaranteed by the state.

Another peculiarity comes out of a need to manage the funds accumulated during a long period of time. Even under condition of complete and total fairness of the authorities any investments may be under risks. Investments without risks do not exist by definition. That is why processes of pension savings management should be organized in a way to minimize risks and provide investment of funds in diversified finance instruments.

Is rather simple to establish investment priorities and the diversification — it is enough to provide corresponding restrictions within the legislation and control its fulfillment. But the first component (risks of the percentage rates, currency rates, rates of securities and other financial instruments) may be minimized only partially with a certain probability component by introduction of the required regulations and norms. But such regulations should be elaborated and introduced in practical management of the assets of pension system. The minimal index of management efficiency should be protection of savings from the inflation.

Apart a problem of transition period should be mentioned. The pension system operates today (in a good or bad way— it is another issue) in a quite understandable way. It will operate in an understandable way after the end of the transition period when people who start to contribute the system from the beginning of their labor activity retire. There are two categories of the employees left. One — are those whose age today is between 40 years and the age of retirement. These are pensioners to be.

According to the ideology of introduction of the multi-pillar system they do not have time to make sufficient savings, but its amount will be the more non sufficient the closer they are to 40 years. Thus the source of pensions for these people together with their own savings there should be funds from the solidarity system. Today, conditionally speaking all the pension to every employee is paid to the full out of the solidarity system. After ending of the transition period, each pensioner will have to be paid certain minimal pension out of the solidarity system. Its source should be the contributions to the solidarity system in the minimal dimension required.

It results in a problem of the Pension Fund incomes balancing during the transition period, or rather optimization of the correlation between the contributions to the solidarity and to multi-pillar systems.

Intuitively it is understood that as a result of demographic processes the correlation mentioned should change in favor of the multi-pillar system and be determined not by sight but using the corresponding multifactor mathematic model.

Obviously the accumulation system per se is not a universal cure. In the multi-pillar system, the same way as in solidarity one the deductions are applied not to all, but only to official wages. And when a newly made pensioner clears up that his personal savings are not enough to satisfy his ambitions, he will be able to blame only himself for that.

In this context it is of importance the system of non state provision of pensions. It has developed in Ukraine since 2004. In present in the area all the required infrastructure is created and the required competitive environment is formed. Although as before the aims declared at the system introduction remain not reached. In reality no more than 3% of the able-bodied population enjoys the non state pension benefits. Total amount of the funds attracted is below than UAH 1 billion. It is a modest result for the five years of development.

Expectations that voluntary savings may consist of an important share within the pension system are overstated for today. As far as a person decides on his own whether to enter the system of voluntary savings, the deductions for future pension start to compete with other expenses items

(food, clothes, durable goods, education, healthcare, etc.) becoming more vital in some periods of life. In other words voluntary pension savings — is a toy for reach societies, Ukraine unfortunately not belonging to them.

Besides there are two reasons slowing down the development of non state pension provision system. First of all the population does not trust to financial institutions (with good reasons for it). The events of the end of 2008 another time destroyed any possible beginnings of trust to the policy of the National Bank of Ukraine.

Secondly the present stimuli are obviously not enough to create real interest for the employees and the employers. An additional motivation for the employers is needed that could be based exclusively upon the economic profit.

That is why the efforts by the experts should be concentrated on the elaboration of non money stimuli. For example in case of the increase of the retirement age within the solidarity system it would possible to apply to the participants of non state funds another rules for definition of the retirement age. The same mechanisms could be provided for the system of the education, healthcare, etc.³⁷

Also many problems emerge related to the fulfillment of the valid pension legislation. In particular in 2009 the working pensioners were paid fewer funds than it was provided by the legislation.

Thus the resolution of the Cabinet of Ministers of Ukraine № 530 “Certain Issues of the Social Protection for Several Categories of Citizens” provides that in case of the recalculation of pension from the bigger wage taking into consideration the insurance length acquired after its appointment, the index of average yearly payment per one person should be applied prior the pension recalculation.

But the Ministry of Labor and Social Policy and the Pension Fund of Ukraine adopted the explanation (letter № 20/0/18-09/039 dated March 11, 2009) determining that the recalculation of pension in 2009 is applied using the index of wages for 2007.

That means that in 2009 we had a large amount of pensioners defrauded. They were paid fewer funds than provided by the law. It turned out to be somehow that the letter from the ministry was more important than the resolution by the Cabinet of Ministers of Ukraine.

For sure the issue requires regulation by means of making amendments to the laws regulating provision of pensions. The Ministry of Labor and Social Policy informed the Ukrainian Helsinki Human Rights Union on the matter. But prior its legislative resolution the state should act in correspondence with the legislation and not to look after ways to save on the pensioners.³⁸

Later the Ministry of Justice of Ukraine addressed the Ministry of Labor and Social Policy and the Pension Fund with the demand to recall the letter from the places of its application and to revoke it. These two organizations with their decrees violated Ukrainian legislation.³⁹

General Prosecutor's Office of Ukraine also found in the actions of the authorities of the Ministry of Labor and Social Policy and the Pension Fund of Ukraine indications to components of crime. In an answer to the deputies' address the General Prosecutor's Office made a protest against the unlawful actions by the authorities of the Ministry of Labor and Social Policy and the Pension Fund of Ukraine.⁴⁰

Also during a long period of time in Ukraine there were valid discrimination clauses of the pension legislation limiting people's right to pension in case of the emigration to other countries.

The problem of Ukrainians right to pension violation when they move abroad existed for a long time. Many horns were locked in fight of the pensioners with the state authorities concerning their right to pension.

³⁷ It is needed to increase not the retirement age but the official wages. Pension reform through the eyes of an interested party. Koval O. // *Dzerkalo tyzhnia* (Дзеркало тижня) № 33 (813) September 11–17, 2010 <http://www.dt.ua/2000/2650/70348/>

³⁸ The state defrauded the pensioners <http://www.helsinki.org.ua/index.php?id=1254745773>

³⁹ The Pension Fund and the Ministry of Labor violated the legislation of Ukraine <http://www.khpg.org/index.php?id=1261861143>

⁴⁰ Pensioners are under given 250-400 UAH monthly <http://ua.glavred.info/archive/2009/06/23/101255-3.html>

All of those dealt with the provision of the Law of Ukraine “On General Compulsory State Retirement Insurance” providing that pension payment is stopped for all the time of living a pensioner abroad. Only in case when there is a corresponding international agreement on social security with corresponding state, a pensioner gets a chance to obtain what he had earned with his labor.

In fact pensioners’ right for receiving a pension was put under dependence on actions by the state signing international agreements with one or another country. Legally there was a situation created, when the citizens, working on the territory of Ukraine and paying the insurance contributions were deprived of possibility to obtain the pension.

Only after the adoption of the decision by the Constitution Court of Ukraine (25-pn/2009 dated October 07, 2009) on the acknowledgement as non constitutional of these provisions of the pension legislation, pensioners got a chance to defend their right to pension.

Besides the Constitutional Court in its resolution stated that that the Verkhovna Rada of Ukraine had to pay attention on the necessity to bring in correspondence with the Constitution of Ukraine the provisions of other laws regulating payment of pensions to the pensioners permanently residing in the states, Ukraine did not sign the corresponding agreements with. Until present the issue is not defined legally and the rights of such pensioners are still violated.

It is also important to state that the Constitutional Court of Ukraine explicitly put a question on the obligation of the State to adopt the law on compensation of material and moral damage, caused to physical and juridical bodies by acts and actions, acknowledged as non constitutional. But as far as the law determining the order and the conditions for such compensation is still absent by now, in fact it is impossible to obtain it.⁴¹

3.4. INTRODUCTION OF A SINGLE SOCIAL CONTRIBUTION

It is necessary to mention that in last two years there were more attempts to introduce single social contribution in Ukraine.

Thus, in the beginning of July, 2010 the Verkhovna Rada of Ukraine passed the Law of Ukraine “On Collection and Accounting of Single Contribution for Mandatory State Social Insurance” signed later by the President of Ukraine. The Document offered to implement in Ukraine the unique system of social contributions collection, its accounting and control over its complete and timely payment and also the single information system of social contribution payers and the people insured.

The Law states that the introduction of the single social contribution, offered to implement since January 1, 2011, will permit to simplify gradually the interaction of the payers with the funds of social security.

At the same time this legislative document did not avoid problems that might significantly reduce its value. It is proved by the analysis of the document carried out by the Main Research Expert Direction of the Verkhovna Rada of Ukraine as back as on the level of draft bill, adopted as background. It should be said that the conceptual remarks of that organization were not taken into consideration further.

In particular in opinion of Main Research Expert Direction the law is rather vulnerable from the conceptual point of view, as far as from the point of view of state management theory. It is not fully coordinated with patterns of any managerial activity (including ones related to mandatory state social security). According to its foundations the introduction of the single social contribution should be objectively accompanied by the creation of the single state of mandatory state social insurance, subject to single organizational management body.⁴²

⁴¹ Ukrainians abroad should be paid their pensions. But will the moral damage be compensated? <http://www.helsinki.org.ua/index.php?id=1255086207>

⁴² Conclusion of the Main Research Expert Direction of the Verkhovna Rada of Ukraine as regard to draft bill “On Collection and Accounting of the Single Social Contribution”. (№ 6525 dated June 15, 2010). http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=37981

Instead the Law offers in contradiction to the patterns, the preservation of existing system of respective funds of mandatory state social security that are relatively separate, social security funds, managed by corresponding separate management bodies created especially to manage the funds. According to the contents of the draft bill those, together with the bodies of the Pension Fund of Ukraine would continue to fulfill part of management functions related to corresponding social security funds. It would objectively result in duplicating its managerial functions in corresponding areas of mandatory state social insurance of Ukraine, in emerging conflicts and misunderstanding between the Pension Fund of Ukraine and management bodies of the corresponding social security funds. In total the criteria above mentioned, in opinion of Main Research Expert Direction will influence negatively the efficiency of management in the area of mandatory state social security in Ukraine as a whole.

It is needed to mention that at introduction of single social contribution it was important to carry on the systemic reform of all the bodies of mandatory state social insurance together with corresponding legislation. It would result in creation of the unique body, providing functions concerning the consolidation of collection, accounting and control over payment and application of the single social contribution for mandatory state social insurance. Unfortunately it has not been done.

Besides the experts have numerous criticisms concerning the law mentioned. For example the law makes amendments to the Law of Ukraine “On Mandatory State Social Insurance in the Event of Unemployment” not related to the topic of the draft bill. In particular the project excludes all the provisions concerning the voluntary participation in this type of security for the self-employed persons and physical bodies — subjects of *entrepreneurial activity*. ***Such persons are subject to mandatory insurance for the case of unemployment. Also the amendments to the law include the working pensioners among those subject to the mandatory insurance in the event of unemployment.***

It is important that such amendments to the Law mentioned violate one of the acting principles of mandatory state social insurance as regard to mandatory insurance only for hired employees that is the social protection for this category of people, guaranteed by the state. And concerning people who provide employment for themselves (including doing work by civil agreements), physical bodies entrepreneurs — they have a right for material security according to this type of insurance under condition of payment of insurance contributions on voluntary basis. It is similar to insurance in the event of temporary loss of working capacity.

It is needed to mention at the same time that establishing mandatory insurance in the event of unemployment for working pensioners violates the logic of social protection of the citizens by the state, because this category of citizens already receives pension and does not require double protection.

Relating the categories mentioned to those subject to mandatory insurance in the event of unemployment, in the Law of Ukraine “On Collection and Accounting of Single Contribution for Mandatory State Social Insurance” it is provided respectively the amount of the single payment for its payers taking into consideration directing its part on mandatory state social insurance in the event of unemployment. Is such a way for this category of payers the dimension of the single contribution is increased.

Main Juristic Direction of the Verkhovna Rada of Ukraine in the analysis of the law declared that the provisions related to extension of persons subject to mandatory insurance in the event of unemployment and directing part of the single contribution paid by them to the insurance in the event of unemployment did not correspond to the requirements of Article 22 of the Constitution of Ukraine and require to be excluded from the draft bill.⁴³ Despite the validity of the remark the Verkhovna Rada of Ukraine did not take it into consideration passing the law.

⁴³ Observation of the Main Juristic Direction of the Verkhovna Rada of Ukraine to the draft bill “On Collection and Accounting of the Single Social Contribution” (registration № 6525). http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=37981

4. RECOMMENDATIONS

1. Reform the system for social benefits, divide legal norms into those guaranteeing socio-economic rights and those granting certain privileges in connection with a particular position or special merits;
2. Stop the practice of suspending the form or not implementing legal norms guaranteeing socio-economic rights;
3. Allow for the full funding of guarantees of socio-economic rights enshrined in law;
4. Improve the calculation of the subsistence minimum, approving a new subsistence basket of food items and goods and services; adopt new methods for calculating this indicator;
5. renounce the use of indicator “a guaranteed level of subsistence minimum”, which unreasonably reduces the minimum social guarantees that are declared in the legislation;
6. Improve regulation of the quality of food items, as well as the quality and safety of drinking water;
7. Introduce measures aimed at providing housing affordable, prevent arbitrary eviction of homes (for example, dormitories), violation of rights to housing affordability for vulnerable groups;
8. Ensure proper financing and understandable and effective mechanisms for implementing a program providing social housing, as well as the development of a network of reintegration centers and social hotels for people who are homeless;
9. improve work on social protection for vulnerable groups in response to increasing rates for utility services, including operation of a transparent and effective system of utility incentives and subsidies;
10. Gradually reduce the percentage of direct State funding of social needs and increase the amount financed by the population on the basis of increases in all income, first and foremost, wages, pensions and other forms of social transfers;
11. introduce a single form of targeted social assistance for unforeseen circumstances — the death of a relative, serious illness, natural disaster, social conflict, etc;
12. ensure a strict link between social benefits provided and the sources and mechanisms for compensation of their value to those providing them;
13. Introduce standardized approaches for determining the size of payments from the State Budget to compensate those providing benefit services;
14. Continue reform of the pension system by introducing an accumulation level of this system and create the conditions for this;
15. Avoid discrete increases in the minimum pension and introduce a rule for indexation according to which increases in the pension would be linked to the index for consumer prices calculated for groups in society with different incomes;
16. Improve regulation and supervision over private pension funds taking international experience and consultations into consideration;
17. Create mechanisms for implementing the judgment of the Constitutional Court regarding the non-compliance with the Constitution of the Law “On the State Budget for 2008”;
18. Improve legislation concerning a system of single social insurance and develop mechanisms for introducing it, and for preventing “corrupt schemes” in its functioning.

XVI. THE RIGHT TO WORK¹

1. OVERVIEW

The right to work is a crucial socio-economic right. In accordance with the International Labor Organization (ILO) Statute, general and lasting peace can be established only under condition that it is grounded on social justice. It further stipulates that unsatisfactory working conditions causing injustice, necessity and poverty among large number of people may provoke riots so big as to pose threat to peace and harmony in the world.

Moreover, it is important to understand internal relations between labor and human dignity, since the right to work determines people's opportunity to engage in work in order to ensure material well-being and personal development in conditions of freedom and dignity, economic security and equal opportunities. Last two years were rather complicated for the Ukrainian economy. Considerable difficulties have existed in the field of ensuring labor rights. The increase in number of unemployed and those working a short working week, remaining on unpaid vacation, with delayed or unofficially paid wages has contributed to considerable decrease in standards of living among the population. It all has demonstrated the existing defects in employment's ensuring in Ukraine. Official level of unemployment in Ukraine does not reflect its real level, the unemployment benefit is not sufficient for minimum requirements, the mechanism for provision of a benefit for partial unemployment has still not been launched, there are problems with employment of the vulnerable groups of population. These factors demonstrate the State's non fulfillment of its obligations to guarantee the employment.

It is similarly difficult to claim the adherence to the principle of just remuneration for work. In particular, Ukraine keeps far away from the standards of minimum wage as defined in the European Social Charter. Although the nominal size of wages has somehow increased over the last two years, rising prices on food, transportation, housing and utility bills did not allow to feel it. At the same time, employees of the public sector have not noticed any changes. Since the legislation includes some legal norms which "freeze" their wages at a certain level, often even lower than the minimum wage.

The problem of wage arrears remains sharp, and the State's measures aimed at its decrease still do not make changes for the better. Similarly, there are crucial problems with providing effective control over the fulfillment of labor legislation. Unfortunately, both wage arrears and infringements of labor legislation remain widely spread in Ukraine.

Apart it is worth indicating that the State has not managed to make any progress in the field of ensuring secure labor conditions over the last years. The number of injuries and work-related diseases keeps on growing and every fourth person in Ukraine work in conditions that do not meet the sanitary-and-hygienic standards. It vividly attests to the inefficiency of measures taken in this field by the State.

¹ By Maksym Scherbatyuk, UHHRU.

2. SAFEGUARDING EMPLOYMENT

The world financial crisis, reduction in manufacturing, financial and material arrears, problems with products sale — it all has caused dismissals of staff. The rows of unemployed are being reinforced by people who until quite recently have considered their working position to be firm and reliable. Nowadays in Ukraine one can observe partial employment and concealed unemployment at the background of further decrease in work productivity.

Existing problems in the field of safeguarding employment and the importance of this field to people are also confirmed by public opinion polls. In particular, according to the poll conducted on September 9 to 16, 2010 by the Sociological Group “Rating”, 60% of the public mentioned the unemployment among the most urgent problems to be solved. In regional terms the problem of unemployment is the most vital for population of the West, Center and South of Ukraine².

According to the State Department of Statistics, average monthly number of economically active population at the age 15–70 (figures provided according to the selective survey of the population (households) on average economic activity over the first half-year of 2010) was 22,1 million people, 20,2 million of them were engaged in economic activity and the rest (1,9 million) were unemployed, that is to say people who did not have a job but were looking for it actively both independently and with the assistance of the State Employment Center. By the end of 2008 the number of this type of unemployed was smaller by far, 1,3 million people. The Minister of Employment and Social Policy, Vasyl Nadraga also declared the increasing number of unemployed³. The level of employment among the population was 58,4% at the age 15–70 and 65,4% at the able-bodied age. The level of unemployment (ILO methodology) among economically active population at the age 15–70 was 8,5% and 9,2% among the able-bodied. The number of unemployed citizens registered by the State Employment Center, by October 1, 2010 was 426,6 thousand people. However, even the Director of The State Employment Center, Volodymyr Galytskyy acknowledged in part the imperfection of official statistics saying that the Center used to register only about one half of those without work. So he did not exclude the possibility that indeed over one million people might be unemployed in Ukraine nowadays⁴.

It is also confirmed by the figures from the State Department of Statistics, in particular, the number of people registered unemployed by October 1, 2010 was 408,1 thousand people, or 21,8% of the unemployed at the able-bodied age as calculated according to the ILO methodology.

There are also discrepancies between vacancies on the one hand, and professional and vocational skills available, as well as where the demand was, on the other. It causes considerable regional differentiation as to registered unemployment. The highest concentration of unemployed was registered in Zhytomyr region and the lowest in Kyiv city.

The demand for employment among those who are registered at the State Employment Center has increased and by the end of September, 2010 it reached 50 people per 10 vacancies. In regional terms there is still considerable differentiation of the above mentioned index: starting with 2 people in the city of Kyiv up to 319 people in the Khmelnytsky region⁵. These figures prove sharp deficit of new workplaces.

However, while dealing with present day situation with unemployment, one should not rely exclusively on figures, especially on official ones. Since the phenomenon of Ukrainian unemployment has its peculiarities, one of them being that official figures can exhibit only the top of an iceberg. And one can only guess about its actual size, inasmuch as there are those who are not registered

² *The biggest problem of Ukraine is unemployment*, a poll <http://www.zaxid.net/newsua/2010/9/27/223043/>

³ There are about 2 million of unemployed in Ukraine <http://www.helsinki.org.ua/index.php?id=1274347107>

⁴ Is the level of unemployment in Ukraine lower than in Europe? <http://www.dw-world.de/dw/article/0,,5386624,00.html>

⁵ Figures from the State Department of Statistics of Ukraine <http://www.ukrstat.gov.ua/>

as unemployed for different reasons, those who form part of the “concealed unemployment”: work a shorter working week, stay on unpaid holidays, receive delayed or unofficially paid wages⁶.

For instance, according to the Accounting Chamber of Ukraine about 1,4 million people, or 13% of staff worked part-time or remained on administrative leaves in December, 2009⁷.

It is also worth noting the drawbacks of legislative regulation of employment. Thus, the Law of Ukraine “*On Amendments to Some Laws of Ukraine Related to Mitigating the Impact of the Global Financial Crisis on Employment of the Population*”, adopted at the end of 2008, restricted the rights of citizens who canceled a work contract by mutual consent. In particular, this law established a legal norm according to which persons, who left their jobs by mutual consent and were registered at an employment center, had the right to receive a benefit only on the 91st day after that. In fact, according to this law people who left a job by mutual consent were equated with those who resigned voluntarily and without good cause. These innovations did not meet the Article 22 of the Constitution of Ukraine and the Constitutional Court of Ukraine acknowledged it with its resolution of April 28, 2009 № 9-пп/2009 recognizing the above mentioned changes as unconstitutional⁸.

Besides, there are the norms of this Law that discriminate rural residents having plots of land but do not have any other job keep valid. The Law denies their right to be registered as unemployed. Practically, this is a mechanism for artificial reduction of unemployment level, especially in those regions where the majority of these people live. As a result, for instance, the number of unemployed decreased by 35 per cent in Ternopil region⁹. It is obvious that such a decrease in official figures cannot be an effective measure for struggle against unemployment.

There are also problems related to taking measures aimed at safeguarding employment for vulnerable groups of population, in particular, for the disabled. As stated by the Accounting Chamber of Ukraine the problem of opening new and preserving the existing workplaces for the disabled keeps unresolved. By the beginning of 2010 only 45 thousand or 14 per cent out of 319 thousand of the disabled in the Lviv, Volyn, Rivne and Ternopil regions were engaged in work.

It is caused, in particular, by the fact that 85% of funds aimed at social, labor and professional rehabilitation of the disabled are spent on operation of rehabilitation centers and organizational and technical provision for the departments of the Fund of Social Security of Disabled of Ukraine. As proved by the Accounting Chamber audit, indeed 7 of 13 main directions of rehabilitation measures were not financed. The mechanism of giving loans and repayable aids for employers to open and preserve working positions for disabled was not in use.

According to submitted reporting, during 2008-2009 644 workplaces were created for the disabled in the Lviv, Volyn, Rivne and Ternopil regions. At the same time, as stated by the Accounting Chamber of Ukraine, indexes from the departments of the Fund of Social Security of Disabled are overestimated and groundless, the majority of created workplaces are not actually confirmed and some of them are not related to employment of the disabled at all.

The Head of the Accounting Chamber, Valentyn Symonenko stated: “Disregarding the principal direction of Fund operation, only 15% of resources are directed to create workplaces for the disabled, the rest is spent on construction and equipment of rehabilitation centers, on operation of departments of the Fund but the main goal — the employment of the disabled — is not met.

⁶ Sharp facets of the labor market // Dzerkalo tyzhnya, № 34 (814) 18–24 September, 2010 <http://www.dt.ua/2000/2675/70398/>

⁷ Information related to administration of the State Budget of Ukraine in 2009 as prepared by the Department of Budget Politics and approved by resolution of the Collegium of the Accounting Chamber http://www.ac-rada.gov.ua/control/main/uk/publish/printable_article/16724385.jsessionid=66CB4F11DDFEBCB1792CC250736E149E

⁸ The Constitutional Court explained how unemployed collect their benefit <http://www.khpg.org/index.php?id=1241087385>

⁹ Does unemployment not rise because labor exchanges do not “see” rural residents? <http://human-rights.unian.net/ukr/detail/192611>

The raised problems refer not only to the Western region where the audit survey took place, they are nationwide and chronic problems of the disabled in our society”¹⁰.

Workplaces are being reduced in specialized manufactures UTOG and UTOS, owned by public organizations of the disabled. Measures on development of business initiative among the disabled and out-work which would allow employment of those with severe health disabilities are not taken¹¹.

There is an urgent problem of young people unemployment. In view of social-economic crisis the youth is one of the most vulnerable groups. Ukrainian legislation defines young people as those from 14 to 35 years old. According to the State Department of Statistics, there are about 15 million young people in Ukraine. 10,7 million of them are urban residents and 4,3 million — rural residents.

Analysis of employment of young people proves that the situation is very unstable on youth labor market due to high level of economic passivity among young people. The problem of discrepancies between labor market's demands and professional education remains unresolved. The research of unemployment rates among population groups broken down by age (ILO methodology) during 2007–2009 (average value for each year, in percentage to the number of economically active population of each age group) registered the highest growth in rate among unemployed at the age of 15–24. This age group is affected above all other groups by financial crisis influence on the country's economy. The rate was 12,5% in 2007 and 17,8% in 2009, that is it grew in 1,4 times. These figures prove totally low employment provision for young people

Among reasons for present situation there are also vague legal norms regulating the field of youth employment. Thus, the Law of Ukraine “*On Provision of Youth Having Higher or Vocational Education with the First Job and Granting Subsidy to Employer*” dated November 04, 2004 № 2150-IV determines the mechanism for granting subsidy to employer who commits to employing graduating students. But this particular law requires clear listing of professions eligible for subsidy and considering regional peculiarities of the labor market.

The Law of Ukraine “*On Promotion of Social Formation and Development of Ukrainian Youth*” dated February 05, 1993 № 2998-XII ensures provision of socioeconomic, political and legal conditions for social formation and development of youth. The Law regulates creation and operation of youth employment centers as alternative institutions to state employment centers. With the view of providing secondary employment for youth, especially for high school pupils and college students, the law determines a legal status of youth manpower. But this legislation does not resolve the issue of equal provision of the first job for graduating students of state and private educational institutions. There is still a quota based on state order.

Legislation safeguards the development of alternative forms of youth engagement in labor market. One of such forms is entrepreneurship. But this field needs improvement. At present the State lacks sufficient legislation, reformed civil and entrepreneurial laws and favorable tax climate to help the young people in starting their own business¹².

3. STATE AID FOR THE UNEMPLOYED

Unfortunately, up to date neither Article 17 of the Law of Ukraine “On State social standards and social guarantees”, nor Article 23 of the Law of Ukraine “On mandatory State unemployment

¹⁰ Unemployed invalids want to work <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16730764>

¹¹ European standards, Ukrainian problems <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16731542;jsessionid=B7CFC3326357DD902A2D298EC37DD632>

¹² Youth unemployment and problems with developing youth entrepreneurship http://www.ya.org.ua/index.php?option=com_content&view=article&id=437:2010-09-20-12-24-17&catid=39:2010-08-29-07-10-35&Itemid=129

insurance” are observed as regards to the size of such an aid determined to be not lower than subsistence minimum for the able-bodied.

Since early 2010 the minimum amount of unemployment benefit for people insured was 500 UAH. This amount was set by the board of the Mandatory State Unemployment Insurance Fund October 1, 2008 and then corresponded to 74,7% of the size of subsistence minimum (669 UAH).

In 2009 the minimum amount of benefit did not change, although actual subsistence minimum for the able-bodied increased up to 872 UAH, or 1,3 times compared to October, 2009.

And only in August, 2010 (resolution of the board of the Mandatory State Unemployment Insurance Fund “On the minimum amount of unemployment benefit in 2010” since 19.08.2010 № 190) the minimum amount of unemployment benefit was reconsidered and new amounts of this benefit were established:

- Since September 1 — not less than 665 UAH (74,5% of subsistence level);
- Since October 1 — not less than 680 UAH (74,5% of subsistence level);
- Since December 1 — not less than 700 UAH (75,9% of subsistence level).

And the unemployment benefit for those without insurance was set as follows:

- Since September 1 — not less than 480 UAH;
- Since October 1 — not less than 490 UAH;
- Since December 1 — not less than 500 UAH.

At the same time, this increase has just brought back the situation which existed back in 2008. It does not mean the implementation of legislative provisions in this field. The amount of unemployment benefit keeps being inadequate to ensure sufficient standards of living or, at least, meet minimal necessities of people who find themselves in distressing situations.

It is also worth mentioning that not everybody registered as unemployed gets this scanty aid. As stated by the State Department of Statistics, 68,5% of people with status of unemployed received unemployment benefit as of September, 2010.

As regards part-time employment benefits, it is known that the Law of Ukraine “*On Amendments to Some Laws of Ukraine Related to Mitigating the Impact of the Global Financial Crisis on Employment of the Population*” has introduced some legislative provisions which regulate payment of this type of benefits until January 1, 2010.

Practical payments of part-time employment benefits had revealed considerable difficulties, so it was necessary to improve some provisions concerning allocating funds to enterprises for specific purposes, to ensure correct and unambiguous application of legislative norms which regulate these issues. In connection with this proposals were developed in order to improve legal regulation in this field.

But despite numerous appeals of trade unions and other organizations, legal regulation of payments of part-time employment benefits had not improved and even the validity of the specific provisions was not prolonged after January 1, 2010. At present these provisions are not applied and some bills are submitted to the Verkhovna Rada of Ukraine aimed at introducing these benefits were not passed.

4. ENSURING DECENT WORKING CONDITIONS

The issue of remuneration for work is crucial in the system of socioeconomic relations since it concerns interests of the main part of population and influences on all the areas of public life. The level of work remuneration determines such basic macroeconomic parameters as social security standards and total effective demand.

Wage is one of main economic categories combining interests of employees, employers and the state and directly influencing on standards of living of the population. One can have the idea of economic situation in any society, its contradictions, achievements, misses based on wage amount, its increases or decreases, timelines of payments.

At the same time domestic standards of work remuneration are rather low. In March, 2010 every sixth employee received minimum wage, every second employee's gross payroll did not exceed the national average amount. Simultaneously, its share in household incomes is decreasing, at the time that the share of social benefits and other current budget transfers is increasing. The share of wages in household incomes was 44,8% in 2007, 43,3% — in 2008, 41,9% — in 2009, 42,4% — in the second quarter of 2010, whereas the share of social security was 36,7; 37,8; 39,6 and 41,9% respectively (Figure 1).

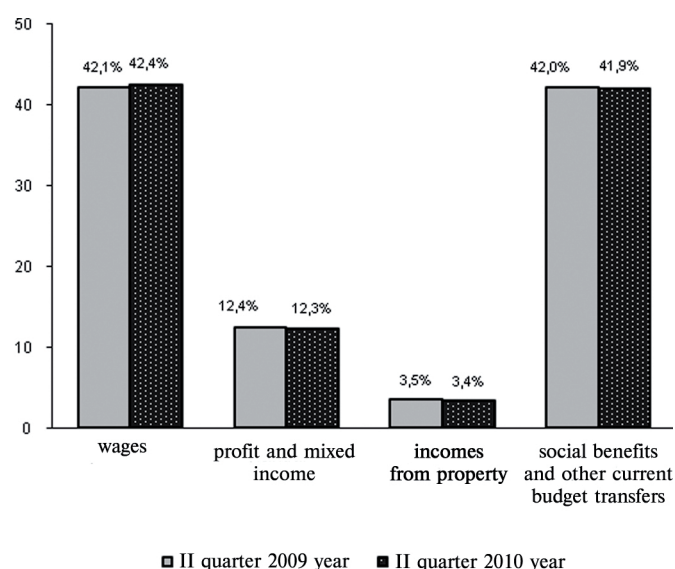
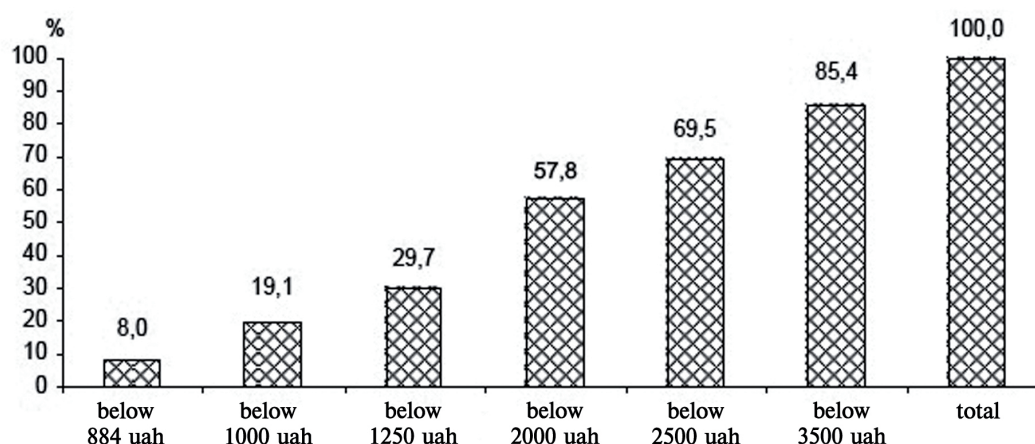


Figure 1. Structure of household incomes in Ukraine¹³

Figures in quantitative distribution of employees by size of wages (Chart 1) prove that every third employee in Ukraine received a wage less than 1250 UAH, which vividly demonstrates low standards of work remuneration in the country.

Chart 1. Figures in quantitative distribution of employees by the size of wages calculated for June, 2010¹⁴



¹³ Figures from the State Department of Statistics of Ukraine <http://www.ukrstat.gov.ua/>

¹⁴ Figures from the State Department of Statistics of Ukraine <http://www.ukrstat.gov.ua/>

Besides, there are considerable branch discrepancies in work remuneration. In particular, as of June, 2010 an estimated 20% of agricultural workers received a wage less than the lowest index, in construction the number of such workers was over 13%. On the other hand, there is a large-scale regional gap in work remuneration, in particular between work remuneration in the city of Kyiv, in the Donetsk and Dnipropetrovsk regions, on the one hand, and, for instance, in the Volyn, Vinnytsa and Ternopil regions, on the other¹⁵.

Especially low wage rates there are in public sector. Improvement of work remuneration of state employees envisages, in particular, the introduction of optimal differentiation of pay bands based on the Single band scale and salaries of varied vocational and qualification group of workers taking into consideration the level of complexity and results of their work; elimination of ungrounded disproportions in work remuneration rates for employees of equal qualification performing work of equal complexity and functional features, and also the wage rise for public sector's employees.

According to the results of evaluation carried out by the Accounting Chamber of Ukraine concerning regulation of payment conditions in public sector on the basis of Single rate scale, it was concluded that payment system based on Single rate scale for public sector's employees did not undergo any improvement during 2009 and first half of 2010 and the situation has just become worse.

Government's decisions taken in this period caused the collapse of rate scale system, provided for public sector, and the leveling of wages. Among them there are: the setting of a salary (wage rate) of first rate employees lower than defined by the law on remuneration and also unsystematic adjustment of payment conditions for some categories of employees.

Having fixed the size of a salary in absolute value lower than a minimum wage in 2009, the Government actually restored "manual control" of wages in public sector.

Hereby, it is worth stressing that the Cabinet of Ministers of Ukraine has not fulfilled any resolution of the Committee of Verkhovna Rada on Social Policy and Labor on setting a salary for first rate employees not lower than minimum wage.

In 2009 the size of a salary (wage rate) of first rate employees was 545 UAH, that is 10–26,7% less than minimum wage legally defined for particular periods of time. Since January 1, 2010 this size was 555 UAH, since April 1 — 567 UAH, since July 1 — 570 UAH, or about 36% less than legally defined size of minimum wage for respective periods. Explanation is that setting a salary of first rate employees at minimum wage level would require additional budget expenditures of 47 billion UAH, with absent sources to cover¹⁶.

Evaluating the situation, the Head of the Accounting Chamber, Valentyn Symonenko, claimed that arguments of the Ministry of Finance concerning lack of financial budget resources to set a salary of first rate employees at level of minimum wage seem not convincing because there are budget resources but they are not distributed among directions of primary importance to the society¹⁷.

As a result, in late 2009 equal salaries at the rate of minimum wage were set for 1-5 rate employees and in 2010 — for 1–7 rate employees inclusively. It undermines the basis of differentiated work remuneration according to employee's qualification and means leveling of wages.

The Accounting Chamber of Ukraine ascertains that lack of understanding of negative socio-economic consequences of low wages keeps causing their unjustifiably low rates in public sector. Wages do not meet their principal goals — recreation of labor force and stimulation of labor. In the first half of 2010 average monthly salary for employees in education (1823 UAH) was 13,6% less than average monthly pay in economics and 24,5% less than in industry, in healthcare (1545 UAH) it was 26,8% and 36,1%, in culture and sport (1955 UAH) — 7,3% and 19,1% less respectively.

This problem was also emphasized by the trade union of education and science. In its letter № 02-5/118, dated March 25, 2010, the trade union stated that the introduction since December 2008 on the basis of government's resolutions №939, dated 25.10.2008, and № 1117, dated

¹⁵ Figures by the State Department of Statistics of Ukraine <http://www.ukrstat.gov.ua/>

¹⁶ The Accounting Chamber of Ukraine: Collapse of pay rate system in public sector continues...<http://www.ac-rada.gov.ua/control/main/uk/publish/article/16730457>

¹⁷ Ibid.

20.12.2008, of fixed value of 545 UAH to set salaries of any rate on the Single rate scale caused its “freezing” for education and science workers at the rate of October 2008. Work remuneration for 1–5 rate employees is leveled; differentiation in work remuneration for trained experts and employees engaged in unskilled labor is considerably weakened. Average salaries of pedagogical and scientific and pedagogical workers, being 1074 UAH and 1864 UAH respectively, as compared to salaries of industrial workers, being 2201 UAH as of January 2010, do not reach even half of the size guaranteed by the Law of Ukraine “On Education”.

It is also stated in the letter that if the above mentioned mechanism of setting wage rates in public sector, in particular, in education, disregarding value of minimum wage defined by the Law of Ukraine “On Establishing the Minimum Subsistence Level and the Minimum Wage” of October 20, 2009 № 1646, keeps functioning, it will cause losses of 12–21 thousand UAH by every pedagogical worker and of 14–37 thousand UAH by every scientific and pedagogical worker on average over 2010¹⁸.

Wage arrears are still among the most urgent social issues in Ukraine, since they infringe the rights of workers to a standard of living sufficient for himself or herself and his or her family, to timely payment guaranteed by Articles 43 and 48 of the Constitution of Ukraine.

Results of evaluation of the situation with wage arrears conducted by the Accounting Chamber of Ukraine are not poor: the amount of wages owed to employees in varied sectors was significantly rising during 2008–2009, in 2008 it increased by 1,8 times (there was the same level of wage arrears in Ukraine in 2005). In 2009 the amount of arrears increased 23,9% more and by January 1, 2010 reached 1,5 billion UAH (Figure 2). Hereby, the increase in the amount of owed wages was due to economically active enterprises.

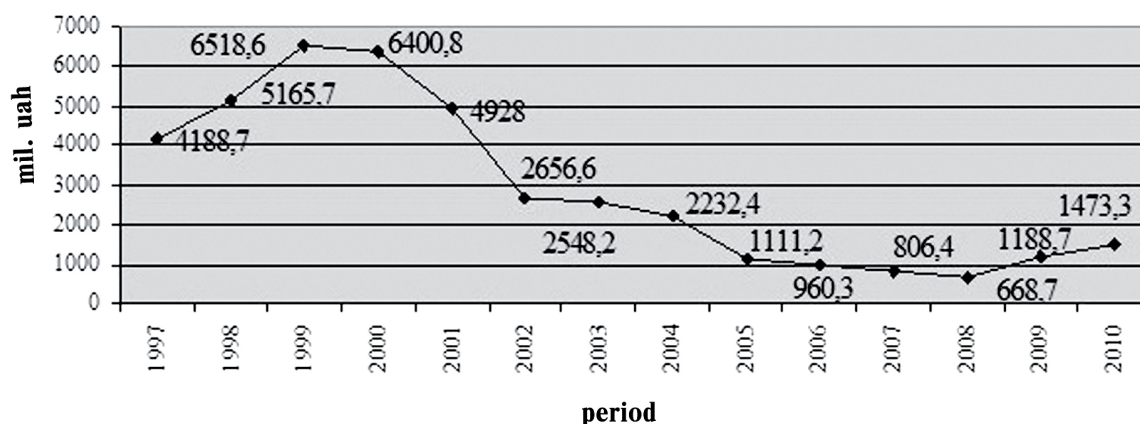


Figure 2. Dynamics of the amount of wage arrears¹⁹

The Collegium of the Accounting Chamber analyzed the reasons for such a situation and made a conclusion that the measures taken by the Cabinet of Ministers of Ukraine to repay arrears for these years have been non systematic, ineffective and in some cases violating norms of current legislation. The majority of causes of arrears rise are related to ineffective administration system of enterprises and inappropriate control on part of correspondent public authorities.²⁰

¹⁸ Letter of the Central Committee of trade union of education and science of Ukraine № 02-5/118 dated March 25, 2010 <http://osvita.ua/legislation/other/7580>

¹⁹ Accounting Chamber of Ukraine. Bulletin prepared on the basis of Report on results of evaluation of the situation with wage arrears. — Kyiv: Accounting Chamber of Ukraine, 2010. <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16727012>

²⁰ Accounting Chamber of Ukraine. The phantom of wage arrears is back... <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16725855>

Thus, weekly monitorings of the situation introduced by the government in 2009 and activity of the Commission on repayment of arrears of wages, pensions, scholarships and other social payments turned out to be useless because they have not solved the issue in question. Monitoring and reporting to the Ministry of Social Policy just distracted heads of ministries from performing the tasks laid on them in this field.

Due to absence of a clear mechanism for channeling funds, in particular into repayment of wage arrears, assets from the Stabilization Fund were used by the Ministry of Coal Industry (Minvugleprom) at its own discretion. In particular, Minvugleprom instead of repaying wage arrears to coal mining and construction enterprises, channeled part of received resources into other purposes. As a result, 1,4 million UAH were used inappropriately.

The problem with repayment of wage arrears has not been solved either by the illegal introduction on part of the Cabinet of Ministers of Ukraine of targeted reimbursement of value-added tax against repayment of wage arrears. It created unequal opportunities for receiving the stated reimbursement by payers and caused inappropriate application of 6,7 million UAH by enterprises that had not had any wage arrears.²¹

Although there is a range of laws on safeguarding timely payments of wages, nowadays regulatory and legal framework to control these issues is incomplete, impeding the creation of effective mechanism for protection of citizens' rights.

In particular, it is necessary to legally define some additional state guarantees for employees in case of employer's insolvency. It is especially vital under crisis conditions when bankruptcy of enterprises has become a widespread phenomenon. It is worth noting that ILO "Protection of Workers' Claims (Employer's Insolvency) Convention" № 173 of 1992 envisages establishment of an organization in order to guarantee repayment of wage arrears in case of employer's insolvency. At the same time this Convention is ratified by Ukraine only in part. The Part III of the Convention dealing with protection of workers' claims by a guarantee institution when payment cannot be made by the employer because of insolvency has not been ratified.

5. ENSURING OCCUPATIONAL SAFETY

Under economic and demographic crisis in Ukraine the situation with injuries, state of health and work-related illnesses of employees has aggravated.

Over the last 5 years almost 5 thousand workers have died and above 85 thousand got injured in production. The rate of fatal accidents considerably exceeds a correspondent average index in European countries. The share of workers engaged in harmful to health working conditions has increased up to 30%. The number of newly discovered work-related illnesses is constantly rising (6–7 thousand a year).²²

Due to large-scale sickness rates, temporal disabilities, invalidity of the injured, economy loses irreversibly skilled labor capacities, billions of budget and social security funds.

Due to lack of stimuli and strict liabilities system, employers save on work safety and are practically not interested in prevention of possible breakdowns and accidents. All expenses dealing with their consequences are indeed on account of the society and compensation to the injured is paid by the Fund for Social Insurance against Accidents which is lately not able to do it any longer due to shortage of finances.

In Ukraine there is no integrated OSH (Occupational Safety and Health) management system, legal and social business culture. The level of business's social liability is to be measured not by the

²¹ Accounting Chamber of Ukraine. The phantom of wage arrears is back... <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16725855>

²² FPU initiates creation of National Strategy for work safety http://www.fpsu.org.ua/index.php?option=com_content&view=article&id=3502&Itemid=2&lang=uk

amount of charities but by safe working conditions it creates. Unfortunately, statistics prove that every fourth employee in Ukraine works in conditions that do not meet sanitation and hygiene norms, about 80 per cent of enterprises do not meet sanitation and hygiene specifications. As a result, the number of work-related illnesses is growing.

According to Deputy Minister of Employment and Social Policy of Ukraine, Vyacheslav Kolomiets, “Out of total number of those who are engaged in industry, construction and transportation, over 1,3 million people work in conditions which do not meet sanitation and hygiene norms. There are 300 thousand women among them”. Vyacheslav Kolomiets also mentioned the fact that the issue of injury prevention was not being solved per se meaning a heavy burden on the economy²³.

The target system of healthcare for industrial employees that had allowed maintaining workers’ health, detecting work-related illnesses at early stages, rather than in irrevocably running form, as it usually happens now, has been almost eliminated.

Injury in non-productive sector is another highly urgent social issue, its rate being by 70 times higher than in productive sector. Annual losses of economy caused by injuries and deaths of citizens in sectors not connected with production exceed 10 billion UAH which means 2,5% of gross domestic product of Ukraine.

At present pace of workers’ health deterioration, by 2015–2020 the demand for workforce for leading industries may be met only by 40–45%, which threatens metallurgical, chemical, coal, mining, energetic and transportation industries with workforce collapse. It is obvious that perspectives of Ukrainian economy growth outlined by the new authorities are cancelled if the present day situation keeps valid.²⁴

It is equally important to draw attention to a number of international standards of occupational safety not ratified by Ukraine. According to National Coordinator of the ILO in Ukraine, Vasyl Kostytsia, this organization has passed 16 Conventions and 15 Recommendations directly connected with occupational safety during the years of its existence. Ukraine has ratified only 6 out of 16 Conventions.

Last year ILO adopted strategic action plan concerning promotion of two more Conventions — “Occupational Safety and Health Convention” № 155 and “Promotional Framework for Occupational Safety and Health Convention” № 187 providing elaboration of national programs on occupational safety. “These Conventions are crucial in the context of decent work”, emphasized Vasyl Kostytsia, “However, Ukraine has not ratified these two Conventions yet”.²⁵

6. STATE CONTROL OVER OBSERVANCE OF LABOR RIGHTS

The legislation of Ukraine provides that observance of laws on labor rights is controlled by Ministry of Employment and Social Policy of Ukraine. Observance of legality is supervised by prosecutor’s office authorities.

The Ministry of Employment and Social Policy in accordance with Provision on it (approved by resolution of the Cabinet of Ministers of Ukraine of 02.11.2006 № 1543) is a main authority in the system of central executive authorities controlling the observance of labor legislation.

There is the State Committee on Observance of Labor Legislation (Derzhnagliadpratsi) in the Ministry of Employment and Social Policy. The main task of Derzhnagliadpratsi in accordance with Provision approved by the resolution of the Cabinet of Ministers of Ukraine of 18.01.2003 № 50

²³ “Decent job — safe job”. Round table, sharp corners, or how to reach a common understanding of tasks http://www.fpsu.org.ua/index.php?option=com_content&view=article&id=3472&Itemid=2&lang=uk

²⁴ FPU initiates creation of National Strategy for work safety http://www.fpsu.org.ua/index.php?option=com_content&view=article&id=3502&Itemid=2&lang=uk

²⁵ “Decent job — safe job”. Round table, sharp corners, or how to reach a common understanding of tasks http://www.fpsu.org.ua/index.php?option=com_content&view=article&id=3472&Itemid=2&lang=uk

is to ensure defense of employees' rights by state monitoring, in particular, observance of labor legislation (except for questions of occupational safety). Such observance is carried out by means of inspections of economic entities of all forms of ownership. On their basis officers of territorial authorities of Derzhnagliadpratsi prepare reports on administrative infringements and submit them to local courts.

In 2009 Derzhnagliadpratsi and its territorial authorities carried out 11.165 inspections (30% more than in 2008) at 8.199 enterprises. However, according to the Accounting Chamber of Ukraine, State Committee on Observance of Labor Legislation monitors only about 5% out of above 1 million of registered employers that use hired labor per year. First of all, this situation is caused by the fact that limited number of Derzhnagliadpratsi officers is not sufficient to meet all the goals at length. At regional level a work inspector-economic entity ratio is 1:14.427 while annual standard is 60 checks that exceeds prescribed standards by 240 times²⁶

By the Decree of the President of Ukraine of 25.05.2004 № 576 "On urgent measures to complete repayment of wage arrears" the Cabinet of Ministers of Ukraine was ordered to take measures to consolidate the State Committee on Observance of Labor Legislation, expand its jurisdiction, improve its material and technical provision and work remuneration for state work inspectors, optimize forms and methods of their work. In 2007 in order to execute the order issued by the Prime-Minister of Ukraine providing reinforcement of state control over observance of labor legislation, the Ministry of Employment and Social Policy developed a draft resolution of the Cabinet of Ministers of Ukraine on increment of the number of state work inspectors and territorial authorities as to provide two state inspectors per administrative-territorial entity. The Ministry of Economy and the Ministry of Justice agreed on the draft resolution without remarks. The Ministry of Finance had made some remarks that were taken into consideration during revision but the indicated resolution of the Cabinet of Ministers of Ukraine has not been passed yet.

The General Prosecutor's Office of Ukraine has also noted the problem with observance of labor legislation in Ukraine. Thus, according to the results of inspections on following the laws on observance of labor legislation in 2009, there were registered numerous facts of deliberate non-payments of wages by enterprise managers, infringements of their minimum size defined by legislation, illegal payments "in envelopes" and in-kind remuneration, concealed labor relations. Employers do not follow statutory requirement for indexation and compensation to employees of that part of their wage which has been lost due to delays in payment terms. There remains an extremely urgent issue with repayment of wage arrears at bankrupt enterprises.

Summarizing, one can say that although public authorities, empowered to monitor and control the obedience to labor laws, have taken certain measures to provide observance of labor legislation over last two years, their efforts have not led to a considerable improvements in this field.

7. PROTECTION OF THE LABOR RIGHTS OF LABOR MIGRANT

Nowadays when rates of migration activity are high, the issue of protection of rights and interests of Ukrainian citizens working abroad becomes particularly important. Due to emergence of a difficult situation on domestic labor market and unemployment growth, there are constant departures of Ukrainian citizens abroad in order to find a job. During their stay of Ukrainian labor migrants abroad some situations threatening their lives and health take place frequently. The majority of problems are caused by illegal labor migrants since in this case the state is not able to protect their rights and legitimate interests in full. Consequently, the efficiency of mechanism of provision of Ukrainian labor migrants' rights depends, first of all, on residence status of Ukrainian citizens

²⁶ Accounting Chamber of Ukraine. Bulletin prepared on the basis of Report on results of evaluation of the situation with wage arrears. — Kyiv: Accounting Chamber of Ukraine, 2010. <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16727012>

abroad. Moreover, another important evidence of the State's effective protection of its citizens' rights abroad is an ability to quickly react on internal social changes.

It is worth mentioning that the most protected among Ukrainian labor migrants are those who stay permanently or temporally on another country's territory on legal grounds and have a proper work permit. But even so, among this category of people there are cases of their rights and legitimate interests' violations. Thus, for example, according to N. Carpachova, a most common violation against Ukrainian labor migrants is employers' refusal to hire those Ukrainian citizens who have permanent residency and, since, are automatically eligible for unconditional and unrestricted employment.

So the issue of protection of rights and legitimate interests of Ukrainian citizens who work abroad keeps being vital. It is necessary to admit that unresolved practical questions of international labor migration cause social vulnerability of Ukrainian citizens working abroad; they are discriminated by foreign employers in terms of remuneration, working conditions, occupational safety.

It should be noted that up to date the mechanism for protection of labor migrants' rights is still imperfect. That is why it is necessary to intensify the process of conclusion of bilateral agreements on employment and social security especially with those countries where remain the majority of Ukrainian labor migrants, in particular, with Italy and Greece. Attention should be paid on imperfections in implementation mechanisms of already concluded agreements which prevent the majority of our nationals from using their rights. Besides, it is essential to constantly monitor the implementation of already active bi- and multilateral agreements in order to increase its efficiency and improve mechanisms of their implementation in the interests of Ukrainian citizens.

Important part in provision of protection of rights and legitimate interests of Ukrainian citizens who work abroad is also played by diplomatic and consular missions of Ukraine. However, very often the efforts of diplomatic and consular missions prove to be not sufficient because there is no real possibility to protect the violated rights of Ukrainian labor migrants.

It is also crucial to apply more intensively the existing universal and regional mechanisms of protection of labor migrants' rights, in particular, to intensify the process of preparation for ratification of the The *United Nations* "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" of 1990, the International Labor Organization "Migration for Employment Convention" № 97 of 1949 and Convention № 143 of 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers providing basic standards of working conditions, remuneration, living and housing conditions, transportation and social security of employees. It is also worth conducting some explanatory work, in particular, in the media, among Ukrainian nationals on existing mechanisms of protection of labor migrants' rights.

8. PROVISION OF THE RIGHTS OF TRADE UNIONS

It should be said on a separate occasion about a part of trade unions in Ukraine. Since Ukrainian trade unions basically remain bureaucratic, official and often rather nominal structures tightly connected with enterprise management and owners.

For a long time the trade union activity in Ukraine has been marked by existing conflict between the Federation of trade unions of Ukraine which is the largest association of trade unions and independent trade union organizations. Serious disputes and conflicts amid trade union movement have made its consolidation of any kind practically impossible. The influence of Ukrainian trade unions on socioeconomic situation in the country — which had not been very tangible either — started to decrease rapidly and the authorities actually stopped paying any attention to them. The most crying instance of fall in trade union prestige became the increase of government price of gas for households without any previous concordance with trade unions as required by the law.

Especially this struggle escalated during intensification of social dialogue between the state, business and employees whose representatives are trade unions.

Thus, in June, 2010 picket rally took place over infringements of rights of independent trade unions. The removal of independent trade unions from participation in negotiation and elaboration of the new General Agreement for 2010–2011 served as a pretext for the rally.

Let us note that the General Agreement is a main document regulating the relation between the state as a controlling authority, nationwide associations of organizations of employers and entrepreneurs and nationwide trade unions and associations of trade unions and regulating basic aspects of social-labor relations.

According to Petro Petrychenko, the General Secretary of the National Confederation of Trade Unions of Ukraine, “Independent trade unions — and there are over 40 nationwide trade unions which represent almost 3,5 million workers from varied industries — have to protest against excesses of the Federation of trade unions of Ukraine (FPU) whose management created the Joint Representative Organ (JRO) of Trade Unions of Ukraine without independent trade unions participation and initiated negotiations concerning elaboration and conclusion of the General Agreement for 2010–2012 with the government and employers without us. Thus, a considerable number of trade unions stayed completely outside the negotiating process”.

“A considerable part of representatives from independent trade unions were dismissed from the boards of social insurance funds. That is why independent trade unions have lost the possibility to represent their members as insured subjects in all social insurance funds. It may cause uncontrollable consequences and even bigger misappropriation of funds in social insurance field”, stated Petro Petrychenko.

The Independent Trade Union of Miners and Confederation of Independent Trade Unions of Ukraine claim the existence of pressure on trade unions activity. In particular, they adduce facts about 40 cases of the infringement of independent trade unions’ rights. Thus, at one coking plant twelve members of the Independent Trade Union of Miners were not allowed to work without warning. The employer explained that these measures were due to the fact these workers ... “have changed a structure of the plant”. It proves that business often overlooks the valid laws²⁷

It is also stated that only in two cases of infringement of trade unions rights the employers reacted properly or the courts issued positive orders. On the basis of these infringements independent trade unions have prepared an appeal to the International Labor Organization on the fact of the infringement of independent trade unions’ rights.

The Federation of trade unions of Ukraine (FPU) also claims pressure on it. In accordance with the appeal of this organization, only in 2009 over 100 cases were considered in courts against FPU and its organizations. It is also said that unfortunately some judges did not examine in detail the circumstances of a case, trade unions’ evidences, ignored direct statutory requirements, among them were norms of international law which led to unlawful court orders. Since the majority of statements of claims submitted to different courts had the same contents, the claimants were not members of trade unions, they gave non-existent addresses, incorrect information about their residence and place of work. Besides, it is said that the subject of many cases has been illegal seizures of the FPU property.²⁸

9. RECOMMENDATIONS

1. Increase unemployment benefit to the subsistence minimum envisaged by legislation;
2. Improve the legislative regulation and continue the implementation of assistance for partial unemployment benefits.
3. Reduce high unemployment among the most vulnerable groups of the population, in the first instance, young people, those approaching retirement age and the disabled;

²⁷ Independent trade union of miners demands transparency and legitimacy of the reforms // Aspect № 36, October 2010 <http://kvpu.org.ua/InformationBlock/Newspaper/DocLib/36-2010.pdf>

²⁸ FPU is against illegal interference in the internal activity of trade unions http://www.fpsu.org.ua/index.php?option=com_content&view=article&id=2480&Itemid=2&lang=uk

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4. Pass amendments to legislation to remove the discriminatory norms regarding members of the rural population registering unemployed.
5. Increase the ratio held by wages in the GNP and in the cost value of production;
6. Bring the minimum wage into line with the demands of the European Social Charter
7. Ensure effective differentiation of remuneration in the public sector through the application of a single system of pay bands, eliminate the practice of setting base salary (wage rates) and tariff category of employee at a rate lower than the law on labor.
8. Take measures to improve pay in State bodies in order to ensure social protection of ordinary employees, removing the system of concealed earnings established through the awarding of various bonuses and supplements which are more dependent on loyalty to the management, than on productivity.
9. Reduce wage arrears for employees of the public sector, and also take measures aimed at minimizing wage indebtedness at enterprises and organizations of any type of ownership.
10. Improve the system of work safety in order to reduce industrial accidents and work-related illnesses, including through improvements to legislation in this area, as well as carrying out prevention programs.
11. Improve control over adherence to standards and requirements in the sphere of protection of labor and ensure swift and efficient investigations into cases of injury.
12. Improve State control over observance of labor rights and create effective mechanisms for reacting to violations.
13. Conclude international agreements in the area of employment and social protection of labor migrants with countries where a considerable number of Ukrainian nationals are working, where such agreements have not been reached.
14. Conclude necessary international agreements with aim to improve protection of labor migrants in the area of employment and social protection.
15. Ensure strict observance of the rights of trade unions, and promote the development of a strong and independent trade union movement.

XVII. RIGHT TO HEALTH CARE AND MEDICAL HELP¹

1. ACCESSIBILITY OF MEDICAL HELP

Currently the health care system of Ukraine is facing a lot of problems, which affect both patients and medical providers.

The Constitution of Ukraine guarantees all the Ukrainian citizens, foreign nationals and stateless persons, residing in Ukraine, free medical care. The majority of medical institutions of Ukraine are either state or municipal.

Practice has proved the inefficiency of this system, which consequently leads to the violation of the right to accessible medical help. The state is unable to fund high-quality and really free medical care. The conditions in many hospitals, especially, designated for TB patients, are lamentable. The public funding does not cover even the renovation costs.

Some medical institutions are trying to resolve the problem by their own means, making patients pay “charity donations”. For example, accepting body substances for testing, medical workers insist that the patients pay something “for the benefit of the lab”. Donations are also expected of in-patients. Without this donation a patient can be refused medical help, issuance of documents referring to his/her medical history or discharge from a medical institution. The donation is registered as “charity” granted by patient voluntarily, so it is not recoverable as illegally extorted money.

The practice, when the in-patients cover all the medication and medical equipment costs and bring their own bedding and plates, is also rather common. Sometimes, patients are given a list of medications in quantities substantially exceeding the actual need. The patients have no way of checking how the drugs were used.

The human rights organizations received complaints referring to the facts, when people were refused medical help in the state and municipal hospitals, if they failed to pay the doctor. If a patient needs an emergency surgery, this practice can lead to really dramatic results.

Here is a legal paradox: in the Autonomous Republic of Crimea a special governmental program “Health for Crimean residents”, envisaging some free medical services, is being implemented, despite the fact, that these services are to be provided free of charge under the Law in force.

Often public medical institutions cannot offer relevant examination or treatment involving state-of-the-art medical equipment, i. e. ultra-sound machines or scanning devices. These services are available only to solvent patients. As a result, large portion of the population, especially, the retired people and rural areas residents, cannot afford a necessary examination or treatment. The efforts of local health departments to establish quotas in use of modern equipment for socially vulnerable categories of society lead only to further corruption. Petitions, submitted to human rights organizations and an anonymous survey, carried out by charity Symferopol organization “Getting over” show that the majority of complaints concerning the violation of right to the

¹ Prepared by Aygul Mukanova, Institute for legal studies and strategies, Irina Seniuta, Chartity Foundation “Medicine and Law, and Yevgeniy Nivitsky, the Crimean Republican Foundation “World of the Crimea”.

health care refer to the inaccessibility of free medical care. Interviews with the petitioners and the survey results demonstrated that the majority of respondents do not believe in budget funding for the high-quality medical care and are ready to pay for it if the appropriate quality of services is guaranteed.

2. RIGHT TO INFORMED CONSENT

Alongside with other rights, the right to informed consent is permanently violated, when a patient needs medical help. According to article 7 of the Law of Ukraine “Fundamentals of Health Care Legislation”, each person has the right to receive “reliable and timely information concerning his/her health condition and public health, including potential risk factors and their severity”. Article 39 of the Law maintains that “a health care provider must provide the patient with clear information on his/her health condition, the goal of diagnostic tests and treatment offered, forecast for possible development of the disease, including the risks for life and health of the patient”. Unfortunately, another requirement, stipulated by international standards, namely, that alongside with clear information on potential risks of diagnostic tests and treatment offered, the health care providers must tell the patient about the possible alternatives to their diagnostic tests and treatment, if available.

The informed consent concept is not implemented in practical operation. The information on diagnostic tests and treatment must be offered to the patient in simple and comprehensible language. It means it should be provided in a language, known to the patient, in a clear and uncomplicated way, without the use of medical terms, unfamiliar to the patient.

In practice, when patients come to an out-patient clinic, they are not always given this information, even when antibiotics or other strong medical drugs are prescribed by a physician. In the hospitals, the patients are requested to sign a short text to the effect that he/she agrees to the whole treatment with possible consequences/side effects. This text can be printed on the back side of the patient’s medical history card. The same text is offered to all patients. Usually it is in one language only, either Russian or Ukrainian, depending on the region, without any translation. It contains no information either on planned examination and treatment of the disease or on potential risks involved. A patient can get oral information from a medical provider only if he/she is persistent enough.

A patient M. was taken to a surgical ward for a planned surgery. The doctor just asked her to sign the information on the other side of the patient’s medical history. The examination showed that several medical procedures were in order to prepare the patient for the surgery. The patient’s consent was not sought for any of these procedures: the woman was just told that such-and-such things will be done to her. After the surgery, complications set in, and physicians insisted on new surgical intervention. Although it was not an emergency case, no consent was obtained for it. The patient’s family (her husband and son, who took turns at her bedside) got no explanations either. After the patient’s death, her relatives filed a complaint with the prosecutor’s office, which ended with administrative penalty imposed on the surgeon and other medical staff involved.

In some cases lack of information is due to the physician’s belief that the alternative treatment is not efficient, and the patients would be unable to make right choice or to afford the alternative treatment. In other cases the doctors themselves are poorly informed of modern developments in the treatment of a given disease.

Thus, there was a case, when a doctor, aware of constrained financial circumstances of a child’s family D., did not inform her parents that there was a more effective treatment for her affliction, offered abroad. He assumed that the parents would not be able to afford this more effective treatment, and, therefore, saw no point in mentioning it.

The D. family learnt about the treatment by pure chance. A charity foundation, approached by the patient's mother, covered all the treatment costs.

In another case the surgeon ordered surgical intervention for a patient T., without letting him know, that there is a compatibly efficient therapeutic method of treatment. The doctor was aware of this method, but doubted its efficiency. When T. refused to have the surgery and asked the surgeon whether other treatments were available, this latter answered him in the negative and proceeded to intimidate the patient, telling him that if he does not agree to the surgery, no one would treat him.

Currently, though, some medical institutions have introduced computerized informed consent forms for every nosology and type of disease. These forms contain some information, presented in a language, comprehensible for the patient. The patient reads it, asks the relevant questions, and signs the paper after he/she is satisfied with the answers received. These forms, although, not all-embracing, are a significant step forward in implementing the patient's right to informed consent. They can also be used as an evidence that the doctor warned the patient of all possible consequences of the treatment, and of patient's consent, if a law-suit is filed or prosecutor's or administrative inspection ordered.

3. THE RIGHT TO CHOOSE PHYSICIAN AND MEDICAL INSTITUTION

Adherence to this right under the public health care system comes into conflict with the working norms, work load and salaries of the health care providers. Tariffs and payrolls of the health care and preventive medicine institutions are compiled in accordance with the principles, inherited from the soviet times, and based on residence registration system. The number of providers is estimated in proportion to the number of population in a given area. Therefore, the patient's choice of a more competent physician (e. g. district general practitioner), or of another clinic, lead only to larger work loads for some physicians and nurses, without affecting their wages or medical institution's funding.

That's why when a patient submits a written request, expressing his desire to switch to another doctor, the head physician often responds that there is no way to do it, as the work load is distributed equally between the doctors. In many oblast's patients are unlawfully denied medical help, if they do not have respective registration stamp in their passport or are not registered in a given district.

A written request with the reference to the current Law of Ukraine, addressed to the head physician of a medical institution, usually resolves the conflict arising from a refusal of a health care staff to provide medical assistance.

4. RIGHT TO CONFIDENTIALITY

The "Fundamentals of Health Care Legislation" of Ukraine stipulate that "the patient has the right to confidentiality of information concerning his/her health condition, his/her seeking medical help and of information obtained in the course of medical examination". On April 27, 2007 article 39-1 was amended with the provision prohibiting "to request or to provide any information concerning a patient's diagnosis or treatment at his/her place of work or study"

Notwithstanding clear legislative provisions and liability for its violation, the adherence to this right is often neglected.

For example, in many medical institutions one can obtain medical records by calling a doctor under the patient's name, or simply by using the patient's name at the clinic reception.

In July 2006 Pechersk district court (Kiev) passed a ruling, which classified providing information concerning a person's diagnosis at his/her workplace as violation of fundamental constitutional rights. After that, the Ministry of Health, the Ministry of Labor and Social Policy, Social Security Fund for temporary disability and Social Security fund for industrial accidents and occupational diseases passed a joint Decree № 774/438/207-oc/719 of November 24, 2006 on amending the "Instructions for issuing sick-leave certificates", with following clause: "Primary diagnosis, final diagnosis and the coding MKX-10 are included [in the certificate] only with the patient's written consent. Otherwise primary diagnosis, final diagnosis and the coding MKX-10 are omitted".

It is noteworthy that this ban concerns not only the diagnosis, but also its coding, because modern technologies make it quite easy to find out, what is meant by this or that code.

In many instances, however, the medical institutions still write down confidential information in sick-leave certificates. It is done, first of all, on the request from insurance body to spell out patient's diagnosis. If the diagnosis is not written down in the certificate, the insurance fills out complaints against hospitals or clinics. Although this request is illegal, insurance company continues to pressure physicians, and these latter, unwilling to complicate their lives, include the diagnosis in gross violation of the law and their patients' rights. Here is just one example of such violation and its consequences:

Patient T. has successfully completed her TB treatment and returned to work. The secretary at T.'s place of work learnt about her diagnosis from the sick-leave certificate and divulged it to T.'s colleagues, who made further work intolerable for T., so that she was forced to resign.

Some medical institutions offer another solution to this problem. Before the sick-leave certificate is issued, the patient is asked to give his/her written consent to divulge the diagnosis. These actions, arguably, are also illegal, as they violate the confidentiality right. If 99% of employees bring to work a sick-leave certificate with the diagnosis, then the 1%, that does not have the diagnosis written down, will immediately become the center of undue curiosity and suspicion.

The sick-leaves without diagnosis are a must, while a sick-leave certificate with a diagnosis introduced on the patient's request should be an exception. That's why the joint Decree does not enforce the patient's written consent, but allows including the diagnosis on patient's wish and written request. By the way, the codes, used instead of diagnosis, are also illegal.

The confidentiality right is often violated as a result of negligence in handling medical records. The patients share their experience, that in some out-patient clinic and hospitals in Symferopol the test results are put on one desk, from which they are collected by medical staff and patients indiscriminately. Thus, the results can become known to strangers as well. Sometimes the patients (or his/her relatives) are encouraged to go through all the papers to find "their own" information.

Patient G. underwent treatment in gynecology ward. Her medical history was put on a table in the staffroom and became available to a physician from another department. The patient new him personally and was definitely against his knowing her medical history or diagnosis.

Often the confidentiality is violated in relation to contagious diseases, including HIV. Divulging this information leads to drastic consequences for the patient, his/her social life, relationships, work or studies. Sometimes the medical staff assumes that revealing the information they serve the public, warning others of potential contagion. Often it happens through negligence, in conversations.

It is noteworthy, that information is spread (deliberately or accidentally) mainly by middle and junior medical staff, and not by the physicians, who are better aware of their liability for these actions. However, there are cases, when the doctors divulge the patients' information to their relatives or to the staff of the school, in which the patients are studying, trying to coerce the patients to start treatment.

Thus, a mother took a minor patient home from children surgery ward after refusing the surgery. The doctor insisted on surgery, thinking that all the vital indicators made it necessary. However, he failed to explain his reasoning to

the mother. Trying to influence her decision, he called the child's school, divulged her diagnosis and requested that child would be banned from school to coerce the parents to bring the child back to the hospital. The patient's mother complained to the lawyers of a human rights organization. They studied the case and explained the need for the surgery to her, thus helping her to change her mind.

5. RIGHT TO ACCESSIBLE MEDICAL RECORDS

The violation of patients' right to access the information concerning their health is most common in the current health care system. After treatment is completed, the patient often encounters difficulties in obtaining his medical history with the treatment description or other related medical records.

The health care providers in these situations argue that:

- 1) a patient, not being in medical profession, is not capable of understating the information (ignoring the fact that it is medical staff duty to present this information in the form comprehensible for the patient);
- 2) The knowledge of diagnosis and all treatment details can be harmful and sometimes, life threatening; (ignoring the fact that respective information should be provided with due discretion and subtlety);
- 3) physicians often do not have enough time to go into details, which the patient does not need anyway, or to provide the required records.

Besides, sometimes the doctors assume that only a certificate or an excerpt from medical history are medical information, while all the other documents, e.g. medical history itself, X-rays, scan results etc. are not.

Alongside with that, part 3, article 285 of the Civil Code of Ukraine and article 39 of the "Fundamentals of Health Care Legislation" (part 4) grants physicians the right to restrict information if it can aggravate a patient's condition or health of his/her parents or guardians and interfere with the treatment. It is up to doctors' discretion to decide, how harmful the information can be, and rather often the decisions made have no reasonable justification.

The medical practice shows that it is the lack of information and not its excess that is often harmful to the patient.

Ms. K was examined on her complaint of deteriorating vision. Neither final diagnosis nor treatment plan was made known to her. K. decided that lack of information means that she would go blind in the nearest future. Being under extreme stress she tried to commit suicide. After her life was saved, she went to another clinic. There the practice of providing the patients with complete information was in place. After successful treatment K. fully recovered her vision.

Another case: preceding the surgery, patient M. was not given detailed information on treatment, risks involved etc. The doctors contended themselves with having her sign the treatment consent on the second page of her medical history. After patient's death her family appealed this formal "informed consent" and the medical staff were penalized disciplinarily.

6. HUMAN RIGHTS CONCERNING PSYCHIATRIC SERVICES

In November 2009, The Ministry of Health of Ukraine published statistic data, showing that 1,17 million (2,5%) of Ukrainian citizens sought psychiatric assistance. Among the registered mental cases, people of working age constituted 58,6%, children and teenagers — 19,4%. The Ministry of Health of Ukraine commented that the number of mental disorders is on the permanent increase.

Since 2000 the number of people with disability due to mental condition has grown by 18,7%, and by late 2009 amounted to 593,8 per 100 000 of population. Psychiatrists believe that the real figure representing people in need of psychiatric help is much higher. This discrepancy is due to the fact that patients with mental disorders evade visits to the doctors, because they are afraid that the information on their condition will become public and they will be stigmatized by their surrounding. In other cases, they do not trust the doctors and are afraid to be subjected to forced treatment.

Whatever the case, the number of people suffering from mental disorders in Ukraine is increasing, and the violation of their rights occurs due to the specific nature of mental diseases.

The Ukrainian legislation defining the rights of people with mental diseases has made serious progress. Mental disorders are classified in accordance with the International Statistical Classification of diseases, related health problems and death causes.

The Law of Ukraine “On Psychiatric Service”, as the fundamental legal act, regulates the legal status of individuals, afflicted by mental disorders, and establishes a broad range of their rights. A very significant amendment has been introduced into the Law, i.e. “mental disorder diagnosis cannot be based on a person’s disagreement with current political, moral, legal, religious or cultural social values or on any other grounds apart from those directly related to his/her mental health”.

Here follows the list of most frequent violations of the mental patients’ rights spelled out in the current Ukrainian legislation.

6.1. OBTAINING INFORMATION CONCERNING ONE’S RIGHTS

Due to specific nature of the mental disorders, people suffering from them, sometimes have hard time with perception of information. In cases, when medical institutions are unable to provide comprehensible, complete and clear information, the mental patients practically remain uninformed. This is one of the reasons, why the mental patients have no (or limited) access to psychiatric services, especially when they have no close family to help them. Sometimes the service providers refuse point blank to give out information concerning available services to the mental patients, justifying their attitude by the assumption that the patients are incapable of understanding the information. Unfortunately, the patients often are in no position to complain of such attitude or to insist on exercising their rights.

6.2. FORCED EXAMINATION AND HOSPITALIZATION

The Law “On Psychiatric Service” stipulates psychiatric examination of an individual without his/her consent (or his/her official representative’s consent) on the request from the family members or other persons, if there are indications for such examination. The doctor can proceed with the examination on the basis of oral request, or immediately after the written request is submitted, if there are grounded reasons to believe that the person in question can be dangerous for the surrounding and for her/himself, and also if he/she cannot perform the daily routine, ensuring his/her normal everyday life.

The law in this case does not require any confirmation or evidence, testifying to the dangerous behavior of a person to be examined, to go together with the request. The requirements towards the request are rather vague. It opens the door to abuses in such examinations. Sometimes forced examination was performed on the neighbors’ or relatives’ requests, when they were upset by the behavior of a completely sane person. Often there was absolutely no reason for such examination. And, on the contrary, when the actions of obviously sick person became a threat for the person and her surroundings, the examination was refused.

The issues concerning forced psychiatric intervention are, under the Law, addressed by the local court at the patient’s area of residence, if his/her examination or treatment is feasible in the hospital only or if a person is diagnosed with severe mental disorder, when he/she commits or is bound to commit actions, which are threatening for her/himself or for the surrounding, and if he/she cannot perform the daily routine, ensuring his/her normal everyday life.

XVII. RIGHT TO HEALTH CARE AND MEDICAL HELP

The law also provides for physical restraint or isolation of a mental patient on the warrant not only from the psychiatrist, but also from other medical staff. However, if a person is hospitalized against his/her will, in the next 24 hours this person must be seen by psychiatric board, which should assess the expediency of hospitalization. If it is expedient, a psychiatric staff member submits the notice of forced hospitalization, accompanied by the psychiatric board assessment, to the court within the next 24 hours.

In real life the patients, hospitalized by force, are made to sign the voluntary consent to hospitalization and treatment. This consent usually contains no information on treatment, risks involved and available alternatives for treatment. If a patient has legal representatives, the law allows for making decision without patient's consent, by agreement with representative only. As a result, in many cases the decision concerning psychiatric help and hospitalization is made arbitrarily, without patient's consent or court's deliberation as to the expediency of such intervention into the patient's life.

In Pidvolochysk raion (Ternopil oblast') a medical professional at his own discretion diagnosed his close relative S. with manic-depressive syndrome and referred him to Ternopil oblast' hospital for in-patient treatment. He did so to seize S.'s property. As a result S. spent 5 days in psychiatric ward before the diagnosis was refuted. The proceedings to bring the doctor in question to criminal justice have started.

In this case the victim of unjustified hospitalization managed to leave the psychiatric ward after several days and to insist on diagnosis refutation. In many other similar cases, the victims had to undergo the whole course of unwarranted treatments, which might have seriously and irrevocably affected their health.

Thus, V., a resident of Lyubomyl (Volyn' oblast'), born in 1958 had no complaints as to her mental condition for her whole life. There was no reason to suspect that her inadequate behavior could endanger herself, her surroundings or public order. After her mother's demise on April 20, 2006, she became an owner of a house, bequeathed to her in her mother's will. On June 12, 2006 her sister P., accompanied by her nephew, by force took her to Volyn' oblast' psychiatric clinic № 1, where she, on P.'s request, was hospitalized and treated for 30 days. She never gave her consent, either for hospitalization or for treatment. Nevertheless, the doctors diagnosed her with "chronic delirious disorder" and proceeded with the treatment.

V. did not want to stay in the clinic, tried to get to the phone to call militia and ask to release her. She was not allowed to do that and had to stay in the ward.

Next time, on April 24, 2009 P. called two militiamen and her cousin and by force took V. to Volyn' oblast' psychiatric clinic № 1, where she was hospitalized and diagnosed with "chronic delirious disorder" again. She was prescribed treatment against her will, while her signature in medical history was faked. V. filed complaint for compensation of moral and material damages, she incurred while staying in the psychiatric ward. Now she is afraid to live in her house, and constantly fears that any moment she can be hospitalized against her will.

Lack of sufficient guarantees, precluding such abuses, led to the practice of using forced hospitalization and psychiatric intervention as means of reprisals.

That's what happened to the leader of a public movement "Vinnytsa prosecutor's office without corruption", deputy head of an independent trade union "The workers" Andriy Bondarenko. The prosecutor's office of Vinnytsa oblast' four times approached the court requesting mandatory examination for Bondarenko. On prosecutor's motion doctors from the psychiatric clinic also asked the court to order mandatory examination. They justified their request by the fact that Bondarenko many times filed complaints with law enforcement and judiciary bodies in the oblast'. Bondarenko never had any mental disorders. In order to prove his sanity Bondarenko had undergone psychiatric examination thrice and received certificates to the effect that he had no mental diseases. Nevertheless, on October 29, 2010 the

Vinnitsa oblast' court of appeals ruled that Bodnarenko should be hospitalized by force with the goal of psychiatric examination. The ruling referred to conclusions, that Bondarenko suffered from "acute awareness of his individual rights and demonstrated militant and aggressive readiness to safeguard them by inappropriate means". A. Bondarenko appealed this ruling in the Highest Appellate Court. Proceedings started, but final decision was not made yet.

6.3. PRELIMINARY CONSENT AND RIGHT TO REFUSE TREATMENT

The right to informed consent and refusal of treatment or diagnostic testing at any point is restricted by the mental patients' limited capacity to comprehend information concerning these tests and treatments. In fact, the testing and treatment procedures are not regulated by any provisions.

On May 17, 2007 the Law "On Psychiatric Service" was amended with the clause requiring patient's written consent to the psychiatric assistance. At the same time the law envisages compulsory written consent in cases, when treatment procedures or diagnostic testing involve an increased risk for the patient's health. This clause contradicts the requirement of informed consent for any medical intervention. Besides, the risk rate is defined by medical professional themselves, and, therefore, an arbitrary decision, endangering the patient's health, is always a possibility.

6.4. RIGHT TO FREE LEGAL ASSISTANCE IN RELATION TO PSYCHIATRIC SERVICES

Currently the public health care system is in no position of ensuring this right. The medical institutions have a lawyer on staff, to represent the employer's interests. These lawyers, however, do not (and cannot, due to the conflict of interests) provide legal counseling for the patients.

The state budget envisages the coverage for lawyers' services only in cases, when the state must provide a lawyer free of charge. The system of free legal assistance is limited to criminal defense, while legal counseling for mental patients usually is not provided for.

6.5. RIGHT TO ALTERNATIVE PSYCHIATRIC EVALUATION

The right to alternative psychiatric examination and to evaluation by a psychiatric board with an independent expert participation is defined by the law. In practice, however, this right is very difficult to implement. More often than not, the patients are not aware of this right and have no information that would be instrumental in enforcing this right. On the other hand, if a very persistent patient insists on alternative examination, these dubious claims are regarded as manifestation of his/her morbid condition, which prevents him/her from adequately perceiving the reality and assessing the doctor's actions. In this case the patient's requests are simply ignored. Naturally, the possibility that the patients won't be coherent in the course of examination and treatment is rather high. But at the same time, gross interference into patients' life cannot be ruled out, as medical staff has the whole authority in decision-making concerning psychiatric treatment, and sometimes these decisions lead to irrevocable consequences. An alternative evaluation, meanwhile, could be beneficial both for care providers (if in the future a patient questions their decisions), and for the patients.

6.6. RIGHT TO PARTICIPATE PERSONALLY IN COURT HEARINGS, ESTABLISHING THE NEED FOR PSYCHIATRIC HELP AND RESPECTIVE RESTRICTION OF PATIENT'S RIGHTS

This right is spelled out in the Civil Proceedings Code of Ukraine, which also stipulates mandatory presence of the person in question at the court hearings. The courts adhere to this requirement in their daily operation. The patient's disagreement with the decision on necessity of psychiatric intervention, though, is never reflected in medical records.

6.7. RIGHT TO COMPENSATORY DAMAGE

The issue of compensatory damage arises, when a person is illegally hospitalized in a psychiatric or psycho-neurological ward, when a person's safety was not ensured or when confidential information concerning mental health or psychiatric treatment has been divulged.

Judiciary practice in Ukraine shows that compensatory damage is feasible. To rule in favor of it, the courts require material evidence of the damages incurred. Namely, the courts maintain that a medical (neurological or other) diagnosis and evidence of further treatment should be in place. According to the judges, stressful situation and moral suffering per se do not create sufficient basis for establishing moral damages in money equivalent and collecting them from the guilty party.

The current Ukrainian legislation defines following rights for the mental institutions in-patients:

- communication with other people, including attorneys or other legal professionals, without third parties present, in compliance with house rules of the institution;
- sharing information on their psychiatric treatment with any person, chosen by them;
- enjoying the confidentiality of correspondence in sending and receiving of letters;
- access to mass media;
- entertainment, creative activities;
- practicing their religion;
- approaching directly the head (chief physician) of the psychiatric ward on the matters of treatment, discharge from the institution and adherence to other patients' rights;
- help in obtaining mandatory social security or pension benefits in compliance with the current law.

This scope of rights is largely based on international standards. However, the enclosed nature of mental institutions, absence of an independent body to supervise their compliance with these standards and to intervene on patient's behalf in the disputes between the patient and the hospital, completely nullifies these rights.

For example, a 20-year old K. was put into psychiatric ward by her mother without her consent. The mother justified the need for mandatory intervention by the fact that her daughter changed her religious beliefs, converted to Islam and wanted to marry a Muslim. All the daughter's claims that she did not want to undergo forced treatment went ignored. Besides, as a Muslim, K. was trying to read namaz and wear a head-scarf. The doctors forbade her to do that, insisting that it was another proof of her mental disorder. Petitions, written by K. to chief physician, remained unanswered. At her mother's request, K.'s friends and fianc  were not allowed to see her. She could not place a phone call and finally felt totally isolated. Only with a help of other patient's sister, K. managed to get in touch with a human rights attorney, as the hospital staff gave her no such opportunity

Under the legislation in force, decision on restricting the rights of persons in psychiatric treatment, is registered in medical records, with the term of its validity, and can be appealed in court. The use of such persons in forced labor is prohibited. Nevertheless, sometimes patients are made to work hard in mental institutions. It is called work-therapy and if a patient disagrees to work, he/she can be coerced or even beaten.

Thus, on August 11, 2010 a 43-years old patient died in Novosavitsky mental institution as a result of multiple body injuries, including broken ribs, hematomas and broken jaw. Earlier, patients of this institution complained to an NGO "Committee to fight organized crime", claiming that they were battered by the staff, forced to do hard work and to take strong psycho-neurological drugs. After criminal law-suit was filed, the law-enforcement staff exhumed 30 bodies of the institution inmates. For some patients under 20 years of age, heart failure and liver cirrhosis were established as the official cause of death. Four institution employees were charged with criminal liability for causing severe body injuries, failing to provide medical care, attempting to hide the crime, abusing their official duties.

6.8. ACCESSIBILITY OF INFORMATION

A person in need of psychiatric help or his/her official representative has the right to familiarize him/herself with the medical history and other medical records, and also to have copies of written decisions concerning the proposed treatment. If complete information about person's mental health condition can be harmful for the person or threatening for the person's surroundings, a psychiatrist or psychiatric board can restrict this information.

If this is the case, the psychiatrist or psychiatric board informs the official representative of the person, taking the latter's interests into account. Medical records reflect the fact of providing/restricting information.

This provision allows psychiatric wards' staff to make arbitrary decisions on restricting the information, without any justifications as to how or why this information can be harmful or dangerous. Therefore, the patients are denied the whole information on their disease. The medical staff can –and does – also deny information on the basis, that due to specific nature of patients' affliction they are incapable of comprehending the information and can harm themselves and others by using it.

6.9. INTERDICTION BASED ON MENTAL DISEASE

The possibility of random interdiction based on mental disease remains a serious problem in Ukraine. Civil Proceedings Code of Ukraine spells out the interdiction procedure for mental patients. It can be done on the grounds of the family request or motion from agencies in charge of care of custody.

The law allows for carrying out the interdiction procedure at the absence of person in question, so that he/she cannot argue his/her case. This provision is contrary to international standards, i.e. any decision concerning establishment of mental disease and restriction of person's rights can be made only with due consideration to the person's opinion. In practice, over 90% of all the interdiction cases are ruled without the person's presence.

The interdiction decision is not preceded by thorough investigation of all the circumstances, while its justification is given in a standard clause, contending that [the person] "cannot understand the meaning of his/her actions or control them". The forensic psychiatric evaluation is decisive in the process. However, the absence of independent forensic psychiatry and experts' direct subordination to the Ministry of Health significantly affects the objectivity of their opinion.

The person found incapable has no right to appeal the decision. The procedure for reinstating person in his/her rights in case of changed circumstances and improved mental health is in place, but it can be started only by the patient's guardian or an agency in charge of care or custody. The patient does not have the right to do it.

The violation of the person's right to participate in interdiction decision-making often leads to the situation when a person finds out that he/she is legally incapable only after the decision was made.

Thus, Mr.K. was found incapable by the decision of Frunze district court (Kharkiv) of February 17, 1989. He learnt about this decision 20 years later. The decision was made on the grounds of forensic psychiatry evaluation, without K.'s presence. The decision was not served to him either. The guardian was not appointed. The current law prohibits incapable persons from filing appeals against interdiction decisions or initiating the reinstatement process. The custodial agency refused to file the motion for reinstatement of capability. Hence, K. was illegally deprived of any possibility of leading normal life and managing his property, as well as of any opportunity to change the situation.

Under the current law, a person, found incapable by the court decision, cannot act as an independent party in court and other proceedings, or to appeal his/her diagnosis.

7. RECOMMENDATION

1. To separate at the legislative level the notions of accessible and gratuitous medical services in order to enable medical institutions to provide some paid services officially.
2. To introduce medical insurance, which would be able to improve significantly the situation in case of adoption of reasonable law. In this case, it would be better if medical institutions would be independent entities, and help in the form of benefits and free medical services would be provided to vulnerable groups.
3. To amend Article 285 of the Civil Code of Ukraine and Article 39 of the Law of Ukraine “Fundamentals of the laws of health” on access to medical information of the person, whom the information concerns.
4. To amend the Law of Ukraine “On psychiatric care” on provision of all kinds of psychiatric care with patient’s informed consent, regardless of the fact that whether he was deprived of legal capacity or not.
5. To include into the duties of medical workers full and obligatory informing of patients about their health, medical procedures and possible consequences.
6. To elaborate written forms of proper and full informed consent with the possibility of adding extra information about peculiarities of the disease and treatment of concrete patient.
7. To conduct seminars and refresher courses for training of medical staff on rules and procedure of providing information to patients, obtaining informed consent and on the concept of medical confidentiality.
8. To elaborate and put into practice electronic medical records with information security system preventing a doctor or other person from changing the records, with rendering access to it only to a limited circle of persons.
9. To finance hospitals and to pay salaries to doctors depending on the number of patients that obtained medical services.
10. To elaborate on legislative level and put into practice the institute of independent medical examination, including mental health.
11. To amend the Civil Procedural Code of Ukraine regarding the consideration of applications about deprivation of legal capacity with the mandatory presence of the person against whom the application is submitted, and giving such person the opportunity to appeal personally against the decision on deprivation of legal capacity.

XVIII. RIGHTS OF PEOPLE LIVING WITH HIV/AIDS¹

The HIV infection rate among adult Ukrainian population is one of the highest in Europe. Under the criteria, formulated by Joint UN Program on HIV/AIDS and World Health Organization, the HIV/AIDS spread in Ukraine is classified as concentrated epidemics.

By 2009, 340 thousand HIV-infected people over 15 years of age lived in Ukraine. It amounts to 0,86% of the whole population in this age category. According to official data, in 2009 54 persons were diagnosed with HIV, 12 persons — with AIDS, and 7 persons died daily of AIDS-related diseases. The updated HIV/AIDS information shows, that at the beginning of 2010 360 thousand HIV- infected people over 15 years of age, lived in Ukraine.²

The Constitution of Ukraine guarantees all Ukrainian citizens right to medical care, including the right to accessible health care and right to receive adequate medical help. The right to adequate medical care is a social right, the exercising of which is specific and depends on economic capabilities of the state. However, under the international obligations, undertaken by Ukraine, the states must do their best to let citizens exercise all the social rights.

1. MAIN CHALLENGES, ENCOUNTERED IN MEDICAL INSTITUTIONS BY PEOPLE LIVING WITH HIV/AIDS:

- **Violation of voluntary HIV testing** — right to freely make decisions on HIV testing and further treatment;
- **Economic constraints**— some medical institutions demand payment for their services and extort money from the patients;
- **Discrimination** — people living with HIV/AIDS are limited in their access to medical care; they are often refused admittance to medical institutions, surgical interventions, and dental services; cannot obtain information concerning their condition;
- **Stigmatizing** — social isolation of HIV/AIDS patients, rejection and avoidance of such persons by others; mandatory testing without their consent, violence against people living with HIV/AIDS.

On December 23, 2010 the fundamental law regulating the rights of the HIV-positive and people with AIDS “On preventing AIDS and social protection of the population” was amended. Now it is called “On counteracting the spread of HIV-related diseases and legal and social protection of people living with HIV”. This law repealed the benefits, i.e. free transportation to the place of treatment and back for the HIV-positive, and denied them the right to isolated living space.

¹ Prepared by Aygul Mukanova, Institute for legal studies and strategies, Tetiana Bordunys, the All-Ukrainian Human Rights movement “Dignity”, and Ihor Skalko, the Association of HIV-infected “Time Life”.

² Brief survey of status of HIV/AIDS epidemics in Ukraine as of January 1, 2010. // HIV infection in Ukraine: Information Bulletin/ Ministry of Health of Ukraine, Ukraine Center for HIV Control and Prevention, L. Hromashevsky Institute of Epidemiology and Contagious Diseases, AMS of Ukraine, Central sanitary and epidemiological control service under the Ministry of Health of Ukraine, — № 33. — Kiev, 2010. — P. 5.

The amendments concerning the disease-related information are addressed further, in the respective section.

2. PREVENTION

Preventive measures are regulated by the law of Ukraine “On approving national program for HIV infection prevention, treatment and care of the HIV-positive and people with AIDS for the years 2009–2013” № 1026-VI of February 19, 2009 and the respective Cabinet of Ministers’ Decree № 452 of June 25, 2009 “On approving the measures aimed at implementation of the national program for HIV infection prevention, treatment and care of the HIV-positive and people with AIDS for the years 2009–2013”.

This Decree stipulates, in particular,

- providing sterile disposable medical equipment and means of individual protection for the injective drug users (hereinafter — IDU);
- implementing the model of integrated services for IDU in treating HIV infection and tuberculosis.

The drug users are offered preventive services within the framework of harm reduction programs implementation. Most often drug users can find these services in the needle-exchange stations, during HIV-testing or in mobile labs. But these same places are often raided by militia operatives, who detain and use IDU with the goal of obtaining information, recruiting them, fabricating criminal cases, needed to meet the quotas of successful crime prevention etc.

Thus militia officers (“Berkut” special unit) detained a couple N. at the needle-exchange station, wrote down a protocol on used needles confiscation, “found” two witnesses, who testified that N. family were using drugs near the needle-exchange station. Then for the whole year the N. have been blackmailed, forced to prepare and sell the drugs, as well as to bring raw material for the drug production (poppy straw); all their money was taken away from them. After the N. couple joined the *substitution therapy* program, they were given legal assistance (the internal service of Ministry of Interior was contacted), the situation changed for the better and “Berkut” people disappeared from their lives.

3. DIVULGING THE INFORMATION ON HIV-STATUS

Ukrainian legislation prohibits divulging the information on HIV status of a person, considering this information confidential and establishing civil and criminal liability of medical staff for divulging this information. The Law of Ukraine “On counteracting the spread of HIV-related diseases and legal and social protection of people living with HIV”, the Cabinet of Ministers’ Decree № 2026 of December 18, 1998, as well as the Ministry of Health Order № 415 of August 19, 2005 “On improving the system of voluntary counseling and HIV-testing” are specific legal acts prohibiting the divulging of information on HIV status. The normative basis in place ensures confidentiality and makes divulging of personal information on HIV status unacceptable. Nevertheless, the divulging of information by medical staff occurs pretty often. Some out-patient clinics have a practice of writing “HIV” on a patient’s medical history; the doctors discuss at large patients’ HIV infection found in the course of the examination, without even lowering their voices, or share this information with friends. These actions lead to serious complications in the HIV-positive people’s life. The individual concerned faces all sorts of humiliations, other people stop to communicate with him/her, he/she is fired from work, denied medical attention, or, on the contrary, given medical help with most demonstrative precaution measures.

Thus, P., a resident of Horlovka (Donetsk oblast') delivered a baby at the time, when she was diagnosed with HIV. Mother and child were registered in the municipal hospital № 2 with the respective diagnosis. A nurse, employed by the hospital, met P. at the bus stop and asked how she was feeling. Having heard that everything was OK, the nurse retorted that it was impossible, as both mother and son were HIV- infected. The whole conversation took place with P.'s acquaintances present. Spreading the information resulted in family ostracizing by the neighbors, children and their parents at school. Nevertheless, the court, that judged P's claim against the nurse, did not find grounds for establishing moral damages for the aggrieved family.

On August 4, 2010 HIV-infected O. was brought to intensive care ward in Zaporizhzhya. Talking to a physician, O. told him about his HIV-positive status. Since then he noticed biased attitude on behalf of the medical staff. O.'s supervisor, on learning about his status, came to the hospital. There the physician gave him an excerpt from the O.' medical history, which said that he had been using drugs for many years, was HIV-infected, suffered from hepatitis, and participated in methadone program. When this information was given to the supervisor, O.'s brother, unaware of O's HIV status, was present. When O. returned to work after treatment, colleagues started to avoid him, stopped talking to him or even greeting him. O. had to resign as he could not keep his job under the circumstances.

Because of the physician's actions, O. suffered a serious mental trauma, was discriminated against by family and colleagues, and suffered moral damage due to impossibility of leading active social life and breach of normal relationship with his relatives. After negotiations between the attorneys and the physician the latter paid O. damages in the sum of 5000 UAH and publicly apologized to him.

Under the Law of Ukraine "On counteracting the spread of HIV-related diseases and legal and social protection of people living with HIV", medical examination with the goal of establishing HIV is carried out only with the consent and on the request of the person in question and is anonymous. The examination results, whether positive or negative, are confidential and classified as medical secret. The divulging of this information is permitted only to the person in question and to the his/her legal representatives, health care institutions, prosecutor's office, investigation and inquiry agencies and courts in the cases, spelled out in the Law of Ukraine.

Meanwhile, till the end of 2010, some state agencies, which are not the part of the aforementioned list, requested mandatory examination and information concerning HIV status of individuals in certain official procedures, without reasonable justification. For example, when foreign nationals applied for temporary residence permits, the Ukrainian migration service demanded that they produce certificate on their HIV status. The examination preceding the obtaining of the certificate was carried out for certain fees. This requirement is not stipulated either by Ukrainian legislation, or by any by-laws. However, without such certificate migration service refused to grant the temporary residence permit, even in cases when such permit was due. Without the permit the foreigners are not allowed to stay in the territory of Ukraine.

Besides, the MIA of Ukraine departments insist on collecting information about the substitution therapy patients, many of whom are HIV- infected. In 2009–2010 the International HIV/AIDS Alliance in Ukraine, as well as local NGOs several times pointed out these violations to MIA and Procurator's General Office of Ukraine, but the situation has never changed.

On January 18, 2011 the MIA of Ukraine Department of Drugs-Fighting ordered the heads of territorial divisions to collect information on drug users treated within the framework of substitution therapy programs, specifically, on HIV status of those patients. International HIV/AIDS Alliance was informed that in compliance with this order, MIA operatives by January 22, 2011 promptly collected the required information, sending out illegal requests to the medical institutions, carrying out the so-called "surveys" for the patients and their families in drug-clinics or at their homes all over Ukraine. To that end, they used intimidation and pressure. This gross violation of the confidentiality

right caused fast response on behalf of the NGOs and International HIV/AIDS Alliance, which sent an open letter to the President of Ukraine and also approached the international organizations and Global Fund to Fight AIDS, TB and malaria, but the situation remained unchanged.

Under the new law provisions of December 23, 2010 the information on HIV positivity can be revealed only by the court's decision, except in cases, when it is divulged to the person, whom it concerns or to medical professionals. However, their practical implementation is still pending, as the procedural legislation does not define relevant court proceedings.

At the same time, under the new version of the law, physician is authorized to divulge the information to the HIV-positive partner without the patient's consent, if the patient is reluctant to do so.

If the HIV status information is divulged under different circumstance, article 132 of the Criminal Code of Ukraine establishes criminal liability for this action and defines the potential perpetrators of patients' human rights' violations: health care providers and supportive staff of the medical institutions, who obtained the patients' information by virtue of their professional duties. Despite the fact that such divulging occurs very often, not a single medical worker has been yet brought to criminal liability under this provision.

A family with two HIV-positive children resided in a village in Zhytomir oblast'. The children were registered in the raion clinic. A neighbor worked as a nurse in this clinic. She learnt about the children's HIV status by chance, and shared the information with all the village residents. The neighbors started to abuse the children in all possible ways. They forbade their own children to be in touch with them. The sick children's parents filed a complaint with the prosecutor's office requesting a criminal law-suit against the neighbor. The neighbor pled not guilty and proceeded, together with her husband, to intimidate the claimants. The parents decide to give up and moved to another place of residence.

Article 135 of the Criminal Code of Ukraine contains is most instrumental in the context of protecting the rights of HIV-positive children.

Namely, part 1, **article 135 of the Criminal Code of Ukraine** provides the definition of leaving in danger — willful leaving of a person without help, if he/she remains in a condition dangerous to life and is unable to ensure his/her self-preservation due to young age, old age, illness or helpless condition and where the one, who left this person without help, was obliged to care after this person and was able to provide help to him or her, and where this one himself put the victim in a condition dangerous to life, without assistance a person whose condition is life-threatening and who has no possibility of using self-preservation measures due to minority, old age, disease or other helpless condition, if the person who abandoned them was obliged to take care of the person and was able of providing assistance, and also in case when person in charge has created the dangerous situation for the victim. This violation is penalized by up to two years of imprisonment or custodial restraint.

This law is applicable to negligent parents or guardians, who do not care for their minor children, neither treat them nor give them medication etc. Currently there are many cases in Ukraine, when parents for various reasons (religious being not the least of them) refuse to treat an HIV-positive child or to use antiretroviral therapy.

Obviously, such attitude endangers a child's life. Medical providers must explain to the parents the consequences of their negligence and talk with them about their liability for their actions.

4. HIV CONTAMINATION DUE TO NEGLIGENT PERFORMANCE OF PROFESSIONAL DUTIES

Article 131 of the Criminal Code of Ukraine, addressing negligent performance of professional duties resulting in a person's contamination with HIV or other incurable disease virus, becomes especially topical in the context of AIDS epidemics. This felony involves criminal liability of medical, pharmaceutical or other specialists who perform their duties neglectfully or unscrupulously,

thus causing individual's contamination with HIV or other incurable disease virus, threatening for human life. This crime can be penalized with up to three years' custodial restraint or imprisonment with prohibition to occupy certain positions or to perform certain functions for certain period of time. If two or more persons were contaminated, the culpable party can be imprisoned for the term between three and eight years with prohibition to occupy certain positions or to perform certain functions for up to three years' term.

Although most relevant to AIDS epidemics in Ukraine, Article 131 of the Criminal Code of Ukraine is difficult to implement, because the proof of medical workers' culpability often depends on timely identification of HIV-infection. Unfortunately, the infection can manifest itself after prolonged period of time, which complicates inculpatory evidence.

Under article 17 of the Law of Ukraine "On counteracting the spread of HIV-related diseases and legal and social protection of people living with HIV", persons contaminated with HIV as a result of medical manipulations, are entitled to judicial compensatory damages from the guilty party.

Transfusion of blood or its components, the use of other biological fluids, cells, organs and tissues for medical purposes is allowed only after mandatory laboratory tests of donors' blood for HIV infection are done. To prevent the HIV infection spreading through donors' blood, its transfusion is ordered exclusively when it is the only means of saving human life. In other words, if a patient's life is threatened so that he/she can be saved only by immediate blood transfusion and no pre-tested donors' blood is available on the spot, the transfusion of blood, checked for HIV infection by means of express test, is allowed upon patient's (or his/her official representative's) consent. If obtaining informed consent from the patient or his/her legal representative is not feasible, the decision on blood transfusion is made by the doctors' conference. If such conference cannot be convoked, then decision is made by the physician providing medical care. The fact of transfusion of blood, checked for HIV infection by means of express test, with patient's (or his/her official representative's) consent should be reflected in *writing* in the medical history of the patient, while the blood specimen is immediately sent to the laboratory for testing.

On June 22, 30 and July 4, in neonatal pathology ward of Mariupol city hospital № 3, fresh frozen plasma, obtained on May 31 from the HIV-positive donor, was transfused to three newborns. The medical staff, including deputy head physician of the municipal blood transfusion station, upon learning that HIV was found in donor's blood, did nothing to inform the head physician of the station or to eliminate the contaminated blood from the blood bank and database, or to warn the employees of the city hospital №3, who used the plasma from infected donor for transfusion. The criminal proceedings on this fact were instituted on August 30, 2005. Court passed two rulings in the case: in the first the party, guilty of the newborns' contamination, was acquitted (the acquittal was repealed on the aggrieved party claim); in the second the judge remanded the case for further investigation. Presently the inquiry is going on.

5. DENIAL OF MEDICAL HELP

Rather often HIV-positive people are denied medical help by the medical institutions, despite strict prohibition of such denial, spelled out in article 16 of the Law "On counteracting the spread of HIV-related diseases and legal and social protection of people living with HIV".

In actual practice many health care providers refuse to provide medical help to HIV-infected patients under various pretexts. Most common among these is the alleged lack of means of individual protection and prevention. The patients are most often denied help by dentists, surgeons and ER physicians. Sometimes the doctors' explanations are fully justified, because medical professionals handling blood have no way of efficiently protecting themselves from contamination.

The State Penitentiary Department of Ukraine faces most serious problems concerning the HIV-positive examination and antiretroviral therapy. Numerous accidents concerning the HIV-positive in remand prisons and correction facilities demonstrate lack of the necessary equipment or medical drugs. Both prison and department administration, and sometimes even prosecutor's office, responding to complaints maintain that the HIV-positive examination is not feasible. And no treatment is possible without prior examination. Here is an example from Novhorod-Siversky (Chernyhyv oblast').

P. Shcherbyna, who has been HIV-positive for 10 years, has been an inmate of remand prison since August 2010. Despite his numerous complaints, e. g. that he had lost all his teeth, suffered from dizzy spells and constant fever, he was never examined or offered medical help while in custody. In its last response, the prosecutor's office stated that no HIV blood test was possible.

In other cases, the institutions under the State Penitentiary Department refuse to provide treatment for HIV infection, referring to contra-indications for use of antiretroviral therapy if other treatment is administered. These rejections sometimes are not justified, so that antiretroviral therapy is not offered even after the completion of all other treatments.

K., who stayed in a correction facility № 13 and had the 4th, terminal stage of HIV and HIV-related tuberculosis, was treated only for TB. The treatment, unaccompanied by antiretroviral therapy was rather inefficient, as the immune system of the patient was very weak. When K. asked for antiretroviral therapy, the facility administration answered that antiretroviral therapy is contra-indicated for him due to his aggravated condition and setting in of opportunistic infections. Meanwhile, under the standing order of the Ministry of Health of Ukraine, this diagnosis does not contra-indicates the use of antiretroviral therapy. Only a liver disease or other indicators related to it can be cause contra-indication. The said indicators for K. were normal. Therefore, the refusal to start antiretroviral therapy was completely ungrounded. Besides, the facility administration referred to the lack of vacutainers as another reason for denying help to the HIV-positive inmates.

It is noteworthy that the rights of people living with HIV/AIDS are violated most often due to the lack of relevant legal knowledge among medical workers and Ukrainian public at large.

A Kirovohrad resident gave birth to a daughter. On the fifth day she, together with the newborn, was moved from delivery ward to the hospital. After her admission the hospital physicians became aware of the fact that the woman had HIV infection. Immediately the doctors forbade her to see her daughter and then ordered her to leave the hospital. For a month the woman kept trying to restore her own and her child's rights: she complained to Kirovohrad oblast' Health Department and to the prosecutor's office, but received negative response. Then she filed complaint with the Ministry of Health of Ukraine. The Ministry checked the facts, referred to in the woman's complaint and established the guilt of the medical staff. The Ministry of Health decision enabled the woman to file a claim with the court, demanding compensatory damages for the damnification. Moreover, the HIV diagnosis proved wrong and the woman was completely healthy. The court proceedings lasted for eight months. Finally the court decided that both her and her child's rights have been violated and ordered Kirovohrad oblast' Health Department to pay her compensatory damages.

6. RECOMMENDATIONS

1. Encouraging judges and attorneys to promote legal culture on HIV/AIDS-related issues with the goal of protecting the rights of people living with HIV/AIDS and reducing stigmatization and discrimination they suffer.
2. Introducing the training system and incentives for judges and attorneys, involving them in the protection of rights of people living with HIV/AIDS and other vulnerable categories.
3. Reviewing the current normative acts concerning the stay of the HIV-positive children in organized groups and boarding schools; making them inter-sectoral and interdepartmental.
4. Prohibiting disease-related discrimination by the Ministry of Health orders.

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5. Reviewing instructions and requirements for social assistance and pensions to the people living with HIV/AIDS; their re-socialization and rehabilitation.
6. Revising taxation rules for charity donors and sponsors from private companies to create incentives for charities aimed at improving care and support services for the HIV-positive.
7. Introducing the institute of social workers for people living with HIV/AIDS in the medical institutions and in the correction facilities (having sufficient number of social workers and psychologists on staff).
8. Increasing the funding of care and support services from the budget of the Ministry of Ukraine for the Family, Youth and Sports.
9. Developing state-of-the-art training programs for the training and upgrading of specialists, social workers and psychologists in the focus of care and support for people living with HIV/AIDS; including these programs in the various educational establishments' curricula (the Ministry of Health, the Ministry of Education and Science, Ministry of Ukraine for the Family, Youth and Sports, the Ministry of Labor and Social Policy, the Ministry of Justice).
10. Developing and implementing a special optional course (12-16 hours) addressing the rights of people living with HIV/AIDS.
11. Empowering people living with HIV/AIDS, so that they could participate in planning, implementing and assessing the care-giving and support services.
12. Devising and implementing the system of care-giving and support services, including national standards, staff, material and technical basis, interdepartmental network of the agencies offering these services.
13. Actively involving and making use of the Ombudsman's institute.
14. Implementing measures aimed at reducing stigmatization and discrimination and increasing public and professional tolerance and understanding for the people living with HIV/AIDS.
15. Equipping medical professionals with all the necessary means for protection against HIV contamination.
16. Authorizing the Ministry of Health to make the law provisions, prohibiting to demand payments for medical services provided to people living with HIV/AIDS, to all the heads of medical institutions.

XIX. ENVIRONMENTAL RIGHTS¹

1. RIGHT TO SAFE ENVIRONMENT

Summarized official information with respect to environmental safety in Ukraine is scarce. It can be found mainly in national reports on natural environment that should be published annually. Unfortunately, both devising and making these reports public through Internet is delayed year in and year out. Thus, as of early 2011, the reports for 2009 or 2010 haven't been yet published by the Ministry of Environment. Naturally, the task of drawing substantiated conclusions on environmental safety in Ukraine becomes a real challenge.

Political and administrative crisis of 2009–2010 shifted the current environmental problems to the periphery of national interests. There have been no reports on environmental monitoring or environmental safety, prepared by authorized bodies, while those available were compiled on the basis of fragmentary or incomplete observations, and, therefore, tend to be superficial and formal. One can draw a logical conclusion that deep systematic monitoring of environmental safety in Ukraine is lacking.

The State Statistics Committee in its consolidated report “Ukrainian environment in 2009” stated that in 2009 technogenic load on environment somewhat decreased due to slackening in economic activity. However, the environmental conditions, as vitally necessary prerequisite of human existence, still leave much to be desired.

The pollutants' emissions into the atmosphere by the registered fixed sources and transport decreased from 7210,3 thousand tons to 6442,9 thousand tons. However, the density of pollutants' emissions from fixed sources per 1 square km amounted to 6,5 t., and to 85,3 kg per capita, which is much higher than respective indexes for European countries, Russia and Belarus. In some regions these indexes are much higher than mean values for the country. In particular, the scope of emissions per 1 square km exceeded the average indexes 7,5 times per 1 square km and 3,4 times per capita in Donetsk oblast'; respectively, 3,8 and 2,8 times in Dnipropetrovsk oblast'; 2,9 and 2,6 times in Luhansk oblast'; 2,4 and 1,8 times in Ivano-Frankivsk oblast'. Kiev industrial enterprises discharged 52,5 tons of pollutants per 1 square km, exceeding the mean country value eight times! The highest technogenic load was registered in Kryvy Rih, Mariupol, Burshtyn, Luhansk, Dniprodzerzhynsk. It is noteworthy that State Statistics Committee uses only the data concerning the registered sources of emissions, so that numerous negative phenomena lamentably characteristic of Ukraine, i.e. burnings of the abandoned city dumps, burning garbage and leaves in the city, vegetation remains in the fields and forest belts, burnings of waste in wood-cutting areas — remain beyond the scope of assessment.

Major discharges of waste water into the water reservoirs was registered in 2009 in Kirovohrad (share of waste water in total drainage systems constituted 57%), Odessa (45%), Dnipropetrovsk and

¹ Prepared by Oleksandr Stepanenko, board member of UHUR, executive director of Environmental NGO “Green World”, Head of the NGO “Helsinki initiative — XXI”.

Donetsk (43% in each oblast'), Sumy (36%) and Luhansk (33%) oblast's, city of Sevastopol (45%). According to the data obtained by Central geophysical laboratory under the Ministry of Environment, the water reservoirs of the country are polluted mainly with the heavy metals compounds, ammoniac and nitrite nitrogen, sulphates. Significant exceeding of marginally acceptable levels of pollution was registered practically in all river basins, as well as in Kiev, Kaniv, Kremenchuh, Dni-prodzerzhynsk and Dnipro water reservoirs.

According to the State Statistics Committee, as of January 1, 2010, Ukraine accumulated 20,9 million tons of hazardous waste; 35,5 thousand tons among them (0,2% of general amount) fall under the I hazard class, and 2,3 million tons (11%) — under II hazard class. Over 70% of I hazard class waste was found in land-fills of Ivan-Frankivsk and Lviv oblast's.

On February 13, 2010 Procurator's General Office of Ukraine, in compliance with article 2 of the Law of Ukraine "On Procurator's Office" submitted annual report "On law observance in the country in 2009"² to the parliament. A relatively small section of the report addresses the issues of environmental safety and environmental balance. It is noteworthy the PGO in its reports does not tackle this problem in the context of environmental rights' observance. The authors of the report do not even use this concept, either in the section dealing with prosecutor's supervision over compliance with constitutional rights and freedoms of the citizens, or in the section addressing environmental protection and environmental safety. As before, the PGO information addresses the general violations, related to the use of natural resources. Quality and quantity of the data are worse, as compared to 2008 report. Practically there are no quantitative indicators that would reflect the results of prosecutor's supervision over compliance with environmental legislation in forestry and water use industries, use of natural resources, protection of natural preserves. In its own report for 2009 PGO failed to duly address the violations in land relations, although even superficial monitoring, held by the Uniform State Registry of Court Decisions³ shows that the number of violations of land law, land relation, public and state interests in this area has been increasing all over Ukraine.

Instead the Procurator's Office reports a common practice of non-sanctioned wood-cuttings, illegal spoilage and destruction of forests, timber thefts, violations of green technologies regulations in timber-cutting, poor control exercised by forest-protection agencies, expropriation of forested areas etc. Amazingly, the official site of most competent state forestry agency — State Committee on Forestry — has absolutely no information with regards to these phenomena. The only page, reflecting forest protection and preservation activities of State Committee, dwells on protection from pest, diseases and fires.⁴ Meanwhile, according to PGO information, damages to the state, perpetrated by unknown "pests" amounted to 30 million per year, and the culprits paid only 10% of them. The worst situation was observed in the forests under the Ministry of Agricultural Policy jurisdiction — only 2% of damages were compensated by the culprits, and under the Ministry of Defense jurisdiction, where this index amounted to only 1%.

On January 14, 2011 Ombudsman Nina Karpachova submitted an annual report "On observance and protection of human rights and freedoms in Ukraine"⁵ to the parliament. The report contained information for 2010, while the previous "annual" report dealt with events of 2006–2007. A special section — completely perfunctory and superficial, even in comparison with the same section of the previous report — dealt with the right to safe and sound environment.⁶

Analysis of the first period of the new presidents' team operation, performed in mid-2010 by independent experts, did not show any evidence of prioritization of environmental policy by ruling power⁷. In defiance of European standards, the presidential Economic Reforming Program for the

² http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=36585

³ <http://www.reyestr.court.gov.ua>

⁴ http://dklg.kmu.gov.ua/forest/control/uk/publish/article?art_id=32953&cat_id=32877

⁵ http://portal.rada.gov.ua/rada/control/uk/publish/article/news_left?art_id=234990&cat_id=33449

⁶ http://www.ombudsman.kiev.ua/dopovid_6/d_06_3_6.htm

⁷ <http://www.dt.ua/1000/1550/69721>

years 2010–2014 “Affluent society, competitive economy, strong state” lacks environmental component, which has been missing at the analytical stage, at the stage of goal-setting and among the anticipated program outcomes.

The reforming program superficially declared just one intention, i.e. “to ensure the implementation of European principle, under which the worst pollutants pay the highest fines”. The mechanism of environmental taxation is to be implemented by the end of 2012, while the implementation of new system of payments for the natural resources use is postponed till the end of 2014, i.e. rather remote future.

The goals of new power with respect to environmental protection are formulated in the section three of the State Program for Economic and Social Development in Ukraine for 2010 “Safety of human life and activity”⁸.

Similar to Economic Reforming Program, this cumbersome and bulky document is based exclusively on the analysis of economic factors of development. Social or ecological aspects are not treated as priorities, contrary to the principles of sustainable and ecologically balanced developments. Finally, the “safety” section of the program was prepared without preliminary public discussion, required by Aarhus Convention. Such important priorities as adherence to environmental rights, free access to environmental information, environmental education and raising of public awareness, public involvement in ecologically significant decision-making were omitted.

Summing up, we can argue that such approach to strategic planning in the country with a most resource-consuming economy and the highest rate of environmental exhaustion and pollution will inevitably lead to further deepening of environmental crisis and serious developmental impediments due to misuse of the country’s natural resources.

2. RIGHT TO ACCESSIBLE ENVIRONMENTAL INFORMATION

As noted above, the delays in preparing and publishing national reports on environmental status of Ukraine have become routine. As of late 2010, official portal of the Ministry of Environment offered only the text of 2007 National report, as well as the texts of regional reports for 2008⁹.

For the umpteenth time we are trying to draw attention to the fact that for 6 years in a row the National report has not been submitted to the Verkhovna Rada for consideration or printed as a separate publication, which is a gross violation of article 25-1 of the Law “On Environmental Protection”! That is why neither senior officials nor common citizens are familiar with National report! Under the circumstances, the information contained in the report is studied exclusively by a narrow circle of specialists and public activists. Subsequently, the environmental situation in the country is not properly analyzed by the authorities and does not create incentives for considering environmental factors or threats in the planning process.

One of the major shortcomings of both national and regional reports is the neglect of legal aspects in adherence to environmental rights.

In 2009–2010 the Ministry of Environment made public quarterly analytical environmental reviews, offering the current results of environmental monitoring in specific categories, i. e. air pollution, surface water and radiation safety¹⁰. Useful as it is, this practice cannot compensate for absence of national reports.

As far as special environmental reports are concerned, the lagging behind is even more dramatic. For example, the Second national warning on climate change was devised as far back as 2005,

⁸ <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2278-17>

⁹ <http://www.menr.gov.ua/content/category/78>

¹⁰ <http://www.ecobank.org.ua/GovSystem/EnvironmentState/Reviews/Pages/default.aspx>

the report on the implementation on National program for establishing national Ukrainian environmental network and report to the Second meeting of Aarhus Convention. parties — in 2004.¹¹

The information on spending of money, allocated by State environmental protection fund and regional and local funds has been missing from the Ministry of Environment web-portal for years and still cannot be found there. In our opinion, this practice is quite contrary to publicity and transparency principles of Ukrainian budget system, stipulated by the Constitution and Budget Code. Doubtless, the information on allocation and spending of environmental funds' money, as well as expenditures' analysis, used in ecological decision-making, falls under the concept of environmental information, defined in p. 3, article 2 of Aarhus Convention. Therefore, the state should ensure both free access to this information and active informing of the public.

Starting 2009 the environmental protection agency proceeded to contradict its own resolutions "On informing public on largest pollutants of environment" and "On Regulations on providing quarterly public information through mass media with respect to the largest pollutants of environment". In early 2011 the official web-portal of the Ministry still offered the information on the most polluting industries in Ukraine for 2008.¹² Meanwhile, there was no information concerning steps or measures taken by the Ministry of Environment or local councils with regards to the owners of the industries, to make them stop their operation or have their companies modernized.

The situation with regional or local state administrations' reports on environmental status and implementation of environmental protection programs is not much better. Not a single state region administration in Ukraine performs its Constitutional duty (article 119), which is to provide regular information on implementation of environmental protection programs. They delegate this function to the Ministry of Environment territorial departments.

The state administrations do not publish annual information on environmental status in their mass media, thus systematically violating provisions of article 25-1 of the Law "On Environmental Protection". The official Internet-portals of the majority of state administrations, ARC Council of Ministers, Kiev and Sevastopol state administrations do not have any sections addressing environmental information.

Zaporizhzhya oblast' state administrations' is one exception to this rule. It became the first to implement the provisions of the aforementioned article 25-1 of the fundamental environmental law. In February 2010 a presentation "Information systems with respect to environmental status in Zaporizhzhya region" was made here.¹³ By late 2010 the systems were still in place and accessible.¹⁴

Accessibility and quality of the information offered at the Ukrainian Ministry of Environment official web-portal have been severely criticized by many non-governmental organizations. In 2010 the inadequate presentation of information at the Ministry of Environment official web-portal was for the first time recognized by the court. On August 30 Kiev Circuit administrative court passed a ruling on the IBF "Ecology — Law — Individual" suit against the Ministry of Environment with regards to its official web-page. In its claim the fund made reference to the Aarhus Convention norms demanding active dissemination of environmental information and relevant legislative provisions and functioning of official executive authorities' web-sites.

In June 2010 the Ministry of Environment official web-portal was redesigned. As a result, it started to look more up-to-date, but the access to previous years' information was lost. Current informational contents of the Ministry of Environment web-portal are definitely insufficient. The majority of links to the environmental normative acts of the Cabinet of Ministers of Ukraine

¹¹ <http://www.menr.gov.ua/content/article/6010>

¹² <http://www.menr.gov.ua/content/article/201>

¹³ <http://www.menr.gov.ua/cgi-bin/go?node=5482>

¹⁴ <http://www.zoda.gov.ua/article/1417/>

were not active by the end of 2010¹⁵. Only some of the Ministry of Environment resolutions, passed in 2009–2010, are available on the web-page.¹⁶

In early 2011 a new site of Ministry of Environment Analytical Center has been designed and now is being filled up¹⁷.

Long — awaited printing and publishing of the “Red Book of Ukraine” third edition on the Ministry of Environment site, in compliance with the Law “On Red Book of Ukraine” is a positive sign in promoting public environmental awareness.

The ecological information, collected by of sanitary/epidemiological inspection monitoring, on safe environment for human life and activity, impact of environmental factors on public health was not included into the updated site of the Ministry of Health.¹⁸

In compliance with Presidential Decree № 76 of February 4, 2003 the Ministry of Ukraine for Extraordinary Situations and Public Protection from Chornobyl disaster aftermath (MES) must prepare annual reports on technogenic and environmental safety in Ukraine. However, the updated Ministry site contains no information with respect to these reports for 2009–2010¹⁹.

Under provisions of the article 9 of the Law “On Drinking Water and Water Supply” the national report concerning the quality of drinking water and water supply shall be prepared on early basis. Mass media published some information concerning the development of the 2009 report, but by January 2010 no traces of it could be found on the redesigned site of the Ministry of Regional Development, Construction and Housing and Communal Economy of Ukraine.²⁰

Meanwhile, at the end of 2010 the link to “Report on nuclear and radiation safety in Ukraine in 2009” appeared on the site of the agency, most accurate with regards to making information public — i. e. State Committee for Nuclear Regulation of Ukraine. This information was also published in hard copy.

In their earlier reports on environmental rights’ observance, public organizations mentioned that in early 2008 it became known that the Ministry of Environment set up its own system of classifying the environmental information by creating lists of confidential data. Inaccessibility of information in many cases (and, especially, when it is deliberately hidden) has significant impacts as an impediment in exercising public environmental rights²¹.

Responding to severe criticism and lawsuits the Ministry of Environment could think of nothing better than launch a real “confidentiality race”, formally invalidating illegal resolutions and passing the new ones, equally illegal.

Only on October 27, 2010 Minister M.Zlochevsky signed resolution № 481 “On amending the list of information classified as “confidential”. This resolution removed a number of items from the list of confidential information which is state property, including the most unacceptable, concerning restricted access to the outcomes of state ecological experts’ evaluation.

Doubtless, this step was the result of public campaign for banishment of the most odious resolutions of the Ministry of Environment, carried out by the National environmental center of Ukraine (NECU), IBF “Ecology –Law- Individual”, UEA “Green World”, “Bureau of environmental investigations”, Environmental NGO “MAMA-86” and others.

¹⁵ <http://www.menr.gov.ua/content/article/6049>

¹⁶ <http://www.menr.gov.ua/content/article/6050>

¹⁷ <http://www.ecobank.org.ua/Pages/default.aspx>

¹⁸ http://www.moz.gov.ua/ua/portal/ms_sanepidsit/

¹⁹ <http://www.mns.gov.ua/>

²⁰ <http://www.minregionbud.gov.ua/uk/index>

²¹ The Ministry of Environment orders no.361 of September19,2002 “On validating the list of confidential information”, № 470 of November 25, 2004 “On validating the list of confidential information”, no.158 of April 03. 2006 “On amending the Ministry of Environment order of November 25, 200 № 470” № 540 of December 12.2005 p., № 159 of March 28, 2008 “on approving the list of confidential information” № 231 “On adjusting and systematizing the confidential information data” which annulled the order № 159; order № 289 of June 09, 2008 “On approving the list of information marked as “confidential”.

Nevertheless, it's still too early to rejoice: the restricted access to the environmental information by classifying it as confidential is still very common in our ministries, committees and agencies. For example, over the recent years the State Committee on Land Relations of Ukraine also passed a number of resolutions classifying some information as confidential²². These resolutions cannot be found at the State Committee official web-portal or its territorial departments' web-pages. A common citizen will have hard time trying to get them, even on request. Deliberate hindering of the access to the resolutions permits the State Committee bureaucrats to decline public requests on the grounds that allegedly they fall under the category of classified information. There is no way to verify this statement as the list of classified information is also very hard to get!

The activists of "Green World" environmental NGO came face to face with this practice when they were sending requests for information on various land policy, land protection and privatization issues to Ternopil oblast' authorities. Beyond any doubt, the deliberate narrowing of the scope of accessible information by the bureaucrats is one of the major corruption factors in state management of land resources.

For a long time the State Committee of Ukraine for Forestry has been — unfortunately — ranking first in the suppressing the information. This State Committee never implemented the requirement of article 28, 35 of Forestry Code of Ukraine with regards to monitoring, state registration of forests and state forest cadastre. A special page of the State Committee contains only very basic general information on the goal of forests' monitoring. Unfortunately, it has not been updated since 2007²³. The information on monitoring results, state registration of forests and state forest cadastre must be available to the public, but no one, lamentably, is devising it... In the meantime, all the materials concerning forests management still are classified as "confidential"²⁴. What legal acts or norms require this secrecy, or why the information with regards to forest condition is restricted, remains unclear. So, the information is in place, somewhere, but there is no legal way to obtain it, sorry...

3. EXERCISING THE RIGHT TO PARTICIPATE IN ENVIRONMENTALLY SIGNIFICANT DECISION-MAKING

3.1. DEVELOPING THE DRAFT "STRATEGY OF NATIONAL ENVIRONMENTAL POLICY TILL 2020"

As far back as 2007 the Ministry of Environment started devising the Draft strategy of national environmental policy. Over two next years the Strategy of national environmental policy has been reluctantly discussed and changed several times. In 2010, however, the Ministry of Environment became more upfront in discussions with regards to the Strategy. This new interest towards the strategy of national environmental policy is explained by the fact that Ukrainian government plans to get financial support at the amount of 35 million euro from the European Union and 10 million euro from Swedish government. One of the conditions for this financial support is adoption of the Environmental Strategy by the end of 2010.

The first public hearings on draft strategy took place on June 17, 2010, but they were recognized as invalid by the public activists. The reason for that was the fact that by the time the hearings were called, the draft strategy has been sitting in the Verkhovna Rada for two weeks

²² State Committee for Land Use and Resources № 633 of December 04, 2009 "On approving the list of confidential information which is state property within the framework of State Committee for Land Use and Resources"; order of the State Committee for Land Use and Resources № 359 of May 11, 2010 "On amending the list of confidential information, which is state property" and this information marked as "for service use only".

²³ http://dklg.kmu.gov.ua/forest/control/uk/publish/article?art_id=62971&cat_id=32880

²⁴ Response provided by the director of Ternopil oblast' department for forestry and hunting grounds № 02-2/902 of December 15, 2010 to "Green World" environmental NGO.

already. The Ministry of Environment had to call the new date for public hearing so that the public could provide its considerations. The second hearing on the draft strategy took place on August 26, 2010, and many amendments and considerations were proposed. All of them, however, were disregarded, as the parliament registered the draft strategy on the day following the hearing.

On December 21, 2010 the Verkhovna Rada passed the Law “On fundamental principles (strategy) of the state environmental policy of Ukraine till 2020”²⁵.

3.2. DEVISING THE DRAFT TRANSPORTATION STRATEGY TILL 2020

In 2010 the government tried to adopt the transportation strategy of Ukraine till 2020 even in greater hurry than it adopted the environmental strategy.²⁶ The reason for the hurry was obvious” an opportunity to obtain multi-million support from the European Union and Sweden, on the condition that the document is passed this year.

The Cabinet of Ministers of Ukraine approved the draft strategy on October 20, 2010, despite the fact that no public hearings have been called, although the strategy might have serious impact on environment and environmental NGOs were interested in it. Understandably, as the transport is the fastest growing source of toxic pollution and hot-house gases emissions. That’s why immediate implementation of measures to curb its ecologically inefficient use would be most timely. The priority should be given to energy-saving and less polluting means of transportation and to public transportation, which should be more comfortable, reliable and regular.

Considering this draft the Ukrainian government failed to take into account serious proposals submitted by public organizations and associations. In the footnote we give just one example, i. e. NUO task force proposals on climate changes in the context of draft strategy.²⁷

3.3. INITIATIVE TO CALL A LOCAL ENVIRONMENTAL REFERENDUM IN ZAPORIZHZHYA

Zaporizhzhya city and oblast’ authorities for a long time have demonstrated incapability of decisive response to the violations of environmental protection legislation, committed by metallurgy and chemical industries. That’s why the city air always contains amount of industrial toxicants, substantially exceeding marginally acceptable norms. NFOs’ activists decided to address the problem by means of local referendum, initiated at the public meetings of Zaporizhzhya residents in August 2009. The referendum was supposed to answer the following question: “Do you support the necessity of temporary closing [by Zaporizhzhya city council] of the companies, enterprises and industries, located at Zaporizhzhya territory, if they exceed the marginally acceptable norms of pollutants’ emissions and discharges into the environment ?”²⁸ Unfortunately, the activists never managed to lobby the referendum at the city council efficiently enough.

4. EXERCISING THE RIGHT TO ACCESS TO JUSTICE ON ENVIRONMENTAL ISSUES

Certain successes achieved in lawsuits with regards to environmental protection and environmental rights are due primarily, to the active operation of environmental NGOs.

²⁵ <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2818-17>

²⁶ <http://www.mintrans.gov.ua/uk/discussion/15621.html>

²⁷ http://climategroup.org.ua/wp-content/uploads/2010/08/trasportstr_comments_100817.pdf

²⁸ Zaporizhzhya: shall environmental referendum happen? — <http://www.khpg.org.ua/index.php?id=1266324184>

On November 25, 2009 Lviv Circuit administrative court passed a judgment, satisfying the IBF claim against State environmental protection department in Lviv oblast'.²⁹ The court judged the actions of the department, i.e. classifying the state environmental experts' evaluation results as "confidential information", unlawful and cancelled the state department resolution of May 19, 2009 concerning the list of information, which can be classified as confidential. It also prohibited state department from classifying the state environmental experts' evaluation results as "confidential information".

On the same day Kiev commercial court, passing decision on the NECU claim, invalidated the decision of Kiev city council, which illegally cut down the area of "Zhukiv island" natural preserve from 1794 ha to 196 ha (9 times less)³⁰. The landscape park "Zhukiv island" was established in 1999 on Dnieper river. It protects the whole area of "Koncha-Zaspa" natural preserve, the first natural preserve in the soviet Ukraine. Kiev city council decision grossly violated the law and was made without any considerations of Kiev Master plan of urban development, approval from the Ministry of Environment or Procurator's General Office or scientific substantiation of reductions. The decision was made with one and only goal — to sell it out for construction development³¹.

On November 9, 2010 college of Kiev Circuit administrative court judges passed a ruling on the suit filed by IBF, appealing the Cabinet of Ministers' of Ukraine resolution № 841 "On allotting land-plots for permanent use". By this resolution the government allotted 27 ha of most valuable land of the regional landscape park "Granite and steppe Pobuzhzhya" in the Southern Bug valley to "Energoatom" company for the further inundation by the waters of Oleksandrivka water reservoir. "Energoatom" CEOs believed that the reservoir is needed for the Tashlytska HNPP and Southern-Ukrainian NPP operation. However, the price of inundation, — which, by the way was not stopped in defiance of court's decision — is unique Bug rapids, buried underwater, peril of unique plants registered in the Red Book, destruction of the last historical landscapes of Zaporizhska Sich.

Joint attempts of Ternopil oblast' prosecutor's office and state environmental inspection to bring the culprit, guilty of breaking the natural preserve regime in one of the "natural wonders of Ukraine" — regional landscape park "Dniester canyon" to justice, resulted in defeat in the courtroom. The culprit, a private company "Zolotopotyske" illegally plowed 1.7 ha of protected land in Dniester valley. Nevertheless, on October 12, 2010 Ternopil oblast' Commercial court passed a ruling dismissing the claim on the grounds that "plowing of the natural state park land did not lead to the destruction of the natural system and does not present a threat to the environmental condition of the park".³²

On October 21, 2010 an event, unprecedented both in the judiciary practice and natural reserves' management, occurred. The Highest administrative court of Ukraine passed a judgment, classifying the Presidential Decree №1040/2009 of December 11, 2009 "On establishing a national park "Syversko-Donetsky" as illegal. It is first precedent of court's ruling cancellation of national park status in total Ukrainian history. Kremin' raion council (Luhansk oblast') was a claimant in the case. It requested invalidation and cancellation of the Presidential Decree, and justified its actions by the fact that establishment of the park was not agreed upon with Kremin' raion or city councils, although it is not stipulated by the law, as the park was created exclusively on the lands of forest fund, which is administered by the state.

Oddly enough, the Presidential Administration allowed the Kremin' raion council appeal in defiance of the Presidential Decrees, which defined natural preserves' development as one of the most important state priorities.³³

²⁹ <http://epl.org.ua/pravo/dostup-do-informaciji/spravi/vidkrittja-gromadskosti-visnovkiv-derzhavnoji-ekologichnoji-ekspertizi/>

³⁰ Kiev city council decision no.162/1996 August 22, 2007 "On setting up the "Zhukin island" landscape park".

³¹ <https://helsinki.org.ua/index.php?id=1259398848>

³² Commercial court of Ternopil oblast' case № 2/70-1162.

³³ <http://www.maidan.org.ua/static/news/2010/1291381647.html>

5. ADHERENCE TO THE INTERNATIONAL CONVENTIONS ON ENVIRONMENTAL PROTECTION

5.1. UN EEC ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING PROCESS AND ACCESS TO JUSTICE ON ENVIRONMENTAL ISSUES (AARHUS CONVENTION (OK))

June 2010 Y marked the 10th anniversary of Aarhus convention ratification. At that point it became a part of the Ukrainian legislation. As is well-known, at third Aarhus convention meeting, which took place in June 2008 in Riga, Ukraine and Turkmenistan were classified as countries that do not meet its requirements.³⁴ The meeting's decision maintained that the Ukrainian government does not participate in evaluation of countries' adherence to Convention and does nothing to implement the decisions of the second meeting. In four years the government had done nothing to comply with the Almaty meeting requirements: developing the Convention implementation strategy, harmonizing the law with its provisions, stipulating public participation in decision-making process, and devising practical tools for the Convention implementation.³⁵ Bodies of state power in Ukraine kept Ukrainian public happily unaware of the lamentable contents of both meetings' decisions — not a single mass media organ made them public.

On December 27, 2008 the Cabinet of Ministers approved "Action plan for the execution of Aarhus Convention decision III/6f".³⁶

The said plan had a number of faults, including the following:

- The Ministry of Environment is a main executor of all the Plan's activities; it means that the Aarhus convention is still perceived a professional convention of this ministry, while all the superior power structures, i.e. the Cabinet of Ministers, the President, Ombudsman, law enforcement and judiciary agencies deliberately stand aside, not taking part in its implementation;
- The interdepartmental task force for the implementation of Aarhus Convention decision (nota bene, we are not talking about the whole convention, but just about the latest decision, made by the convention parties at their last meeting!), is not supposed to include the members of public, local self-governments, higher authorities, law enforcement agencies.

The interdepartmental task force should monitor not only the decision, made by the Aarhus convention parties, but a much broader range of issues, related to its implementation in Ukraine. Evidently, by ratifying the convention, Ukraine had undertaken the obligations, first and foremost, with regards to its citizens, and not only with regards to Aarhus convention parties. That's why the task force should be called "The interdepartmental task force for the Aarhus convention provisions' implementation in Ukraine". Its terms of reference should be clearly defined. One of the vice-prime ministers shall be conferred with the authority to act as the head of the task force.

Under the action plan, the Ministry of Environment promised to devise a number of amendments to the legislation, reflecting the Aarhus convention provisions' implementation by September 2009. Obviously, these promises were never fulfilled, and the Ministry of Environment referred to the complexity of the task, need for expert help and complicated political situation in the country as reasons for its failure.³⁷ Next year, reporting on the drafting of legislative acts, the Ministry of Environment and the government failed even to provide the required documents concerning adherence to Aarhus Convention to UN EUC, so that this latter had no way of comparing these documents

³⁴ <http://www.unece.org/env/pp/mop3/mop3.docI.htm>

³⁵ Decision 2/5b "Observance of the Ukraine's obligations undertaken at the II meeting of Aarhus Convention parties, Almaty, May, 27.05.05 r. <http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.8.r.pdf>.

³⁶ CMU resolution of December 27, 2008 p. № 1628- p. <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1628-2008-%F0>

³⁷ Report on the implementation of Aarhus Convention meeting decision III/6f, p. 7 <http://www.menr.gov.ua/content/article/id/31>

with Convention provisions or of evaluating their adequacy and efficiency in resolving the problems, identified by the Committee in its suit against Ukraine as far back as 2005.³⁸

In 2009–2010 the aforementioned interdepartmental task force had never been set up. The fundamental law “On Environmental Protection” had never been amended with new provisions in compliance with the Convention standards. No key governmental documents, promised for the last ten years, (e. g. resolutions “On public involvement in decision-making with regards to the natural environment”, “On publishing information concerning the natural environment status) had been adopted.

The resolution on accessibility of environmental information should contain a provision, stipulating setting up of regional centers of environmental information under the auspices of central and regional executive bodies (government, oblast’ and raion administrations). Currently only an insignificant portion of the environmental information is collected in various department of the Ministry of Environment. In practical operation all the other agencies and departments (the Ministry of Health, the Ministry of Agricultural Policy, the Ministry of Extraordinary Situations, the Ministry of Fuel and Energy, the Ministry of Forestry et al.) deliberately stand aside, not participating in environmental monitoring, collection of environmental information, its systematizing, structuring, and making it public and accessible for the citizens. The responsibility for this, according to the law and to Aarhus Convention, resides with the government and the parliament.

More than once public activists have criticized the inaction of power, that practically withdrew from Aarhus Convention provisions’ implementation. First, the measures, spelled out by the government in the Action Plan, are inadequate and inappropriate, and therefore, failing to meet the recommendations of the Committee on Aarhus Convention provisions’ implementation III/6f. Second, even these partial measures are not a priority for the ruling power, and therefore are not properly addressed.³⁹

Meanwhile, the next Aarhus Convention meeting is approaching. Despite the fact that nothing has been done, Ukraine has to report to the world community. So, on October 29, 2010 the Ministry of Environment published on its web-portal a draft “Joint National Report for 2010 on Aarhus Convention implementation in Ukraine”⁴⁰. The Ministry once again encouraged public at large to send recommendations and remarks on this report to the mail-boxes of the Communications and Public Relations Division of the Ministry of Environment. The results of discussion were to be made public in November 2010, but by early January 2011 neither discussion results not final version of “Joint National Report for 2010 on Aarhus Convention implementation in Ukraine”⁴¹ have been published by the ministry.

It is noteworthy that there was no mention of this report on the sites either of the Cabinet of Ministers, the Verkhovna Rada or the Ministry of Justice, who all share the responsibility for the implementation of international legal acts. The only conclusion which can be drawn from it is that the document in question can by no means be called a National report. It is not a report, prepared by the highest authorities in the country, it is not drafted in the national language, it has not been submitted to the parliament that ratified the convention, Ukraine public is not aware of it, although it has the right to know about the power’s adherence to the principles of “environmental democracy”. It is nothing but a ungainly attempt, undertaken by the Ministry of Environment to “imitate” a national report.

So, nothing has changed over the 10 wasted years, since the ratification of Aarhus Convention. The Ukrainian government resembles the Andersen’s “naked king”, failing to demonstrate either political will or tangible outcomes of the Convention provisions’ implementation into the law and state policy. Instead, the Ministry of Environment has embraced in this farce a lamentable role of

³⁸ <http://epl.org.ua/pravo/dostup-do-informaciji/>

³⁹ <http://maidan.org.ua/static/news/2009/1257845039.html>

⁴⁰ <http://www.menr.gov.ua/content/article/6739>

⁴¹ <http://www.menr.gov.ua/content/article/6739>

the “king’s page”, whose only task is to cover the actual absence of implementation process with its clumsy reports and action plans. Obviously, the king remains as naked as the day he was born.

5.2. FRAMEWORK UN CONVENTION ON CLIMATE CHANGE

NGOs’ standpoint with respect to Ukrainian position in UN negotiations on climate change in Cancun (Mexico)

The NGOs’ proposals with respect to Ukrainian position in UN negotiations on climate change, which took place in Cancun in December 2010 are permanently neglected by Ukrainian government. The main goal of the negotiations consisted in seeking international agreement on emissions reduction till 2020.

Ukrainian government for the umpteenth time expressed its readiness to decrease the emissions of hot-house gases into the atmosphere by 20% as opposed to 1990 level. The environmental NGOs have been sending out declarations and appeals and organizing public actions, trying to convince the authorities that their promises can only mislead the international community, as Ukrainian emissions currently constitute only 55% of 1990 level. In other words, this “obligation” does not oblige Ukraine to reduce the emissions, but, quite contrary, allows for their increase by 70%. The environmental NGOs believe that by 2020 emission levels in Ukraine should not at least exceed actual levels.⁴²

6. THE MOST OUTRAGEOUS VIOLATIONS OF ENVIRONMENTAL RIGHTS

6.1. TERNOPIL “LANDFILL CRISIS”

Malashyvtsy landfill officially does not exist: it was closed for use by the State environmental protection department in 1997. In real life, however, the land plot within the jurisdiction of Malashyvtsy village council (Zboriv raion) for 30 years has been used by Ternopil utility companies as a dump for domestic waste. The dump is located within the second zone on sanitary protection of Verkhnyo-Ivachiv water catchment area, which supplies Ternopil water. The geological stratum is formed by the rock which cannot serve as watertight screen. Hence, there is danger of pollutants’ penetrating from the landfill into the productive aquifer.

In 2009–2010 the village several times launched protests, blocking the road to the landfill. As a result, the sanitary conditions in Ternopil in July–August 2009 became unbearable: the garbage was left in the streets, or taken to the non-sanctioned dumps in the suburbs. Only small portion of the waste was brought to the landfills in the neighboring raions and oblast’s. The city and oblast’ authorities failed to find legal means of resolving the dispute with the Malashyvtsy community and addressing the issue of domestic waste management.

Finally the executive committee of Ternopil city council filed a claim with the Ternopil Circuit administrative court, asking the court to ban Malashyvtsy activists from organizing mass events with the goal of blocking the roads to Malashyvtsy landfill starting August 1, 2009⁴³.

The court failed to protect the residents’ environmental rights. On August 7, 2009 it passed the decision satisfying the appeal and prohibiting the Malashyvtsy activists from organizing mass blockage of all the roads leading to Malashyvtsy landfill, (Zboriv raion, Ternopil oblast’) starting August 8, 2009. The court’s judgment, in compliance with p. 6, article 182 of Administrative Code of Ukraine, has been executed by militia units in August–September 2009.

⁴² http://climategroup.org.ua/wp-content/uploads/2010/11/pos_kankun101118.pdf

⁴³ <http://www.rada.te.ua/news/view/1575>

Over 2010, Malashyvtsy residents many a time attempted to block the waste removal from Ternopil, but all their efforts were in vain.⁴⁴ The residents of the village of Myrolyubivka, Ternopil oblast' also organized mass protests on learning that an alternative landfill was to be constructed in their territory without village council authorization.

Currently Malashyvtsy landfill is still being used in violation of environmental safety and sanitary norms.

6.2. GRANTING CITY OF KALUSH AND SURROUNDING VILLAGES THE STATUS OF ENVIRONMENTAL DISASTER ZONES

Environmental problems Kalush is facing now are predetermined by large-scale aftermath of prolonged inefficient extraction of potassium ores and production chlorine organic compounds. They are in general typical of many mining and industrial cities of Ukraine.

The most serious hazard is created by more and more frequent collapses of surface over the mining fields. Presently 256 residential houses and industrial facilities in Kalush, 109 residential houses in the Khotyn' village, 285 residential houses and 7 industrial facilities in Kropyvnyk village, 304 residential houses and 16 industrial facilities in Sivka-Kaluska village are located on the duffers. 15 surface depressions appeared in the city over the recent years.

Industrial waste presents another serious challenge. The dam can collapse any moment at the sites of potassium waste storages. Dombrovsky potassium quarry 54 million m³ large is another reason for concern. In fact, it is completely abandoned and inundated by water from melted snow and rain, which react with salt. The threat of quarry's collapse and inundation by Sivka river is imminent.

A toxic waste landfill issue should be addressed immediately: one third of toxic waste of Ukraine is buried here, and no one knows what is going on with it. Potentially hazardous waste should wither be disposed of or at least stored safely⁴⁵.

Ensuring Kalush the status of extraordinary environmental zone can serve as a vivid example of successful lobbying of environmental rights' protection by the public and authorities acting together.

In late 2009 public task forces charged with referendum preparation were registered in Kalush in compliance with the law "On all-Ukrainian and local referenda". The referendum initiative was unanimously backed up by city council and mayor — people's deputy I. Nasalyk. At the referendum of January 17, 2010, 97% of all Kalush residents that took part in the voting, answered the question "Do you believe that Kalush area is the extraordinary environmental situation zone?" in affirmative. On February 2 during a working visit to Ivano-Frankivsk oblast', President Yushchenko visited environmentally hazardous areas of Kalush, i.e. Dombrovsky quarry and "Oriana" company toxic waste storage.

As soon as February 10, 2009 the President signed Decree № 145/2010 "On granting the areas of Kalush, Kropyvnyk and Sivka-Kaluska, Kalush raion, Ivano-Frankivsk oblast' the status of extraordinary environmental situation zone". On February 12 the draft law on approving the presidential decree was supported by the Verkhovna Rada. The costs for overcoming the extraordinary environmental situation at the amount of 560 million UAH were included into the budget. The funding of environmental and social measures starts in early 2010.

Meanwhile, on November 13 a vessel with 1.5 thousand tons of hexachlorobenzol on board left Mykolayiv port. Hexachlorobenzol is a class 1 toxic substance, which has been stored for 30 years in the abandoned landfill of extremely hazardous waste from the former "Khlorvinil" LTD company.

⁴⁴ <http://www.rada.te.ua/news/view/2493>

⁴⁵ Regional report on natural environmental status in Ivano-Frankivsk oblast' for 2008 — http://www.menr.gov.ua/cgi-bin/go?node=reg_dop_08

Altogether 11 thousand tons of hexachlorbenzol are buried under the city of Kalush.⁴⁶ The waste will be detoxified at the specialized facility Tradebe in Great Britain, obviously, at the expense of the Ukrainian taxpayers, and not the ill-famed “Khlorvinil”. By the end of 2010 the total of 8,5 thousand tons of hexachlorbenzol is to be removed from Kalush.⁴⁷

In the meantime, the largest active companies in Kalush “Karpatnaftokhim” and “LUKOR”, that in due time appropriated “Khlorvinil” and “Oriana” assets, express no desire to participate in the elimination of the extraordinary environmental situation. On the other hand, the liabilities, left by chemical industry monsters in the past, will scare local residents and cause headache for authorities’ for many years to come.⁴⁸

6.3. SUPPRESSION OF PUBLIC PROTESTS AGAINST WOOD-CUTTING IN KHARKIV GORKY PARK

The confrontation was caused by illegal felling of one-hundred years’ old oaks in Gorky central park. This park area survived even the war and Nazi occupation of Kharkiv in 1941–1943. The goal of felling was to build a highway through the park, linking Sumska and Novhorodska streets⁴⁹.

Decision on allotting the land plot (9.9218 ha) “for the construction of a highway, hotel complex and apartments” was made by Kharkiv city council as far back as February 27, 2008. Then the trees were saved. But on May 19 of this year, disregarding public opinion, Kharkiv city executive committee passed the decision “On removing greenery in the highway “Sumska-Novhorodska” construction site (near Bila Akatsyia street) in Kharkiv”, authorizing felling of 503 trees. On May 20 the felling started. It turned out, that, in lieu of the whole package of documents, required for tree-cutting, the “loggers” had nothing but this decision. The exact site for cutting was not identified, safety rules were ignored. On the first day, over 100 trees were cut. “Pechenegues” environmental NGO activists called militia officials, who stopped the cutting to check whether it was sanctioned. The “Pechenegues” started to protest, set up a small tent town, where the tree defenders gathered. Students, undergraduates, teachers, retirees, office employees took turns guarding the trees in “City fort” — that was the name given by the protestors to their camp. In total several thousand Kharkiv residents participated in the action, with several dozens to several hundreds people present in every given moment. Confrontation lasted from May 20 to June 2.

On May 21, at 4:00 am, militia, using force, tried to disperse the tree defenders, so that they would not hinder the cutting. However, the protesters did not give up. They were protecting trees with their own bodies, getting into the way of machinery. The mount climbers got to the very top of the trees to prevent their cutting.

The tree defenders cut short all the efforts to politicize their actions, removing the representatives of all political forces with their logos. The only acceptable accessories were green arm-bands and the National Flag of Ukraine. Members of oblast’ and city councils from various political parties were present at the “Fort” as private persons. The rumors, spread by the acting mayor G. Kernes and governor M. Dobkin, claiming that the action was funded by the head of local BYUT, former governor A. Avakov, were false. People with various political affiliations, including those who voted for the Party of regions in 2006 and for V. Yanukovych in presidential elections, participated in the action.

Kharkiv residents’ attempts to protect the trees were violently suppressed by the “loggers’ and unknown “municipal guards” — heavily built men in black uniforms, bearing the “municipal guard”

⁴⁶ Kalush wants to be a natural disaster zone — <http://www.unian.net/ukr/news/news-360439.html>

⁴⁷ The Ministry of Environment news — <http://www.menr.gov.ua/content/article/6865>

⁴⁸ http://21.helsinki.org.ua/index.php?option=com_content&view=article&id=10%3Akalush&catid=1&Itemid=3&lang=uk

⁴⁹ “Awarding the culprits and punishing the innocents?” — Yevhen Zakharov, co-chair of Kharkiv Human Rights Protection Group. Dzerkalo tyzhnya № 26 (806) 10 — July 16, 2010 <http://www.dt.ua/3000/3320/70028/>

badges. These people had no IDs, but some were recognized as the personal guards of acting mayor G.Kernes. The law enforcement officers calmly stood aside, observing the protesters' beatings. Several people ended up in the hospital with broken ribs, concussions etc.

The destruction of the green zone was unlawful. Kharkiv city council disregarded the requirements of the law "On area planning and developing", which spells out in detail the procedure for approval of development projects with mandatory public hearings. (articles 30,2–30,7). As eventually turned out, no permits from the Ministry of Environment or other organizations were obtained.

As of early 2008, the Master Plan of Kharkiv Development did not mention this highway. Construction of another highway, going around the old part of the park and children's railroad was planned. Later, though, the graphic portion of the Master Plane was classified as confidential information by the city council, which made any public hearings with regards to area development and trees cutting virtually impossible.

Over May 20–27 over 500 trees were cut, and 200 more trees marked for cutting. On the morning of May 28, around 6:00 am, "municipal guards" in black uniforms attacked the "Green Fort" camp and by force removed the activists from the site. Nine activists, who refused to be moved, were arrested by militia. On June 1, at 4:00 am the camp suffered a new attack. Deputy Head of Dzerhinsky district militia department ordered militiamen to form a line around the camp to prevent fighting. He was disciplinary penalized and his actions were classified as "professionally inadequate", although he acted in total compliance with the law and according to the circumstances. On June 2 people, wearing no badges this time, attacked the camp, while militia did nothing but arrested four tree defenders. The "loggers" were threatening people with their chainsaws and cut a tree with the mountain climber on top. This latter miraculously survived by hiding behind the trunk.

The 'loggers' cut down all the trees and the protesters removed the camp — everything was destroyed. On cleaning up, people moved on foot to oblast' council and oblast' administration buildings at Sumska street. There oblast' council member A.Avakov wanted to meet them as his constituents, but was prevented from doing it. Two more activists were detained by militia on the charge of "organizing non-sanctioned rally".

The protocols of administrative offense under article 185 of the Administrative Code of Ukraine (malicious resistance to militia requests) were compiled with regards to all the activists, detained on May 28 and June 2, although none of them put up any resistance. Two of them — Denis Chernega and Andriy Yevarnitsky — were put in administrative custody for 15 days, another — for three days, four were exempt from liability and others were fined for 140 to 300 UAH. "Amnesty International" proclaimed Chernega and Yevarnitsky prisoners of conscience on the 9th day of their custody. On the same day they were released by appellation court decision.

In June and July the tree defenders, united into "Green Front" NGO, carried out a number of protests against illegal actions of local authorities.

On June 19 a public hearing to decide the further destiny of the trees was held in Kharkiv. The local authorities faked the outcomes of this event. Several thousand citizens gathered at the entrance to Kiev district executive committee to participate in the hearings, but were banned from entering the building. Participants were registered at one venue (2341 persons), while many of them were issued the mandate for quite a different venue. These people were easy to identify — they did not have the hearings' agenda; many were totally unaware of the topic under discussion. Mainly they were school and kindergartens' employees, medical workers, threatened by dismissal if they would not come to the hearing and vote for "right" decision. According to "Pechenegues" press-secretary O. Perehon, "the ballots of those who voted against the tree-cutting, were completely disregarded. No one counted the ballots properly. Out of 300 participants about 20 voted against tree-cutting, but they were all counted as one vote". Sociological phone surveys, showed that 70% of Kharkiv residents were against the highway construction through the park, 15% were for it, and 15% did not care either way.

In August 2010 an Ombudsman submitted to Procurator's General Office a motion, which described the facts of gross violations of human right to safe and healthy environment, hindering of

journalists professional operation and inappropriate use of budget funds. Unfortunately, no culprits were penalized pursuant to this motion. The Ukrainian Ombudsman report “On observance and protection of human rights and freedoms in Ukraine” for 2010 the actions of Kharkiv authorities and militia were judged negatively: “The Ombudsman is obliged to declare: Kharkiv authorities used bulldozers not only on the ill-famed highway, but also on human rights. Nothing like this could happen in a civilized law-abiding state”⁵⁰.

6.4. UNLAWFUL INVALIDATION OF NATURAL PRESERVE “ROZTOCHCHYA” LEGAL STATUS⁵¹

On November 1, 2010 the minister of education D.Tabachnyk signed an order № 1032⁵², invalidating the legal status of “Roztochchya” natural preserve and launching the process of its administration liquidation (article on of the Order “Terminate the legal entity “Roztochchya” natural preserve under the National Forestry University of Ukraine by reorganizing it into a structural division of the said University”). This order is a vivid example of legal nihilism. The very first article is incorrect from the legal point of view. First of all, the preserve was never set up under the premises of the National Forestry University of Ukraine, which is nothing but its research custodian. The order provision are in plain contradiction with article 5 of the law “On natural preserves fund of Ukraine”, under which “natural preserves, biosphere preserves, national natural parks, botanical gardens, dendrology parks, zoos of nationwide jurisdiction as well as regional landscape parks are legal entities”.

The order violates the provisions of article 12 of the said law: “The management of natural preserves, biosphere preserves, national natural parks, botanical gardens, dendrology parks, zoos of nationwide jurisdiction as well as regional landscape parks is exercised by their special administrations”. Meanwhile, the order launched the process of terminating the special administration of “Roztochchya”.

Signing his odious order minister D.Tabachnik unacceptably exceeded his competences, having delegated the administrative functions in environmental protection area and permanent use of the natural preserve to a higher educational establishment, which is contrary to both Ukrainian law and University by-laws.⁵³ The termination of status for the natural preserve means its illegal liquidation. The procedure for setting up and liquidation of natural protected areas is established by the law, and the outlandish procedure, invented by the minister of education to liquidate a natural preserve, obviously is unacceptable.

Over December and January the environmental organizations — NECU, UEA “Green World”, “Pechenegs” and others — carried out a campaign of appeals to the President, Prime-Minister and the Ministry of Environment with request to repeal the illegal order issued by the Ministry of Education.⁵⁴ However, the last full stop in the case was put by “Kiev environmental/cultural center” and “ECOPRAVO-Kiev” NGOs, that filed a claim requesting invalidation of the said ministerial order with Kiev Circuit administrative court. .

⁵⁰ http://www.ombudsman.kiev.ua/dopovid_6/d_06_3_6.htm

⁵¹ Natural preserve “Roztochchya” with total area of 2080 ha was set up by the Cabinet of Ministers’ of UkrSSR Decree of October 5, 1984 in Yavoriv Lviv Oblast, subordinate to the Ministry of Education and Science of Ukraine. The preserve contains pine, beach, sycamore and oak woods, wetlands, precious due to their cenotic structure and biogeographic origins. 7 forest associations are in the Green Book of Ukraine, 31 species of plants and 17 species of animals are in the Red Book of Ukraine, 40 species of plants and 2 species of animals are in the European Red list, 70 species of plants and 5 species of animals are in Bern convention lists. The state program for setting up the all-Ukrainian environmental network in 2000–2015 and some international treaties stipulate the setting up of transboundary biosphere preserve “Roztochchya”, which will include the natural preserve “Roztochchya” as its component. The documentation concerning the Ukrainian portion of international Ukrainian-Polish biosphere preserve “Roztochchya, has been submitted to MAB/UNESCO.

⁵² The order of the Ministry of Education and Science of Ukraine of November 01.2010, № 1032 “On reorganizing the “Roztochchya natural preserve under the National Forestry University of Ukraine”.

⁵³ Art. 16 of the Law of Ukraine “On Environmental Protection”.

⁵⁴ <http://greenworld.org.ua/index.php?id=1295621648>

On January 13, 2011 the court invalidated the part of the Minister Tabachnik's order addressing the termination of "Roztochchya" natural preserve legal entity. On the same day the deputy Minister of Education B. Zhebrovsky cancelled his boss's order as "non-implemented in due time".⁵⁵

7. CONCLUSIONS AND RECOMMENDATIONS

1. The President should issue a Decree "On urgent measures for increasing the priority of environmental policy" which establishes that environmental policy is one of the main priorities of Ukraine's State policy, and give the relevant instructions to the Government on drawing up a draft long-term Strategy of national environmental policy;
2. The Cabinet of Ministers should draw up a draft Strategy for integrating the provisions of the Aarhus Convention into national legislation, together with preparation of the relevant timeframes, practical mechanisms and procedure for bringing into force implementing legislation;
3. The Cabinet of Ministers should include members of the public, bodies of local self-government, higher echelons of power and the law enforcement structures in a working group on implementing the statements of the Aarhus Convention in Ukraine.
4. The Cabinet of Ministers, the Ministry of Justice and the Ministry for Environmental Protection should speed up preparation of draft laws "On protection of the natural environment", "On environmental assessments". "On ratification of an amendment to the text of the Aarhus Convention regarding public access to information regarding the release of genetically modified organisms", etc.
5. The Ministry for Environmental Protection should prepare, present for review by the Verkhovna Rada and publish "National Reports on the state of the environment in Ukraine" for 2008–2010;
6. The Cabinet of Ministers should pass Resolutions on access to environmental information and public participation in decision-making on environmental matters, that are corresponded to the international standards, in particular, Aarhus Convention;
7. The Verkhovna Rada of Ukraine, the Cabinet of Ministers and the Human Rights Ombudsperson should control issues concerned producing and publishing national and special reports on status of environment in Ukraine, prepare in such reports a section on environmental rights observation.
8. To finalize Concept of Education for Sustainable Development, to hold a public discussion on this Concept, and to approve it by government's Resolution to the end of 2011. Government should to create a Strategy and National Action Plan for the Development of Education for Sustainable Development on the base of the Concept.

⁵⁵ <http://ecoethics.ru/prikaz-minobrazovaniya-i-nauki-ukrainyi-po-zapovedniku-rostoche>

XX. PROBLEMS OF DOMESTIC VIOLENCE¹

1. THE SCOPE OF DOMESTIC VIOLENCE

The acuteness of the problem of domestic violence is corroborated by the Statistics of the MIA of Ukraine and research and public organizations data. The number of persons with prophylactic records for domestic violence is going up year in and year out and approaches one hundred thousand now despite the fact that domestic violence is a latent offense and existing statistics do not reflect its scope. Therefore the increasing number of domestic violence cases registered by militia cannot be considered as an indicator of aggravation of this condition or standard of performance of Internal Affairs Agency (IAA).

Table 1. Number of people with IAA record for domestic violence, including gender breakdown

Year	2005	2006	2007	2008	2009	8 months, 2010
Men	72194	74571	77664		85680	91634
Women	10638	9284	9098	8760	7190	5883
All persons with militia records for domestic violence	84155	85178	87831	85085	93327	97722
Number of crisis centers	38	46	54	54	56	61

The persons guilty of domestic violence are men for the most part. The data show the down-trend in the number of women, to whom militia have got on, which got in eyeshot of militia for domestic violence which underlines the gender aspect of violence.

Both physical and psychological violence are the most widespread types of violence amounting to 95% of cases.

Table 2. Correlation of different types of domestic violence

Year	2005	2006	2007	2008	2009	8 months, 2010
Total of reported offenders	59733	63624	65042	66119	72945	55727
Physical abuse	39138	39473	37728	38741	41514	28288
Psychological abuse	17666	21813	24382	24917	29153	25649
Economic abuse	2868	2311	2916	2459	2278	1755
Sexual abuse	61	27	16	2	0	0

¹ Prepared by K. Levchenko together with I. Ohorodniychuk, International Women's Human Rights Center "La Strada Ukraine".

In many cases both women and men, especially in rural locality, know nothing about the state policy on inadmissibility of domestic violence. In fact, the wronged women do not know their rights, while men do not fully realize the wrongfulness of their actions. Usually the conflicting parties are not informed about the law “On domestic violence prevention”.

The information about possible ways to help the wronged women is not disseminated satisfactorily: the assistance centers to turn to for free aid in an exceptional case, addresses of government and public agencies for women’s rights, or helpline numbers to name a few.

The raising of legal consciousness of abusers in domestic violence cases is conducted superficially.

2. THE STATE OF LEGISLATION AND NORMATIVE LEGAL INSTRUMENTS IN THE FIELD OF DOMESTIC VIOLENCE PREVENTION

In September, 2008 the Verkhovna Rada approved a bill amending the Law of Ukraine “On domestic violence prevention” and Code of Ukraine about administrative violations, which came into effect on January 1, 2009. They introduced correction programs dealing with offenders, eliminated determination of victimal behavior, specified the list of public policy subjects in this sphere, and amended article 173-2 with sanctions and so on.

In order to implement this law in 2009–2010 they adopted a number of regulatory legal acts intended to work out principles to assist the wronged persons, specify enforcement powers of state agencies, and also mechanisms of their co-operation:

- Order of the Ministry of Ukraine for Family, Youth and Sports № 1977 from 10.06.2009 “Model regulations on the Crisis center for the members of families, in which violence was committed or there is a real threat thereof”;
- Joint order of the Ministry of Ukraine for Family, Children and Youth and MIA “About approving the Instruction on the order of interaction of boards for family, youth and sports, agencies for children, social service centers for youth and agencies of internal affairs for effective domestic violence prevention” from 07.09.2009 № 3131/386.

As early as on February 19, 2007 the Government program of assistance to families up to 2010 was passed; it contained items dealing with the domestic violence prevention.

3. PLANS TO IMPROVE LEGISLATION AND NORMATIVE LEGAL INSTRUMENTS

In summer 2010 they started working out a new government social program of family support up to 2015 containing the block on domestic violence counteraction. As of the mid-October 2010 the Program was not approved, the final draft was not formed, and, which is most important, the situation with budgetary funding of the program remained unclear. They are included in the project, but the size of financing at the expense of State and local budgets is unknown. In order to finance the program they plan to attract public and international organizations, which have special-purpose resources and make offers to the Ministry for Family, Youth and Sports.

Since 2009 the Ministry of Ukraine has been working to develop a new variant of the Law “On domestic violence prevention”. The Ministry appointed the working group including the representatives of interested state agencies, experts, public and international organizations, which devised a bill. This past summer 2010 the Ministry for Family, Youth and Sports resumed working, but the level of cooperation with public organizations declined. The bill has been placed on the site of the ministry, but the experts think it underdone. At the same time the ministry is obliged to finish working it out, as it is included into the framework of social and economic development of the state for 2010.

On October 5, 2010 the Verkhovna Rada took as a basis the bill № 6634. It suggested amending articles 173, 173-2, 178, 185 of the Code of Ukraine on Administrative Offences (CUAO) intend-

ing to amend the said articles with such sanction as public works. In particular, public works are foreseen for disorderly conduct, domestic violence, infringement of protective warrant or shirking the correction program. The core Committee of Verkhovna Rada of Ukraine for legislative support of law-enforcement activity recommends taking into account the suggestion about amendments to the article 173-2 envisaging public works for the term from thirty to forty hours and for the term from forty to sixty hours for domestic violence, infringement of protective warrant or shirking the correction program². At the same time this bill does not suggest to remove such ineffective sanction as fine.

There is also a necessity to clarify the disposition of the article 173-2 of CUAO, where words "...physical violence with no resulting hurts and injuries" contradict the definition of hurt in article 1 of the Law of Ukraine "On domestic violence prevention". The presence of such definition in the article 173-2 results in cancellation of drawing-up protocols after the facts of domestic violence and requires that the wronged person addresses his/her request to the IAA with a statement about the commission of crime in accordance with the article 125 of the Criminal Code of Ukraine "Trivial bodily harm", which is a private charge offence.

Thereupon in order to increase the efficiency of counteraction against domestic violence they suggest to amend article 27 of the Criminal Procedure Code of Ukraine and exclude trivial and medium bodily harm as a result of domestic violence (articles 125 and 126 of CCU) from the set of those, which bring about action only after a complaint of a wronged person who should later appear for the prosecution.

There is also a need to amend legislation in part of assignment of the functions of endorsement of delivery of protection warrant and participation in the correction program to the competency of courts, which will better motivate the offender to comply with orders and adapt the Law to the international norms.

Both domestic and foreign experts analyzing the low efficiency of punishment for domestic violence suggest criminalizing the repeated domestic violence and non-fulfillment of protection warrant.

4. THE ROLE OF INTERNATIONAL INSTITUTIONS

The problem of counteraction to domestic violence was in the limelight of the UNO Committee for liquidation of all forms of discrimination of women during the defense of the report of Ukraine on the implementation of the Convention of the same name³. Subsequent to the results of discussion of the report of Ukraine the Committee conveyed proposals, the implementation of which should be set forth in the next report on implementation of UNO Convention for liquidation of all forms of discrimination of women submitted to the Committee in 2014⁴. The government should prepare the report and open it to the public for mandatory consideration. The NGOs may prepare and submit alternative reports.

To that purpose the Committee encourages Ukraine to "effectively implement the Law "On domestic violence prevention" (2001) and monitor its influence on women..., to work out package approach to prophylaxis and liquidation of all forms of violence concerning women in accordance with the general proposal of Committee № 19, to raise the level of research and collection of facts about the scope, causes and consequences of violence in relation to women and to include the results of this research into the next periodic report. The committee encourages the Member State

² portal.rada.gov.ua

³ The defense of the 6th and 7th joint report on implementation by Ukraine of the UNO Convention for liquidation of all forms of discrimination of women took place on January 21, 2010.

⁴ Final comments of the Committee for liquidation of discrimination of women (45th session, September 18, February 5, 2010).

to promote effective punishment in domestic violence cases bringing perpetrators to responsibility” (par 28). And then: “The Committee makes a strong appeal to the member state to take all necessary measures in order that all women, which are domestic violence victims, including rural women and vulnerable groups of women, such as Romany women, have a complete access to shelters and social centers for victims, operative facilities of legal defense without age or other limitations..., ensure that the state employees and civil officers, especially law enforcement officials and judicial authorities, medical and social workers are fully informed about the Law “On domestic violence prevention” (2001) and know about other forms of violence in relation to women in order to render proper assistance to the wronged women” (par 29). All these appeals are topical and can be considered as important directions of public policy in this sphere that must be reflected in public programs and documents.

The European legal documents, in particular, proposals and conventions of the CE, are very important for improvement of national activity. On the closing stage of development there is a project of European Convention on violence in relation to women and domestic violence control, which must be open for signature in 2011. Adhering of Ukraine to this document is an important step for working out standards of public policy in the sphere of domestic violence control.

5. THE BASIC PROBLEMS IN THE FIELD OF DOMESTIC VIOLENCE PREVENTION

The basic problems of the current state of the public domestic violence prevention-and-control policy in law-enforcement includes poor workmanship and prosecution, and critical lack of shelters and assistance centers for the victims of domestic violence and poor environment for work with offenders in social sphere. Moreover, there is an insufficient co-operation among different structures on regional, and especially district level, as well as absence of systemic training of specialists in this sphere. As a result of under-funding of the branch, the domestic violence prevention and control are rather ineffective.

6. THE PROBLEMS OF ACTIVITIES OF THE LAW ENFORCEMENT AGENCIES

In 2009 the aids of the Minister for Internal Affairs of Ukraine and the Department for monitoring of human rights in the IAA activities (minister Mohylyov liquidated this office in March 2010) watched over the IAA activities in domestic violence prevention and control. In the process they brought to notice failures reflected in the annual report of the Department “Human Rights in Militia’s Activities — 2009”.

It showed that almost everywhere in oblasts the most offenders are registered behind time, sometimes with 2 months delay. The official notice is issued in about 30% cases. Not always they file copies of warrants, registers etc. In many regions and in some oblasts the protection warrants in domestic violence cases were not issued during 2009 despite the fact that they brought administrative action against a number of citizens according to the clause 173-2 of CUAO several times in a row. The number of record cards registering facts of domestic violence sent to the departments for family, youth and sports make only a fraction of the number of persons registered in IAA for domestic violence. The checking of denials of institution of criminal proceedings after the aggrieved women in domestic violence had notified the militia established that the response was usually formal: they as much as inform the petitioners about the denial of institution of criminal proceedings against domestic violator, and nobody informs women about his suffering an administrative punishment. In many subdivisions nobody gave such classes to their personnel.

The Minister’s aids reviewed the sectors of district inspectors of district militia and showed that the neighborhood militia inspectors have a poor judge of organizing their activities concerning do-

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mestic violence, do not know the requirements of normative documents, do not consider domestic violence control a priority and disregard it.

Presently the district militia inspectors resort to filing pleas from persons wronged as a result of domestic violence and responding to them. Nothing like purposeful prophylactic measures are undertaken, among other things due to the imperfection of normative legal documents (they mostly envisage immediate arrest of violence; they but declare preventive measures and prescribe no concrete steps).

Today the district militia inspector can make effective arrangements to control domestic debauchee providing that:

- the domestic offender was taken in the act;
- the domestic offender inflicted bodily damage;
- the domestic debauchee does not deny his guilt or the fact of violence is corroborated by witnesses.

The drawing-up and consideration of administrative protocol by article 173-2 of CUAO may be conducted only if there is an evidence of confession or if witnesses are present. The official warning of inadmissibility of violence may be issued only after the administrative protocol by the article 173-2 of CUAO has been drawn up, which is a wrong practice, in our opinion. The protective warrant is conditioned on the fact of repetitive domestic violence during a year.

Therefore, if a woman referring an information against a domestic violator to militia is unable to indirectly prove the fact of such violence, she actually remains without protection (instead there is an order to dismiss criminal complaint and a report is drawn up about prophylactic conversation with a man). As a result the domestic hooligans realize their impunity and victims resort to victimal behavior, which triggers violence in such families later.

In summer 2010 the public organization “The Association of Ukrainian Monitors of Human Rights Guarantees in the Activities of Law Enforcement Authorities” was established, which continued monitoring the IAA activities concerning the observance of human rights. As a result of all-inclusive monitoring of the 2010 IAA activities, including domestic violence control, the experts of this Association concluded that “unfortunately, there is no clear and systemic, effective and coordinated with other departments system of early recognition, prompt response and taking steps on every instance of domestic violence. There are no considerable achievements in targeted domestic violence prevention. Therefore the estimation and level of local public trust concerning the effectiveness of IAA violence control remain extremely low⁵. And at the bottom is the fact that the activities of district militia inspectors and departments of criminal militia for children delinquency do not include it as a priority. The chiefs of these departments and MIA do not put emphasis and do not control this field in a proper way.

Taking into account the workload, the DIM usually resorts to filing an appeal of the domestic violence victim and proper response to it. There is no continuous and purposeful prevention prophylactic as a result of imperfection of normative legal documents among other causes. They are intended to stop violence; the prevention of violence is but declared; the concrete steps are not foreseen.

During the last few years once and again they demanded to ease VKMSD from the composition of criminal block and include it into the block of public security and termination of their investigative activities, which would improve the protection of children. It would also allow registering in advance all families practicing child abuse, bring out the roots of domestic troubles and, if necessary, take children out from dangerous environment. The MIA chiefs agreed with it; however, until now there is no solution⁶.

⁵ The materials of the chapter “Prophylactic of domestic violence and human trafficking” of the report of Association UMDPL “Human Rights & militia activities in 2010” were prepared by L.O. Guema.

⁶ The materials of the chapter “Prophylactic of domestic violence and human trafficking” of the report of Association UMDPL “Human Rights & militia activities in 2010” were prepared by L. O. Guema.

7. THE PROBLEMS OF SOCIAL ASSISTANCE

In Ukraine there is not a sufficient amount of specialized establishments for victims of domestic violence, though there is statistics showing their annual increase (table 1). At the same time, even the superficial comparison of the data on crisis centers and number of persons with militia record with militia record show that the amount of centers for organization of social assistance to the domestic violence victims is negligibly small. The information on temporal shelters for domestic violence victims is unavailable.

In accordance with the Model Regulations on Social-Psychological Aid Centers, assistance here may be rendered only to persons aged under 35, which demonstrates inequality in the access to social services and contradicts the Constitution of Ukraine, Law “On domestic violence prevention”, and principles of human rights protection. After this age the aid can be rendered to citizens with minor children only. The subdivisions of departments of labor and social policy work only with single citizens needing help, but they keep away from domestic violence cases. In Ukraine there are no specialized establishments for domestic violence victims. The social and psychological rehab centers in some areas serve all categories of vulnerable population, though under age of 35 only⁷. After this age the assistance is possible to citizens with minor children only, which demonstrates the principle of inequality in access to social services. Thus not only the Law “On domestic violence prevention” needs improvement, but also a number of other laws and normative legal documents, especially the Law of Ukraine “On social work with children and youth”, which includes family as an object of social work as well (article 4)⁸, but the age limit makes 35 that testifies to self-contradiction of this Law (<http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=878-17>).

The experts, in particular the Association of Ukrainian Monitors of Human Rights Guarantees in the Activities of Law Enforcement Authorities, observe the inactivity of corresponding social services, which have turned into bureaucratic establishments which carry out formal recording and correspondence only. They ignore practical activities. They need immediate reshuffle so that they are able to perform objective social inspection, effective social support of such category of families and introduce educational, correction and rehab programs for corresponding categories of persons. They waive requirements of Laws of Ukraine “On protection of childhood” and “On agencies and services for children and special establishments for children” concerning protection of the rights of minors and proper individual prophylactic⁹.

⁷ Article 15 “The grounds for modification or termination of social services to families, children and youth” of the Law of Ukraine “On social work with children and youth”.

The grounds for modification or termination of social services to families, children and youth are as follows:

- achievement by children of 18 years of age and young people of 35 years;
- voluntary rejection of a social services if this rejection or its consequences do not violate the rights and freedoms of others and do not threaten the life of the person who refuses to receive the relevant type of social services;
- if the grounds for the said social services become obsolete;
- other circumstances prescribed by law.

⁸ Article 4 “The objects of social work with families, children and youth” of the Law of Ukraine “On social work with children and youth”.

“The objects of social work with families, children and youth include as follows:

- family, children, youth;
- professional and other groups;
- social groups in need of social assistance”.

⁹ The materials of the chapter “Prophylactic of domestic violence and human trafficking” of the report of Association UMDPL “Human Rights & militia activities in 2010” were prepared by L.O. Guema.

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Table 3. Possibilities of social establishments to render assistance to the victims of violence, 2010¹⁰

Establishment	Additional info
Child Guidance and Family Counseling Center, Simferopol Oblast	Age — up to 35, children — up to 1,5 (no admittance with senior children). Paid service / free: free Term of stay: limited by the age of a child. Also possible over 3 months and up to a year. Registration: needed obligatory medical examination. Lwyr, psych, soc worker: services available
Center and Social and Psychological Assistance from Domestic Violence, Djunkoy Region	Age — up to 35. Children: admission with children of any age Paid service / free: free residence, paid meals. Term of stay: up to 3 mos Registration: needed CCM I/ref obligatory medical examination. Lwyr, psych, soc worker: services available Day facility only for lack of light and heat. No funds! The wronged mother with her child has to go home for the night.
Mother and Child Center, Sevastopol	Age: up to 35; child: up to 1.5. No admission with older children (permitted women preg 7 months and more). Paid service / free: free service Term of stay: limited by the age of child. Also possible over 3 months and up to a year. Registration — needed CCM I/ref obligatory medical examination. Lwyr, psych, soc worker: services available Women from Sevastopol only. No regional or rural residents! Psychotic women inadmissible.
Center for Domestic Violence Social and Psychological Aid, Sevastopol	Age: up to 45; children: women admissible with children of any age (but often no places available though) Paid service / free: free residence, one free meal a day Term of stay: up to 3 mos Registration — needed CCM I/ref obligatory medical examination and psych cert. Lwyr, psych, soc worker: services available Women from Sevastopol only. No regional or rural residents! Psychotic women inadmissible.
Institute of Family (NGO's shelter), Sevastopol	Age: any Children: women admissible with children of any age Paid service / free: stay and meals free of charge Term of stay: on-the-spot decision Registration is unnecessary Lwyr, psych, soc worker: services available Women are admitted not only from Sevastopol but also from the region.
Volyn Oblast Center for Social and Pedagogical Aid, Volyn Oblast	Age: different. Children: depending on the situation, allowed Paid service / free: free Term of stay: up to 3 mos Registration: not needed; medical checkup Lwyr, psych, soc worker: services available
Public Center for Social and Psychological Aid; Dnipropetrovsk	Age: up to 35; Children: depending on the situation, allowed Paid service / free: free. Term of stay — unlted (as necessary) Registration: desirable Lwyr, psych, soc worker: services available

¹⁰ Shown in bold type are requirements that prevent equal access for victims of domestic violence to get assistance. The information was obtained during data collection on the performance of domestic social institutions providing assistance for wronged persons in order to organize advising on violence prevention and children's rights protection on the national hotline.

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Virtus NGO's Charitable Institution, Dnipropetrovsk	Age: different. Children: over 3 yrs, if younger, the child temporally goes to the Child's Home (The child and mother are separated) Paid service / free: free. Term of stay: unlim. Registration: not needed Lwyr, psych, soc worker: services available
Zaporizhzhia Oblast Center for Social and Psychological Aid, Zaporizhzhia	Age: different; children: 3 yrs and more Paid service / free: free Term of stay: up to 90 days Registration: desirable, medical check, documents Lwyr, psych, soc worker: services available
Luhansk Oblast Center for Social and Psychological Aid, Luhansk Oblast	Age: unlim Children: depending on the situation Paid service / free: free Term of stay: up to 3 mos Registration: desirable Lwyr, psych, soc worker: services available
Sumy Oblast Center for Social and Psychological Aid, Sumy	Age: up to 35 Children: problematic Paid service / free: free Term of stay: 3 mos Registration: not needed Lwyr, psych, soc worker: services available
Mother and Child Center (for women in a fix) (Only for women with children under 18 mos). Will be open from 15.10.2010, Cherkasy Oblast	Age: unlim Children: from the 7th month of woman's pregnancy and up to 18th month of her baby Paid service / free: free Term of stay: up to 18th month of her baby Registration: unnecessary; l/ref Lwyr, psych, soc worker: services available
Public Mother and Child Center, Center for Social Psychological Aid, Khmelnysk Oblast	Age: unlim Children: 14 and more Paid service / free: free Term of stay: unlim, until problem is solved Registration: not needed Lwyr, psych, soc worker: services available
Center for women with children, which are about to renounce a child, or there is a miscarriage threat, Khmelnysk Oblast	Age: preg 7 months and more, or women with children Child: up to 18 mo Paid service / free: free Term of stay: up to 18th month of the baby Registration: not needed Lwyr, psych, soc worker: services available

The listed limitations of access to social services suggest that the system as a whole is in no fit state to provide social services and social protection to the population. The distribution of establishments among different state institutions (the Ministry of Ukraine for Family, Youth and Sports with inside State Social Service for Family, Children and Youth, Ministry of Labor and Social Policy, Ministry of Health Care), subordination complexity among local agencies and top-down command structure of executive power, thematic stratification, numerous limitations for aid recipients (age, sex, registration, presence or absence of children, lone or family person etc.), as well as underfunding result in failure to render proper assistance, which is overt human rights violation by the state. Therefore the ultimate solution is the governance and subordination branch restructuring, liquidation of irrelevant state structures and creation of but one agency of social protection.

8. THE DOMESTIC VIOLENCE VICTIMS AND WORK WITH OFFENDERS: PROBLEMS OF FUNDING

The impediment in the aid-to-the-victims agencies consists in financing of their activities by local budgets, which for the most part have no such budget line. Even the subsidized charities are on the verge of closure.

The social service procurement problems in the case of domestic violence assistance remain unsolved.

The program of state financial support through the Ministry of Ukraine for Family, Youth and Sports remains limited and nontransparent. Despite proposals and good sense, only youth organizations are funded. The Ministry fails to create targeted domestic violence prevention programs. On the other hand, most organizations try to register as youth organizations in order to get state funding.

The state family support, including the domestic violence control package, will be carried out at the expense of state, local budgets and other lawful means. The latter include public and charity funds, international technical aid, other countries and international donors. This past fall, 2010, the Ministry of Ukraine for Family, Youth and Sports asked international and public organizations to make offers to co-sponsor this program, which was done.

At the same time, lately, the ruling coalition urged to close up these institutions¹¹ (after the Security Service had checked the activities of the International Renaissance Fund in September 2010); if it is not a private opinion, but an official concept, it may threaten not only the said theme but also the development of human rights activities and civic society in general.

9. THE PROBLEMS WITH THE INTRODUCTION OF CORRECTION PROGRAMS FOR WORK WITH OFFENDERS

In 2010 they started introducing correction programs for offenders. Several correction programs were worked out with the help of Coordinator of the OSCE Projects Office and La Strada Ukraine Center. In 2009 two international seminars were held: “Social work with offenders: international experience and prospects of introduction in Ukraine” on June 11–12 and “Domestic violence control: social and psychological work with offenders” in September.

The Coordinator of the OSCE Projects Office helped training first 300 specialists for the job. But the problems are still there. During 8 months of 2010 the correction programs were attended only by 165 of over two thousand offenders allotted by IAAs. No educational establishments, including the professional development ones, train such specialists. The centers of social aid for family, children and youth have neither funds, nor premises, nor specialists. Besides, there is but a letter of proposal of the Ministry for Family, Youth, and Sports on realization of correction programs by them. None of the proposed programs has been approved and recommended by the Ministry. As of October, 2010 they are sent for reviewing to the Pedagogical Academy of Ukraine. However the reviewing itself seems problematic as there are no relevant specialists in the Pedagogical Academy. There is also an unsolved problem of an authorized establishment certifying programs and specialists. Legally speaking, it is important that the referral to participate in the correction programs is issued under the court decision and not by the IAA.

Moreover, the correction programs today are not treated, as in the past, neither as a variety of social work, nor as alternative sanctions (types of punishment). Classifying correction programs as a kind of social work equals them with service rendering, which is out of character of correction programs that must be realized in a situation, when the negative activity of a person is not directed

¹¹ The adherents of Yanukovych call on the SSU to stop the activities of Western funds. — <http://helsinki.org.ua/index.php?id=1287828142>

at him/herself, but at other members of the family. But one has yet to develop the legislation about the alternative types of penalties and punishments.

10. THE PROBLEMS OF LAW-ENFORCEMENT AND PROSECUTION

As to the low efficiency of counteraction to domestic violence, then it should be noted that absolute majority of sanctions ordered by courts in domestic violence cases are fines. According to the SSD of MIA of Ukraine, for 6 months of 2010 the fines made to the tune of 82% of decisions by article 173-2 of CUAO, and administrative arrests made about 13%. Therefore, after a person puts in an application concerning a family member to the militia, she must pay a fine for the offender because most offenders are unemployed. This fine strikes not so much at a violator, as his family; thus, the victim of domestic violence suffers twice. According to 2010 data, if in Zhytomyr Oblast about 59% persons have to pay fines, in Ternopil Oblast about 98%. The level of application of such sanction, as an arrest, makes from 1.5% in Ternopil Oblast to 25% in Odesa Oblast.

Table 4. Basic types of administrative penalties for domestic violence

Year	2005	2006	2007	2008	2009	8 mos, 2010
Types of administrative penalties						
Fines	61737	66873	72080	74169	83687	58893
Administrative arrest	10615	9334	9718	10342	14289	9279
Warning	7157	5822	5554	5104	3304	2461
Correctional works	349	375	412	350	230	64
Exempt from administrative responsibility	318	380	532	591	722	328
Total	80176	82784	88296	90556	102232	71025

Many problems arise, when violence is committed in a state of alcoholic intoxication. It is an absolute majority of cases, according to hotline counselors and enforcers. They are no go situations today. The compulsory medical treatment is forbidden; the judicial decree about compulsory treatment is rarity; there is no sufficient number of such accessible professional establishments in the country. The voluntarily treatment is rather expensive, and the majority of families cannot afford it. The Law of Ukraine № 1254-VI passed on 14.04.2009 abolished all legal grounds for forced appointment for cure for alcoholism. Such situation is nothing but vicious circle of violence.

11. PROBLEMS QUESTIONS OF HUMAN RESOURCING AND PERSONNEL TRAINING

In Ukraine, there is still a problem of training of law enforcers and amending curriculums of higher educational establishments of the MIA of Ukraine with special courses and subjects on counteraction to human trafficking, domestic violence prevention, and protection of children's rights.

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Small steps in this direction are not enough. In 2009 the Office of Coordinator of Projects of OSCE together with the MIA of Ukraine set up a special class for training enforcers dealing with domestic violence control at Dnipropetrovsk State University of Internal Affairs.

In 2009, the Kyiv National University of Internal Affairs initiated training of militia students for subdivisions of criminal militia for children.

The program of equal opportunities and rights for women in Ukraine, which has been realized during 2010–2011 under UNDP, includes training for 13 000 district militia inspectors working on domestic violence prevention. There are other positive examples. However, this activity is not enough, especially in the case of instructional work based on understanding of principles of protection of human rights and interests of wronged persons.

Unfortunately, the Ukrainian militia is not ready to fulfill its mission and, as Liz Kelly puts it, “explain to women, children, criminals and wider community that the police are serious about violence against women and that it cannot be tolerated.”¹²

12. THE COORDINATION OF ACTIVITIES OF DIFFERENT PUBLIC ADMINISTRATIONS AND LOCAL SELF-GOVERNMENT AUTHORITIES

The problem of interaction of different violence counteraction-and-prophylactic agencies is also topical for Ukraine. It is a subject matter of many workshops and conferences; the special interdepartmental coordinating boards are created; the special joint order of the Ministry of Ukraine for family, youth and sports (as the authorized public establishment for protection of children’s rights, domestic violence prevention, human trafficking control and introduction of gender equality) and Ministry of Internal Affairs of Ukraine (№ 3131 from September 7, 2009) is being prepared for adoption of the Instruction about the order of cooperation of departments (offices) for family, youth and sports and corresponding units of the MIA in domestic violence prevention. However, the appeals of citizens and estimations of experts show that the interaction among different state structures and redirecting of victims to receive targeted and complex aid is still a serious gap in public policy of domestic violence prevention.

13. AWARENESS CAMPAIGNS INTENDED TO BOOST UNDERSTANDING OF DOMESTIC VIOLENCE PROBLEM

The prevailing gender stereotypes in the community on the whole, public officers, social workers, ignorance about international legal documents on protection of women’s rights and protection from violence require continuation of well-designed awareness campaigns, first of all “Stop violence!” The latter was waged by social and international organizations. There followed major outdoor advertizing campaigns against violence waged by the UNDP and CE together with the Ministry of Ukraine for Family, Youth and Sports and NGOs. The first wave started in Kyiv in May 2009; the campaigners advanced the slogan “Stop violence! Such prezzies no more!” calling on wronged women to stop suffering and violence.

Since 2010, the informational work is sponsored by the European. In August, 2010 the so-called “bangle” campaign “Remain a human” was waged which used outdoors advertizing. The involved mobile service providers will help to use hi-tech communication. The increasing number of phone

¹² Liz Kelly. *Violence against women and children*. Vision, Innovation and Professionalism in policing. Guide. Council of Europe, March 2003.

calls to the National hotline for prevention of violence and protection of child's rights may serve an efficiency index. The global action 16 Days against Gender Violence is still underway.

14. THE NATIONAL HOTLINE FOR DOMESTIC VIOLENCE PREVENTION

From November 30, 2004 till December 2009 there were about 10 000 hotline contacts on prevention of violence and protection of children's rights: 3 756 appeals in 2009 and over 4000 during 10 months of 2010. Thus, in 2009 and 2010 there is a considerable increase of hotline contacts (for example, in 2008 there were about 1350 calls). It is connected with national information campaigns "Stop Violence!", AVON program "Against domestic violence", CE's campaign "Stop abuse of children", programs backed by the European Union, and rising awareness of the fact that domestic violence is not a private family matter. These campaigns promoted hotline appeals, assistance available etc. Women make 54% of calls, men 16% and children — 30%.

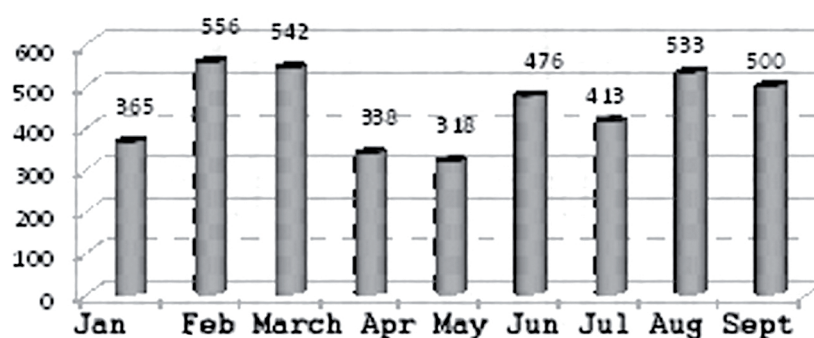


Fig. 1. Number of phone calls per month (January through September 2010)

The national hotline on prevention of domestic violence and protection of children's rights is not only an effective public advisory instrument, but also helps monitoring the activity of state and municipal structures, law enforcement authorities counteracting domestic violence and assisting the wronged persons.

In addition, the analysis of calls allows showing in-process trends in domestic violence. For example, in 2009, the first complaint from the Afghan citizen of Ukraine about the use of violence by his parents forcing him to marriage came to the center of "La Strada Ukraine". In the course of rendering assistant it turned out that there were precedents for it, which is deserving attention of the specialists of the State Committee for Nationalities and Religion, social services, and law enforcement authorities

15. EXAMPLE OF GETTING BUSINESSES INVOLVED IN DOMESTIC VIOLENCE PREVENTION

As early as in 2008 the AVON Co. got involved in counteraction to domestic violence and went on with it in 2009–2010. The AVON Co. is going to write and distribute pamphlets and brochures on domestic violence; include proper matter into its advertising catalogs, support of NGL in prevention of violence and protection of children's rights; provision of information-and-advice and legal assistance concerning prevention and management of domestic violence. In 2009, the AVON Co. collected a considerable sum of clients' money and used it to sponsor NGL.

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Table 5. Implementation and relevancy of proposals from previous reports (2007 and 2008)

	Proposals of 2007 Report	Fulfillment of proposals of the 2008 Report: analysis	Progress in 2009–2010
1.	To approve Bill № 2539.	Amendments to the Law of Ukraine “On domestic violence prevention” and CUAO adopted on September 25, 2008. As against the Bill № 2539 not everything was accounted for.	
2.	To amend the MHC Order № 33 from 2000 on the staff list taking into account the needs of medical and psychological rehab centers .	Not done	Not done
3.	To amend model regulations of the centers of social and psychological assistance concerning age limits of clients for getting aid (below 35).	Not done	Not done
4.	To amend regulations about centers concerning the possibility to get aid regardless of registration at place of residence.	Not done	Not done
5.	To improve public and parliamentary control of the due course of law on prevention of violence against women.	There existed control, though the situation never improved substantially.	The same. There existed control, though the situation never improved substantially.
6.	To harden sanctions against committers of domestic violence and set terms of their administrative detention.	It was done due to the amended Law of Ukraine “On domestic violence prevention” and CUAO	Requires new amendments, including criminalization of the repeated domestic violence and disregard of protective warrant
7.	To set the terms of administrative detention of committers of domestic violence or violators of protective warrant prior to judicial settlement.	It was done due to the amended Law of Ukraine “On domestic violence prevention” and CUAO	
8.	To introduce alternative punishment for committers of violence, including public works and obligatory participation in rehab programs that will help to reduce criminalization of domestic offenders.	Partly fulfilled due to the amended Law of Ukraine “On domestic violence prevention” and CUAO. The question is about the introduction of correction programs for committers of domestic violence.	The correction programs were put on foot. The need to amend existing legislature. Training of specialists. Te urgent need to appoint a responsible organ.
9.	To settle the issue of committers of domestic violence and their further rehabilitation.	Partly fulfilled due to the amended Law of Ukraine “On domestic violence prevention” and CUAO. The question is about the introduction of correction programs for domestic violators.	The application of these norms is insignificant. This activity requires more attention of the state and control by public organizations.
10.	To create special rehab departments for rehabilitation of aggressors under specialized establishments for victims of domestic violence.	Not done and no prospects under current normative base.	Not done. In accordance with the directions of the deputy minister for family, youth and sports the responsibility is laid on the centers of social services for family, children and youth.
11.	To set administrative responsibility for propaganda of violence and cruelty.	Not done	Not done

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12.	The government of Ukraine should design national backing for the CE campaign fighting against violence against women.	Ukraine participated in this campaign. In 2008, the national campaign was initiated "Stop violence".	Continuation of the "Stop violence" campaign. The plan of measures is not approved yet; as of October 2010 it is still under development at the Ministry for Family, Youth, and Sports. Needs public evaluation.
13.	To publish in official language and distribute the № 5 Proposal (2002) of the Committee of Ministers of the CE and Letter of Explanation.		It was done by international organizations
15.	To work out and approve the National program of counteraction to domestic violence in Ukraine.	Partly fulfilled. The question is about the program of "Stop violence" campaign.	The separate program will not be developed. The draft program of family aid up to 2015 includes sections on counteractions to domestic violence.
16.	To provide in every region of Ukraine establishments for victims of domestic violence: crisis centers, centers of social and psychological help, shelters, medical and social rehab etc.	Partly fulfilled	Not done
17.	To provide all victims of domestic violence with access to legal services, incl. women excluded from social connections and migrants, recent refugees, representatives of minorities and handicapped women.	Done partly, mostly in accordance with possibilities of public organizations	Not done. Equal access is not to services
18.	To provide sufficient funding of organs dealing with domestic violence prevention.	Not done	Not done
19.	To work out the system of public financing of crisis centers and shelters for the victims of violence. Shifting responsibility for financing of these establishments onto the local budget creates unequal circumstances for the victims of violence from various regions of the country, which have equal rights.	Not done	Not done
20.	To monitor the quality of services available to the victims of violence and increase the efficiency of the law of Ukraine "On domestic violence prevention" by the way of systematic data collection on implementation of regulations of Ukraine "On domestic violence prevention".	The NGOs have just begun introducing such system of monitoring.	The DAS was implemented by the joint order of the Ministry for Family, Youth, and Sports and MIA of Ukraine № 3131/386. At the same time it is not enough.
21.	The Ministry of Ukraine for Family, Youth, and Sports may explore the possibility of opening vacancies of specialists in domestic violence prevention and human trafficking control, as well as coordinators in these fields at the departments for families and youth of regional public administrations and city executive committees.	Not done due to the shortage of funding	Not done

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22.	To compile on national and regional DBs of government structures and NGOs dealing with prevention of all forms of violence.	This work is done by the Ministry of Ukraine for Family, Youth and Sports together with NGOs	The DB is available. Needs online updating.
23.	To provide early detection of families prone to violence or to its commitment, and organize social accompaniment of such families.	Done here and there.	The same. Done here and there.
24.	To attract public agencies to counteraction against domestic violence and promote the network "Men against violence".	Organizations are attracted. Though no stable funding is available.	The same. Organizations are attracted. Though no stable funding is available.
25.	To collect and regularly publish stats on occurrence of domestic violence in Ukraine, on preventive measures taken, as well as monitor judicial stats on the results of domestic violence trials.	The statistics is constantly compiled and made public by the Department of public security of the MIA of Ukraine.	In accordance with the order 3131/386, the stats from the end of 2009 are compiled not only by the SSD of MIA of Ukraine but also by the Ministry for Family, Youth, and Sports. The forms of statistical reports need improvement.
26.	To generalize experience of application of legislation on counteraction to domestic violence, to collect and distribute the best practical proposals on prevention of domestic violence, protection of victims and persecution of criminals on national, regional and local levels.	Done. E. g., the guidelines of the SSD of MIA of Ukraine have been worked out.	Done
27.	To revise the role of the office of public prosecutor, so that the public prosecution bodies could independently lay an action in the absence of official complaint of the victim of violence. This will minimize the risk of perpetrator's influence on a victim and the violator could not move to close the case down.	No info.	The role of the office of public prosecutor in counteraction to domestic violence is insufficient.
28.	The MIA of Ukraine should promptly consider appeals and reports about domestic violence and stop renunciation of registrations of claims about domestic violence.	Done partly.	Done partly.
29.	The Ministry of education and science of Ukraine should include domestic violence as a human rights violation problem and a problem of health of society into the curriculums of educational establishments for law officers and law enforcers, medics, social workers, teachers etc. To include the courses on prevention of domestic violence and aid to its victims into the curriculums of educational institutions training psychologists, teachers, lawyers, enforcers, social and medical workers.		No systematic implementation.
30.	The state committee of statistics should better state statistical records of domestic violence prevention designing new reporting forms intended to register domestic violence prevention and introduce statistical reports reflecting violence and cruelty in relation to children. To provide for systematic statistical data collection with line-item and type representation.	Not done	See commentary to par 25.

16. CONCLUSIONS

The important directions of modern public policy in the field of prophylactic and counteraction against domestic violence include dissemination of information, education, training; creation of effective assistance and protection of victims; improvement of interagency cooperation to grant domestic violence control and relief aid on national, oblast and regional levels, increase of efficiency of law-enforcement actions and prosecution of violators; work with offenders, urgent advanced training of civil servants dealing with domestic violence control, forming of non-acceptance of violence as a form of tackling social conflicts, forming of the NGOs sponsorship mechanisms, financial in the first place.

17. PROPOSALS FOR PREVENTION AND CONTROL OF DOMESTIC VIOLENCE

For the Verkhovna Rada of Ukraine

1. To conduct Parliamentary hearings “About the state of implementation of the Law of Ukraine “On domestic violence prevention”.
2. To adjust the Law of Ukraine “On social work with children and youth” in accordance with the Law of Ukraine “On domestic violence prevention”.
3. To amend the Law of Ukraine about administrative violations, the section about exclusion of such sanction as fines from the article 173-2.
4. Clarify the disposition of the article 173-2 of CUAO, where words “... use of physical violence which did not cause physical pain and bodily harms” conflict with wording of physical violence in the article 1 of the Law of Ukraine “On domestic violence prevention”.
5. To amend the legislation in the section referring to the jurisdiction of courts of all functions of endorsement of protective warrant and participation in the correction program.
6. To amend article 27 of the Criminal Procedure Code of Ukraine concerning the exclusion of light and moderate bodily harms as a result of domestic violence (articles 125 and 126 of the CCU) from the list of those which go to criminal court only on the basis of complaint of a victim, who therefore has a right to appear for the prosecution.

For the Cabinet of Ministers of Ukraine

7. To amend the executive order of the Cabinet of Ministers about model regulations about centers for equal and unlimited access to social services, including the liquidation of the clause about 35-years limit.
8. To work out the system of budgetary financing of crisis centers and shelters for the victims of violence. Sending the responsibility for financing of these agencies down to local budget means the unequal conditions for the victims of violence from various regions of the country, who have equal rights.

For the Ministry of Ukraine for Family, Youth, and Sports

9. To work out and submit to the Cabinet of Ministers of Ukraine the amendments to the Statute of the Ministry, taking into account the Law of Ukraine “On domestic violence prevention” and proposal of the UNO Committee about liquidation of all forms of discrimination of women according to the conclusions of the sixth and seventh joint reports

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- on Ukraine's implementation of the UNO Convention on liquidation of all forms of discrimination of women.
10. To amend the staff lists of departments for family and youth of regional state administrations and city executive committees with positions of specialists in domestic violence and prevention of human trafficking and coordinators of these directions.
 11. To collect and regularly publish statistics on occurrence of domestic violence in Ukraine and relevant control measures.
 12. To get NGOs involved in counteraction to domestic violence.
 13. To ensure early finding of families with violence problems — real or possible — and provide for social accompaniment of such families
 14. To continuously update DBs of state agencies and NGOs working to prevent all forms of violence.
 15. To work out suggestions amending the Law of Ukraine “On the State Budget” in order to ensure that all NGOs have equal competitive access to budgetary financing.
 16. To include into drafts of state documents aims, tasks and measures designed to reduce gender violence and discrimination of vulnerable groups of women, esp. migrant women belonging to minorities, etc.
 17. Together with internationals and NGOs to go on informing citizens about aid availability in the cases of domestic violence, training their personnel, teach specialists to work with offenders and victims.
 18. To administer personnel tests to find out their knowledge of the laws of Ukraine “On promotion of equal rights and possibilities for women and men” and “On domestic violence prevention” and occurrence of gender stereotypes among public officers. To organize training depending on the results of tests.

For the Ministry of Internal Affairs of Ukraine

19. To ensure operative consideration of appeals and reports about domestic violence, to make renunciation of registration of domestic violence cases impossible.
20. To exclude violations of legislation by district militia inspectors (refusal to record appeal of a victim about domestic violence, refusal to answer the phone calls for help, refusal to issue forensic medical referral etc.)
21. For law enforcers: to follow the rules of ethics and conduct with citizens.
22. To combat corruption in law enforcement agencies.
23. To pay attention to law enforcers guilty of domestic violence and other crimes and apply corresponding disciplinary penalties and punishments.
24. To constantly improve the skills of law enforcers.

For the Ministry of Health Care

25. To amend the Order of MHC № 33 from 2000 about staff list and account for the needs of medical and psychological rehabilitation centers.

For the Ministry of Education and Science of Ukraine

26. To include the domestic violence as a problem of violation of human rights and problem of social health into the curriculums of establishments for the staff of judicial and law-enforcement bodies, medics, social workers, teachers etc.

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27. To include the lectures on domestic violence prevention and aid to its victims into the curriculums of institutions of higher learning training psychologists, teachers, lawyers, enforcers, social and medical workers.

For the state judicial administration of Ukraine, Academy of Judges of Ukraine

28. To generalize experience of application of legislation in the sphere of counteraction to domestic violence, to collect and propagate the best practical proposals about prevention of violence, protection of victims and prosecution of criminals on national, regional and local levels.

For the Foreign Ministry of Ukraine

29. To ensure propagation of the Proposals of UNO Committee for liquidation of discrimination of women according to the results of discussion of the sixth and seventh joint report on implementation by Ukraine of the UNO Convention on liquidation of all forms of discrimination of women.

XXI. TRAFFICKING IN PERSONS AS VIOLATION OF HUMAN RIGHTS¹

On March 7, 2007 the Cabinet of Ministers of Ukraine approved the Government Program of Counteraction to Trafficking in persons up to 2010. However, the final redaction became considerably shorter comparing with the draft version worked out by joint efforts of government, international, and public organizations in 2005. For example, now the Program contains no records of the system of realization monitoring, no clauses on creation of the office of the National Coordinator of counteraction to trafficking in persons, on development of national mechanism of redirection of the victims of trafficking in persons etc. The total budget of the program makes as little as Hr1,469,700.

1. SOCIO-POLITICAL SITUATION IN UKRAINE: 2009–2010

Speaking about the socio-political context of counteraction to trafficking in persons, one can but repeat that “in recent years, the organization of counteraction to trafficking in persons in Ukraine has been evolving in a difficult social and political environment, which to a great extent determines achievements and shortcomings in this field.”

2009 became a year of political discussions on the eve of presidential elections, continuation of financial and economic crisis and confrontation of different branches of power that prevented effective management. It was also characterized by continuous political instability and beginning of presidential electioneering, deepening of financial and economic crisis in Ukraine that had its effect on upping inflation, prices and unemployment figures. At the same time those Ukrainians who had gone off in search of a living decided not to return home en mass, though the number of returnees grew up against previous years.

2010 became a year of fundamental political changes in Ukraine affecting not only political elites and parties but also directions and vectors of socio-political development of country, values and reference-points that could not but influence the policy of counteraction to trafficking in persons in Ukraine. The counteraction to trafficking in persons and public policy in this sphere can be considered, in spite of inactivity declaration by predecessors and abandonment of everything that was done, as sheer inertia using past groundwork: approval of the draft concept of the Law of Ukraine “About fighting against trafficking in persons”, ratification of CE Convention about fighting against trafficking in persons, preliminaries for the new program of counteraction to trafficking in persons, re-approval of the order about creation of the Council of Experts for consideration of complaints about sex discrimination.

¹ Prepared by the experts of the International Women’s Human Rights Center “La Strada Ukraine”; gen. ed. by K. Levchenko.

The reshuffle was undertaken in the Ministry of Ukraine for Family, Youth and Sports and in the Ministry of Internal Affairs². Besides the political figures of minister and deputy ministers the restructuring touched the chiefs and personnel of the Department of domestic policy of the Ministry for Family, Youth and Sports and Department Trafficking-in-People Crime Control of the MIA of Ukraine. Therefore it's too early to assess the work of new chiefs. We can only aspire to success of further traditional development.

The new team started with rejection of everything their predecessors did speaking about administrative dereliction of the orange government during five years in office (though the present team at the time held office for one year and a half). Giving political flavor to work and relations became the distinctive mark of 2010. The ambitious statements and declarations of the first six months of 2010 crashed against the results of administrative reform on December 10, 2010 liquidating the Ministry of Ukraine for Family, Youth and Sports. Its functions concerning domestic and gender policy and planning of counteraction to trafficking in persons and protection of children's rights were not handed over to any single structure. In a few weeks they decided to transfer the Department of Family and Gender policy including a separate department for counteraction to violence and trafficking in persons to the Ministry of Education, Science, Youth and Sports.

At the same time there remains the important initiating and active stand and role of international and public organizations working in the field of prevention of trafficking in persons and international assistance to the victims. Such international organizations as IOM, OSCE, CE, and UNICEF to name a few remained active in control of trafficking in Ukraine.

Five years after Ukraine had signed the CE Convention on the measures of counteraction to trafficking in persons the latter was ratified in September 2010. It is applied to all forms of trafficking in persons: both national and international, linked or not linked with the organized crime. The convention gives the mechanism of identification of the victims of trafficking in persons, provisions about the necessity of criminalization of using the services of a person suffering from trafficking in persons, clauses on travel and certifying documents, provisions on coordination of efforts in counteraction to trafficking in persons and the mechanism of monitoring of the implementation of Convention.

It is the very important instrument of protection of the rights of persons suffering from trafficking in persons. Moreover it helps to establish regional European mechanism of monitoring coordinated by special GRETA task force. The ratified Convention requires amending current legislation.

2. THE ESTIMATION OF THE ACTIVITY OF UKRAINE IN THE REPORTS OF INTERNATIONAL ORGANIZATIONS

Annually, in June, ever since 2001, the State Department of the USA prepares and makes public its reports on the state of counteraction to trafficking in persons in different countries. The last report was published in June 2010 summarizing the results for 2009³.

During the years of monitoring Ukraine found itself in the second group of countries (it means that the state takes certain steps in direction of counteraction to trafficking in persons, though insufficient) in 2002, 2003, 2004, 2006, 2008 and 2010 (by results of activity in preceding year). And there was also the so-called "supervision list" in 2005, 2007 and 2009. It means that the state can be relegated to the third group of countries and is closely monitored by international missions. The report pending in June 2011 will reflect the results for 2010.

According to the Democracy Index for 2010 (as of November) Ukraine slipped 14 points down to 67th position from 53rd in 2008. Ukraine's democracy demotion is the biggest in Europe.

² 100днів нового керівництва МВС. — Харків: Права людини, 2010. — 100 с.

³ <http://www.state.gov/g/tip/rls/tiprpt/index.htm>

The worst indexes of Ukraine are in the categories of “functioning of government”, “electoral process and pluralism”, “political culture” and “political participation”. By the index “efficiency of the functioning of government” Ukraine is in the group of countries including Ghana, Dominican Republic, Philippines and Peru yielding to such countries, as Lesotho, Mali, Namibia, Papua New Guinea, Mongolia, Suriname, Jamaica etc⁴.

By results for 2010, the index of gender development of Ukraine slipped 15 points down.

The UNO department places Ukraine in the middle of the list of destination countries. The last IOM statistics shows that Ukraine has become a destination country.

3. THE GOVERNMENT PROGRAM OF ECONOMIC AND SOCIAL DEVELOPMENT OF UKRAINE FOR 2010 (CRISIS-PROOF PROGRAM)

The government program of economic and social development of Ukraine for 2010 (Crisis-proof program) among the basic tasks of social policy in the field of family support contains “provisions for equal rights and possibilities for women and men in all spheres of public life, counteraction to sex abuse and trafficking in persons” (p. 19).

The anticipated targets and results include as follows: lower occurrence of domestic violence, cases of sex discrimination, diminishing number of trafficking-in-persons victims (p.21). The planned arrangements include as follows: to draft a Bill “About counteraction to trafficking in persons” (December, 2010), to draft a Bill “About amending the Bill of Ukraine “On prevention of domestic violence” (July, 2010), to draft the decree of the Cabinet of Ministers of Ukraine “About approval of the planned arrangements of the National campaign “Stop Violence!” for 2010–2015” (p. 21). The Ministry of Ukraine for Family, Youth and Sports was appointed the chief executor and later liquidated as a result of administrative adjustment.

The program provides for cuts of target programs budgeted by the state and leaving only the top priority tasks for 2010 (the leftover target programs will use other sources of income, such as local budgets, customers’ money etc. provided by the Ministry of Economic Affairs, Ministry of the Treasury, other central executive bodies (c. 10).

4. LABOR MIGRATION TRENDS

The end of 2008–2009 was characterized by the global financial crisis. In such situation the specialists were at variance about future consequences of world economic crisis for Ukrainian labor migrants. Some experts were of the opinion that it could bring back home a lot of Ukrainian labor migrants, who had lost their job abroad. Taking into account mass job cuts in Ukraine, the labor migrants would join the unemployed at home⁵. However, other experts, including those from the Ministry of Labor and Social Policy, deny such mass return of labor migrants to Ukraine. By some estimates, the labor migration pattern remains the same: they come to visit their relatives on high days and holidays and later return to work abroad. At the same time there evolves a new pattern of domestic labor migration, when the oblasts with labor-scarcity situation invite workers from oblasts with high unemployment rate. Moreover, Deputy of Verkhovna Rada, ex-Minister of Foreign Affairs Arseniy Yatseniuk thinks that, despite the efforts of the European Union and Russia to limit

⁴ Democracy Index 2010 was prepared by the experts of Economist Intelligence Unit, a part of the analytic Economist Group. — <http://www.pravda.com.ua/news/2010/12/30/5732893/>

⁵ <http://www.ua.rian.ru/economy/20081231/78072285.html>, <http://korrespondent.net/business/economics/756410>, <http://www.dt.ua/2000/2675/64965/>.

labor migration to their countries, Ukrainians do not return because there is a great need in skilled manpower⁶.

5. INSTITUTIONAL STEPS. MANAGEMENT AND COORDINATION PROBLEMS

The gender policy is coordinated through the intermediary of the Interdepartmental coordinating committee on counteraction to trafficking in persons, domestic violence, gender and domestic policy, protection of children's rights. Such prodigious office intended to coordinate the activities of different bodies of state power was created as early as in 2007 and survived until 2010. Once and again it was under attack for poor performance. The attempts were undertaken to reform it and create a number of targeted teams instead. In addition, there remained a problem of office work in decision-making. In fact, the Interdepartmental Committee is an advisory board and its decisions should be classified as assignments and instructions of the Cabinet of Ministers to be binding upon central executive bodies, oblast state administrations, and organs of local self-government. After having reformatted it, we should go on boosting the impact of the committee. Its authority is underrepresented; nevertheless, if there is political will, official instructions may be drawn for the Cabinet of Ministers, which practice was resorted to in the past. It is very important at that that its efficiency should be backed by the invitation of representatives of relevant international and public organizations to participate both in committee's discussions and decision making.

Poor activity coordination remains a problem today. In many situations it is not worsening of activity that matters, but disregarding problems and supporting of far-from-perfect practice of the former government. Anyway, there are no promised improvements.

6. COLLABORATION WITH PUBLIC AND INTERNATIONAL ORGANIZATIONS. AN ESTIMATION OF GOVERNMENT'S READINESS TO COOPERATE

Actually, all assistance to the trafficking-in-persons victims and prophylactic work (with rare exceptions) are promoted and initiated by the same international and public organizations. Therefore the degree of openness of power to civil society NGOs, its readiness to carry on a dialog and delegate authority are important conditions of success (and existence) of this area of public policy in general.

In order to estimate changes in the field of introduction of gender policy in 2010 against 2009 (including the counteraction to trafficking in persons, prevention of violence against women etc.) the expert inquiry was conducted⁷. The study does not claim to be exhaustive; however, the polled opinions of activists in the field of protection of rights of women and introduction of gender equality give grounds to bring out trends gender policy development in 2009 and 2010. For the most part the questions touched on the estimation of activity of government bodies of national and oblast level in the field of development and implementation of gender policy, cooperation of state authorities and NGOs, estimation of activity of international, donor and public organizations in this sphere.

⁶ <http://mycityua.com/news/country/2009/03/11/085501.html>, http://www.newsru.ua/arch/ukraine/23apr2009/ne_powertajutsja.html, <http://www.ukranews.com/ukr/article/194167.html>, <http://www.epravda.com.ua/news/4a0164389ec0c/>

⁷ The inquiry covered over 60 experts from 18 oblasts of Ukraine: scientists involved in researching gender issues, NGO activists, journalists writing about gender issues, former assistants of the Minister of Internal Affairs of Ukraine managing human rights issues and responsible for issues of combating gender discrimination, international organizations, and independent experts. The greatest number of experts (18) resides in Kyiv. The e-mail survey was conducted from May 23 to June 3, 2010. The experts could answer only chosen questions; therefore the total of answers to each question is different.

By all indicators the state-of-affairs indexes slipped in 2010 against 2009. The lowest became the index “The level of response of the Authorized Representative of Verkhovna Rada for Human Rights to violation of women’s rights and gender discrimination”: 1,77 point in 2009 and 1.4 in 2010. The lowest 2010 index “The level of response of the bodies of state power to violation of women’s rights and gender discrimination”: 1.38 points. The most negative was the dynamics of such indicators as “The attention of top leadership to gender issues” (minus 1,22 points) and “The estimation of performance of the Ministry of Ukraine for Family, Youth and Sports” (minus 1,06 points}.

The highest were such indicators as “The degree of NGO’s activity in the field of protection of women’s rights and promotion of gender equality at the national level” (3,68 point in 2009 and 3,54 in 2010) and “The level of collaboration of the Ministry of Ukraine for Family, Youth and Sports with international organizations at the national level” (3,68 points in 2009 and 3,4 points in 2010).

7. RECOMMENDATIONS OF THE UNO COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

On January 21, 2010 Ukraine presented the combined sixth and seventh periodic report about implementation of the UNO Convention about elimination of all forms of discrimination against women. The report was prepared and submitted in accordance with the procedure of corresponding UNO Committee. The questions to the members of delegation for the most part touched upon the issues of low representation of women among the top leaders and in decision-making, violence against women and organization of counteraction to trafficking in persons.

As to the counteraction to trafficking in persons, the Committee welcomed the activity of Ukraine intended to prevent forced labor and trafficking in persons and fight against them, which had been conducted from the consideration of its last periodic report in 2002, inclusive with the adoption of complex program of prevention of trafficking in persons in Ukraine for 2002-2005 and ratification in 2004 of the UNO Convention against transnational organized crime and additional protocols.

In March 2010 the new government received the UNO Committee recommendations on elimination of discrimination of women, in which it showed concern about low policy efficiency in counteraction to trafficking in persons, low representation of women in top administrative bodies, and about prevalence of gender stereotypes in society, and violence against women (see: <http://um-dpl.info/index.php?id=1275745690>).

At the same time in par. 30 and 31 of the final remarks of Committee members recognizing the efforts of Ukraine intended to tackle the problem of trafficking in women and girls, including the creation of several advisory and consultative bodies, drafting of a bill on combating trafficking in persons and protecting of victims and ratification of relevant international instruments they noted with concern “that the root causes of trafficking are not sufficiently addressed, funding of shelters remains scarce and that, in general, resources allocated to combat trafficking are still inadequate. The Committee is furthermore concerned about insufficient international cooperation to bring perpetrators to justice.” The Committee proceeds and “calls upon the State party to address the root causes of trafficking, to accelerate adoption of legislation on trafficking, to provide sufficient funding for the effective implementation of the State Program for the Prevention of Trafficking in Persons in Ukraine and of other measures aimed at combating human trafficking and to regularly monitor their impact. Furthermore, it urges the State party to take all appropriate measures, including allocating sufficient funding and establishing additional shelters for the rehabilitation and social integration of women and girl victims of trafficking. Likewise, the Committee calls upon the State party to ensure a systematic investigation, prosecution and punishment of traffickers, including through enhanced

international cooperation, and to provide information about the number of victims as well as the number of investigations and their outcome.”

The Committee requested (par. 50 of the final remarks) the wide dissemination in the State party of the present concluding observations in order to make the people, including Government officials, politicians, parliamentarians and women's and human rights organizations, aware of the steps that have been taken to ensure de jure and de facto equality of women, as well as the further steps that are required in that regard.

But despite the Committee's requirements, the Ministry failed to acquaint public with final remarks and to discuss ways of their realization. As to two measures recommended by the Committee — combating trafficking and increase the representation of women in decision-making (accordingly paragraphs 31 and 33 of final recommendations) — the reporting must take place in 2012. The answers to other remarks will be included into next periodic report in February 2014.

8. DRAFTING THE BILL OF UKRAINE “ABOUT COUNTERACTION TO TRAFFICKING IN PERSONS”

On December 15, 2010 the Cabinet of Ministers of Ukraine adopted the resolution № 2257-r “About the approval of Conception of the Bill of Ukraine “About counteraction to trafficking in persons”. Under this document the Ministry of Education, Science, Youth, and Sports, Ministry of Internal Affairs together with interested central executive bodies should “draft, taking into account the guidelines of the Conception approved by this resolution, and submit to the Cabinet of Ministers of Ukraine the Bill of Ukraine “On combating trafficking in persons”⁸ before December 31, 2010.

It should be noted that such bill was drafted by the Ministry of Ukraine for Family, Youth and Sports backed by the Office of Coordinator of OSCE Projects in Ukraine and underwent international examination as early as in 2008–2009. It was brought up for public discussions organized on June 30, 2009, and submitted for endorsement to central executive bodies. However, such tight timetable prevents proper public discussion of the final bill.

The enactment of the bill is intended to determine ways of legislative settlement of counteraction to trafficking in persons, minimization of consequences on established legal basis, executive authorities, determination of the status of the victims of trafficking, and priority assistance to such persons. The law should determine as follows: the guidelines of public policy targeted at counteraction to trafficking in persons; authority of executive bodies while combating trafficking in persons; mechanism of prophylactic of trafficking in persons, combating it, and assistance and protection to the wronged persons; rights of trafficking victims applying for aid; principles of international cooperation in combating trafficking in persons; strengthening of responsibility for offences related to trafficking in persons.

The expectations linked to the enacted Bill of Ukraine “On combating trafficking in persons” formulated in the Conception are ambitious, but their realization depends on respective legal formulas, because the wording of the conception is nothing but descriptive generalizations. Therefore, for example, there are different ways to increase the efficiency of activities, improve methods of management, and improve coordination of executive bodies combating trafficking in persons. The international experts and organizations, including OSCE, believe that the creation of institutes of National coordinators may become such effective mechanism. The bill contains no such norms.

The conception contains declarative statements as well; for example, about “imprinting in popular memory of negative attitude to trafficking in persons as flagrant infringement of human rights” or “eradication of popular bias towards victims of trafficking in persons”.

Or such, which, from our point of view, need no embodying in the laws, for example, “the increase of common awareness concerning the ways of elimination of trafficking situations and possi-

⁸ <http://www.kmu.gov.ua/control/uk/cardnpd>

bilities of assistance; devising and implementation of prevention of trafficking in persons, preclusive measures (information and education, settlement of migratory issues, socio-economic initiatives)", "determination of effective pattern of cooperation of executive bodies and local self-government authorities, international, public organizations and legal entities in combating trafficking in persons; revving up international cooperation in combating trafficking in persons and assistance to the wronged persons".

There are problems, which can be solved only if there is a program budget; for example, "assistance by human services centers for family, children and youth, by the centers for psychological support, centers for children, psychological rehabs for children, establishments set up by enterprises, institutions, charity funds, associations of citizens or individual citizens to the victims of trafficking in persons taking into account their special necessities depending on the form of exploitation, and category of victim (children, foreigners aggrieved from trafficking in persons in Ukraine etc.)". The amount of financing of the Law of Ukraine "On combating trafficking in persons" is determined annually during reality budgeting at the national and local levels.

There is a positive need in "continuous monitoring of domestic situation checking trafficking in persons and efficiency of combating it and taking into account new challenges."⁹

9. DRAFTING A PROGRAM INTENDED TO COMBAT TRAFFICKING IN PERSONS

The effective period of the Government program of counteraction to trafficking in persons ended in 2010; therefore there is a need of drafting a new program of counteraction to trafficking in persons up to 2015. The main questions are as follows: will the new program take into account the recommendations of national and international experts and organizations, consider experience (positive and negative) of previous program, and, which is the most topical, will the budgetary financing be available.

In spring 2010 the Ministry of Ukraine for Family, Youth and Sports created a working group to draft a new program. However, it has not set to work after ministerial reshuffle. As in the case with other programs and documents, in summer 2010 the new appointees started from scratch. The program was expected to be drafted in a few weeks, which was doubted by the experts. At the instance of the Ministry of Ukraine for Family, Youth and Sports the Coordinator of OSCE projects in Ukraine rendered expert and technical support to the interdepartmental team drafting the new Government target program of counteraction to trafficking in persons up to 2015 (2 experts, group conference: July 7 and 21, August 9, 2010). The draft program was finalized in the fall. It is worth noting that it allows for indexes and indicators, which in the future (if the present redaction is approved) will provide the ability to measure the efficiency of performance.

10. DATA COLLECTION AND ANALYSIS

The problem of reliable statistics is still topical in Ukraine. The same is underlined in the final remarks of UNO Committee by results of consideration of the sixth and seventh reports of Ukraine about implementation of the UNO Convention on elimination of all forms of discrimination of women: "the Committee regrets that the report contains insufficient statistical information on the situation of women in all areas covered by the Convention." Therefore the Committee implores Ukraine to improve data collection system, including the use of measureable indexes for evaluation of trends in position of women and progress in actual equality of women.

⁹ <http://www.kmu.gov.ua/control/uk/cardnpd>

In case of need Ukraine was advised to appeal for international aid for data collection and analysis. There is no background on such appeal. There is no uniform system of statistics on trafficking in persons. MIA of Ukraine keeps record of criminalities statistics, the Government service for family, children and youth, International migration organization, NGOs and so on are responsible for aid-to-victims statistics. Meanwhile the Ministry of Ukraine for Family, Youth and Sports is devising an administrative data collection on control of trafficking in persons. However, it is rather alarming that the wronged persons' DBs may feature no personal data and private life protection.

11. LAW-ENFORCEMENT ACTIVITY

In 2009 the MIA Trafficking Crime Control Department filed 279 suits, article 149 CCU. There were 42 wronged children. However, like in the past, only scarce cases came to court or got the sentence pronounced.

In 2009 the Department of Trafficking Crime Control set up an inside cybercrime control unit, which was a positive step. In spring 2010 the new MIA management reorganized the Department of Trafficking Crime Control into the Department of Cybercrime and Trafficking-in-Persons Control. However, at the end of 2010 the reshuffle was still underway. They planned to do away with the department.

During eight months of 2010 the MIA units cleared 189 crimes qualified by article 149 CC of Ukraine (against 279 for 2009), stamped out six international gangs of traffickers (against 11 in 2009). They identified and brought to Ukraine 254 victims of trafficking in persons (against 335 in 2009). For the first six months of the current year the specialized trafficking-in-persons control units drew up 2300 administrative records on prostitutes, including over 40 minors. They detected about 200 brothels and about 100 cases of procurement. Certainly, it is a far cry from the real-life situation in Ukraine, which only testifies to low efficiency of internal affairs units combating trafficking in persons. They tend to detect insignificant crimes only. They fail to notice the long-term activity of international gangs. They verify and solve crimes only when informed by victims, their relatives or NGOs, to which the wronged persons turned to for assistance¹⁰.

The experts believe that the MIA units fail even to inquire into the matter of persons belonging to potential risk groups. The most probable routes of trafficking in persons remain outside the investigation. For example, in the early summer, the Ternopil VEZHU sent 49 bachelors of hospitality business for work practice to Bulgaria. However, in reality, the students were reduced to hewers of wood and drawers of water (to clean suites and beaches) 14 hours a day. They were not paid for their work (in fact, their money went to their academic instructors), the children got one meal a day, inappropriate accommodation, and their passports were taken away by employers on arrival to Bulgaria. They had no chance to return to Ukraine on their own. Their phone calls to their educational establishment requiring stopping such "practice" and bringing them back home were ignored. Only after several students had succeeded to escape and return to Ternopil and file an application to militia the students were brought back to Ukraine. The criminal proceedings were instituted against teachers. Unfortunately, there is still no legislative regulation of students' work practice abroad; not a single Ministry, including MIA, has initiated such step.

The militia units do not devote sufficient attention to functioning of private saunas, massage cabinets, tour operators, marriage and model agencies, which are often a false front of unlawful activity in this sphere. Their activity must be monitored by militia units. The up and going criminal brokerage is the result of inactivity of the organs of internal affairs. The latter ignore instructions

¹⁰ In preparing the information on the status of law enforcement in combating human trafficking we used the report "Human Rights in Ukrainian Militia — 2010" drawn up by the Kharkiv Human Rights Group and the Association of Ukrainian monitors of human rights in the internal affairs units. — Kharkiv: Human Rights, 2010. — 276 p. Author of the relevant section: L.O. Hema.

of the Decree of the Cabinet of Ministers of Ukraine № 1013 from 19.11.2008 “On approval of criteria of risk evaluation in the case of brokerage in job placement abroad and scheduled inspection periodicity”. This normative legal instrument established clear criteria of estimation of threats for a person of fraudulent schemes initiated by unfair licensees, wrongful acts of foreign employers, threats to fall a prey to trafficking in persons. Its clauses on control and initiation of withdrawal of license by the Ministry of Labor and Social Policy are not fulfilled by law enforcers.

In fact, the organs of internal affairs make no use of the Guidelines for detection and investigation of crimes related to trafficking in persons, which were co-authored with the American association of lawyers in 2009. Their content was agreed with the Judicial Court of the Supreme Court of Ukraine and Prosecutor General’s Office and recommended for implementation by operative and investigatory organs of internal affairs¹¹.

The number of cases of the so-called inside trade in people is upping all the time, and its victims are mostly countrypersons, because there is severe unemployment, outmigration of whole villages, and criminals can easily persuade a peasant through his/her ignorance. The problem is aggravated by the fact that the victims have no idea, whereto they can apply for aid and are afraid of publicity. More and more the Ukrainians exploit their fellow-citizens, esp. labor and sexual slavery. Therefore, the militia units should urgently design a mechanism of detection of the victims of trafficking in persons and aid them, which should be stated in the Law “On prevention of trafficking in persons”.

12. THE JUDICIAL BRANCH OF POWER: PROBLEMS OF INEFFICIENCY

The reports of international organizations and findings of experts permit to state the low efficiency of judicial branch of power, which is brought out by inefficient trials. The problem of trials and passing of sentences seriously undermines the right of the victims of trafficking-in-persons for fair trial. The problem may be tackled with educational measures and advanced training of personnel of the judicial branch of power, including the Academy of Judges of Ukraine and improvement of anticorruption legislation and control, design of mechanisms preventing abuse of power by the representatives of the judiciary.

13. INDEMNIFICATION TO THE TRAFFICKING-IN-PERSONS VICTIMS

In 2008 the European campaign “*Europeans for indemnifications to the trafficking-in-persons victims*” (Comp.Act) went underway; it intended to provide for real reimbursement of material and moral damage to the victims of trafficking in persons. Comp.Act is a three-year campaign prioritizing the study of real access to indemnity by victims of trading in people, lobbying of inclusion of compensations to the trafficking-in-persons victims into the legislation and legislative actions, training of advocates, policemen, public prosecutors, judges in these fields. The Ukrainian partner is the La Strada Center.

In 2010–2011 all campaigners from 15 countries of Europe investigate the trafficking-in-persons victims’ accessibility to compensations. *The general aim* of the project is to include the issue of indemnifications for the trafficking-in-persons victims into national legislation and real compensation for their material and moral losses. *The priorities* of the project are as follows: 1. Detection of judicial and system restraints, which prevent the trafficking-in-persons victims from receiving compensations. 2. Protection and aid to trafficking-in-persons victims in getting indemnifications.

¹¹ Права людини в діяльності української міліції — 2010.

3. Minimization of restraints preventing the victims of trafficking in persons in getting their indemnifications.

14. STANDARDIZATION OF SOCIAL SERVICES IN COMBATING TRAFFICKING IN PERSONS

In 2010 the standardization of social services in combating trafficking in persons went on in 2010. The 2010 priorities included *lobbying* of adoption of design-driven documents (Instruction in the pattern of social work in combating trafficking in persons, Preliminary regulations about a hotline for combating trafficking in persons) which had been drafted by a task group and approved by academic council of the State institute for family and youth development in 2009; the international *skill sharing* and introduction of standards of social services in combating trafficking in persons; *improvement of documents* (reformatting as an order).

The necessity of adoption of social service standards became a mantra at all-Ukrainian meetings organized by the Ministry of Ukraine for Family, Youth and Sports (conferences, seminars), during meetings with the Minister, Deputy Minister, department managers, and were worded in many letters to the Ministry. The standardization of services in combating trafficking in persons is the important step improving realization of the rights of citizens for proper social protection, determination of minimal services rendering aid to the victims of trafficking in persons and risk groups, streamlining of services in combating trafficking in persons by social workers at the state level. This lobbying permitted to include the article on the approval of standards into the draft of the National Special-Purpose Program of Combating Trafficking in Persons up to 2015.

The standardization in 2010 led to new drafts submitted to the Ministry of Ukraine for Family, Youth and Sports and the Deputy Minister's letter (№ 1/15780 from 16.12.2010), which highlights the importance of social service standards in combating trafficking in persons "intended for realization of social work at the higher quality level". However, "due to the reshuffle in accordance with the Ukase of the President № 1085/2010 "On optimization of the system of central executive bodies" the central government organ vested with a function of policing counteraction to trafficking in persons will set up a task group to improve standards."

15. NATIONAL HOTLINE FOR COMBATING TRAFFICKING IN PERSONS

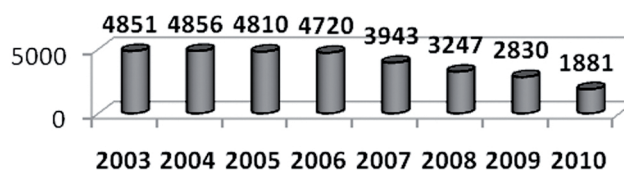
The national hotline for combating trafficking in persons is a component of the state system of detection and redirection of the victims of trafficking in persons¹². The National hotline is intended to control causes, conditions and circumstances of person's involvement in the situation of trafficking, render advice and social-psychological assistance to the risk group, detection of trafficking in persons, assistance in the search of people in the situation of trafficking in persons.

The partners of the National hotline in redirecting, consulting and information are as follows: MIA, MFA, Ministry of Labor and Social Policy of Ukraine; State Job Center; Ministry for Family, Youth and Sports of Ukraine; Government Border service of Ukraine; OSCE; International Organization for Migration.

¹² The hotline for trafficking control was set up on the basis of La Strada Ukraine on November 18, 1997 in the framework of the program La Strada: Prevention of Trafficking in Women in Central and Eastern Europe. Since November 2002 the hotline became a national and free facility. The National Hotline is a dual phone, which makes it possible to simultaneously consult two parties. The National Hotline enables timely information on labor migration, details of international law on education, marriage, and adoption abroad. It is also a channel aiding those who have got into the situation of trafficking. The National Hotline is a priority and an important guideline of the Center.

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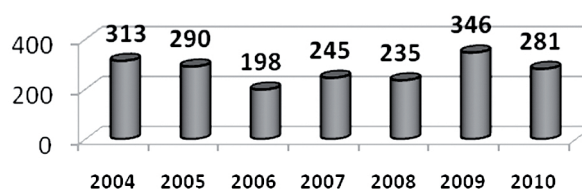
Summary of phone calls per year, beginning from 2003



The diagram shows that the hotline calls began dropping down since 2005 with the same advertising. The similar trends are present in other countries, which use hotlines to prevent trafficking in persons.

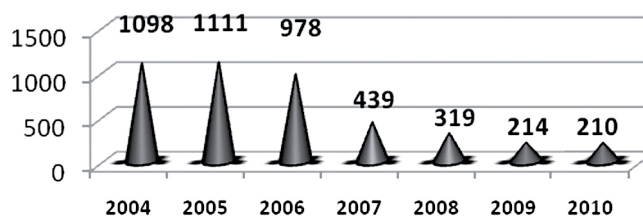
The on-line consultations are an important category of appeals. For 2004–2009 the National hotline granted 1627 consultations. From January to November 2010 the Center provided for **281** consultations.

Online consultations in 2004–2009



During 2004–2009 the experts of the National hotline, State Job Center, held 4159 consultations on company validity check concerning switch dealers working in Ukraine and offering jobs abroad. 210 consultations were held from January to November 2010.

Consultations of State Job Center experts in 2004–2009



The national hotline as a redirecting mechanism for the victims of trafficking in persons. During 2004–2009 1220 trafficking-in-persons victims were offered social assistance. There were also appeals concerning violence in family abroad. The main services rendered to the wronged persons were as follows: psychological, socio-pedagogical, socio-economic, legal and information.

The channels of information on persons in need of assistance: 84% over the hotline on prevention of trafficking in persons and 16% over the Internet.

The sources of financing of the National hotline for combating trafficking in persons included cash means of international organizations and donors. The state did not support the Hotline.

16. TRAINING OF SPECIALISTS

According to the data presented and verbal estimates by the representatives of state structures, the absolute majority of trainings of different groups of state specialists in this sphere was

initiated and financed by international and public organizations. Meanwhile 2010 is characterized by complication of process of preparation and realization of such trainings as a result of worsening attitude toward them from the side of chiefs of various state bodies. For example, Deputy Minister of Internal Affairs of Ukraine Zyma L.M., who headed the Department for control of crimes linked to trafficking in persons (DCCLTP) and Department of criminal militia for juvenile delinquency (DCMJD), forbade the staff of these departments to attend the international school of law enforcers for combating trafficking in persons, which had been organized by the EU funds in Georgia.

The participants also went off these trainings. It applies both to law enforcers waiting for job cuts and liquidation of the DCMJD. There is but a bleak outlook for them; they do not know their place in the framework of these services, await for reductions or job cuts, retirement and, therefore, consider training of no use.

At the same time teachers, social workers readily attended seminars and trainings, established personal contacts, got handouts. They maintain many permanent working contacts.

The trainings were carried out by representatives of IOM, Coordinator of OSCE projects, La Strada, other NGOs. The basic target groups included district militia inspectors, personnel of DCCLTP, DCMJD, Public social service for family, children and young people, offices for family and youth, state border service, health care services, educators (teachers, social teachers and psychologists, teachers of vocational educational establishments etc.).

17. PUBLICATION OF MATERIALS, REALIZATION OF INFORMATION AND EDUCATIONAL CAMPAIGNS

The publication of materials on combating trafficking in persons, realization of information and educational campaigns in 2009 and 2010, as well as training of specialists remained the initiative and task of international and public organizations. The airtime for TV and Radio social advertising is the most complicated problem. In this respect the Law of Ukraine "On advertising" does not work.

The positive example is the effort of DCCLTP to use out-of-home media in Kyiv (2009).

In 2010, the Ministry of Ukraine for Family, Youth and Sports of Ukraine, NGOs and international organizations initiated preparatory work for prophylactic of child's sexual tourism, trafficking in children, dissemination of HIV, promotion of healthy life-style etc. before Euro-2012 would be held in Ukraine. In November 2010, in response to an appeal of the UNICEF Child's Fund the Minister of Ukraine for Family, Youth and Sports ordered to set up the *Organizing committee for preparation for Euro-2012* including representatives of various ministries, NGOs and international organizations.

18. FORMING OF THE NATIONAL REDIRECTING MECHANISM FOR THE VICTIMS OF TRAFFICKING IN PERSONS.

In 2009–2010, the Coordinator of OSCE projects in Ukraine and Ministry of Ukraine for Family, Youth and Sports experimented with the National mechanism of redirecting for victims of trafficking in persons (NMR) in Ukraine in the Donetsk and Chernivtsi Oblasts.

To that end they drafted the Directive of the Cabinet of Ministers of Ukraine "On realization in Donetsk and Chernivtsi Oblasts of experimental development of the National mechanism of redirecting of the victims of trafficking in persons" and national guidelines on coordination and cooperation of local executive bodies, organs of local self-government, other organs, establishments and organizations within the framework of the National mechanism of redirecting of the victims of trafficking in persons.

With that end in view, e. g. in the Chernivtsi Oblast, they finished drafting the Regulations of the Regional inter-agency committee on assistance to the victims of trafficking in persons, which was submitted for the consideration of the Coordinating committee on counteraction to trafficking in persons of COSA and Chairman COSA; concluded the curriculum the “National mechanism of redirecting of the victims of trafficking in persons in Ukraine”, and scheduled planned training for trainers.

In the Donetsk Oblast, e. g., they worked out, discussed and adopted for approbation in five chosen oblast cities “The guidelines for coordination and cooperation of local executive bodies, organs of local self-government, other organs, establishments and organizations while assisting the victims of trafficking in persons” which is a regional master document about redirecting and aid to the victims of trafficking in persons; they finalized the curriculum for public officers, trainers and program of further training of personnel. In both oblasts the local authorities backed the approbation of the National mechanism of redirecting of the victims of trafficking in persons.

19. PROBLEMS OF ASSISTANCE TO THE VICTIMS OF TRAFFICKING IN PERSONS

The situation with assistance to the victims of trafficking in persons is very unsatisfactory. The thing is that Ukraine is ever more frequently identified not only as a country of origin of the victims of trafficking-in-persons but also as a country of transit and destination.

There are regulations of the Government program of counteraction to trafficking in persons intended for Ukrainian citizens, but there are no special regulations on repatriation and socialization of foreign victims of trafficking, provisions for their needs in shelters and aid during their stay in Ukraine. As a rule, these foreigners identified as victims of trafficking in persons in Ukraine come from Moldova, Uzbekistan, Kyrgyzstan, Kazakhstan, although there are also such victims from Belarus, Slovakia, Czech Republic, Lithuania, India, Russia, and Philippines.

The Law “On protection of persons participating in criminal court actions” stipulates the right of victims to protection, if they participate in criminal proceedings. In practice these legal instruments are not applied to the trafficking-in-persons victims or applied extremely rarely.

In Ukraine there are an insufficient number of specialized establishments for victims of trafficking in persons, although the statistical data show the annual uptrend. At the same time even the superficial comparison of data of the crisis centers and number of persons with militia record show that the trifling number of centers prevent coping with social work targeted at assistance to the victims.

The experts of international organizations complain that presently Ukraine has neither the program nor structure or specialized houses for reintegration of trafficking victims, which are taken care of by public organizations of human rights activists only. Today, only the International organization of migration in Ukraine sponsors seven centers for victims (in Volyn, Zhytomyr, Lviv, Odesa, Chernivtsi, Kherson oblasts and in Kyiv).

According to IOM data, this organization sponsors about 95% of programs of aid to victims of trafficking in persons in Ukraine. It is difficult to overestimate the value of Kyiv medical rehabilitation center for victims of trafficking in persons founded and financed by IOM. According to the data of representatives of NGO, the Center renders complex and specialized confidential medical assistance. It is a unique establishment in Ukraine, where medics see patients from all oblasts.

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Victims of trafficking in persons assisted by IOM, Kyiv¹³

Destination country	Number of victims				
	2007	2008	2009	2010	All
Russia	225	200	144	253	822
Poland	78	117	61	82	338
Czech Republic	53	7	41	27	128
Italy	29	17	18	28	92
Austria	46	21	—	1	68
Inside Ukraine	12	1	30	23	66
Portugal	23	14	21	—	58
Turkey	3	1	4	8	16
Great Britain	3	9	1	—	13
Greece	8	—	2	2	12
Spain	5	5	—	1	11
Norway	1	—	7	1	9
Hungary	3	2	3	—	8
Ireland	—	—	—	8	8
Other countries	11	10	5	8	34
	500	404	337	442	1683

In the Lviv Oblast all establishments involved in counteraction to trafficking in persons also direct the detected victims to NGO Women's Prospects, which can bring them to the shelter. The shelter is designed for 6 women and 1 child. If necessary the NGO can hire an apartment for the wronged men. In such case the IOM pays for them. The NGO can send trafficking victims to other establishments, for example, the Salus Center. In the Khmelnytsk Oblast, the trafficking victims detected by the Job Center and oblast Department for control of crimes related to trafficking are sent to Caritas organization.

Only the Center La Strada Ukraine renders aid to 1822 persons in 1997–2009. In 2009 the assistance was rendered to 62 adults and 46 children. The main services needed by the wronged persons and other provided by the Center included psychological, socio-pedagogical, socio-economic, legal, information. At the time the top services for adult clients comprised consulting, assistance in search of persons missing abroad and their return, psychological and legal aid, assistance in establishment of contacts with relatives, payment for professional training etc.

The problems of social protection agencies are described in the section on domestic violence. The limitations of access to social services permit to conclude about inefficiency of the whole system of social services and social protection. The scattering of establishments among different departments, complicated subordination to local authorities and vertical executive structures, thematic stratification, numerous constraints on aid receivers (age, sex, registration, presence or absence of children, single or family person etc.), not to mention insufficient financing make the needed aid inaccessible which is the overt violation of human rights by the state. Therefore the best way out is the change of the system of state administration and subordination in this sphere, liquidation of excessive state structures and creation of single service of social protection.

The complexity of social assistance development is multiplied by dependence on local budgets which traditionally lack funds. If even they are subsidized by the government, the social establish-

¹³ As of September 30, 2010.

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ments are about to close. There remains an unsolved problem of commissioning public organizations which render social services to the trafficking-in-persons victims.

The program of financial support by the Ministry of Ukraine for Family, Youth and Sports remained limited and non-transparent. Despite recommendations and good sense only youth organizations are financed. The Ministry fails to finance programs targeted to combat trafficking in persons. On the other hand, most organizations try to get registered as youth ones to obtain state financing. With liquidation of ministry and transfer of its functions to the Ministry of education and science (now — education, science, youth and sports) the outlook is rather gloomy.

In December 2010, the Regulations of the Cabinet of Ministers led to approval of planned activities of the National campaign “Stop violence” up to 2016¹⁴. The plan envisages register rules for establishments and organizations designed to control domestic violence, as well as media commercials on assistance to victims of domestic violence. However, the Government keeps away from its chief duty of securing civic financially backing the victims of domestic violence. Therefore they will not appropriate funds for shelters (in accordance with this document)¹⁵. As it is the same shelters that could accommodate the trafficking-in-persons victims, the outlook for aid is gloomy.

20. FORMING OF NATIONAL MECHANISM OF REDIRECTING OF VICTIMS OF TRAFFICKING IN PERSONS

The national mechanism of redirecting of the victims of trafficking in persons means collaboration, when the public institutions fulfill their duties and secure protection of rights of the victims of trafficking in persons and coordinate strategic partnership with civil society. The international community treats creation and introduction of such mechanism as important and necessary precondition of effective control of trafficking in persons and protection of victims’ rights. The current Government program of counteraction to trafficking in persons contains no articles on development of such mechanism. Therefore such tasks must be included into the new program taking into account the experience of pilot activity of Office of Coordinator of OSCE Projects in Ukraine together with the Ministry of Ukraine for Family, Youth and Sports in Donetsk and Chernivtsi Oblasts.

21. STATE OF IMPLEMENTATION OF RECOMMENDATIONS CONTAINED IN 2006 REPORT

№	Recommendations	Implementation in 2007	Implementation in 2008	Implementation in 2009–2010
1.	To ratify the CE Convention on combating trafficking in persons amending legislative acts and bring them into line with Convention.	Not done The Bill was not brought in Verkhovna Rada by the Ministry of Justice. This topic was discussed during several meetings initiated by the Center La Strada Ukraine and Verkhovna Rada Committee on legislative support of law-enforcement activity ¹⁶ , during which the Ministry of Justice had to draft and bring in a bill.	Not done The Bill was not brought in the Verkhovna Rada by the Ministry of Justice. The NGOs and Verkhovna Rada Committees initiated several meetings to discuss the problem.	Convention ratified on September 21, 2010. At the same time the legislation needs amending in accordance with the Convention.

¹⁴ Regulations of the Cabinet of Ministers of Ukraine.

¹⁵ Levchenko K. The Cabinet is about to combat violence without aid to victims.

¹⁶ Recommendations of the meeting at the Verkhovna Rada Committee on legislative support of law enforcement, February 27, 2008. http://www.rada.gov.ua/~k_zakon_pr/ht-27_02_2008.html#s3

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2.	To work out indemnification system for the victims of trafficking-in-persons.	Not done	Not done	Not done. The possibilities of indemnification were studied by the Office of Coordinator of OSCE projects in Ukraine; the work is carried on by the Center "La Strada Ukraine"
3.	The effective strategy of control of trafficking in persons should combine legal measures and law-enforcement activity with prevention, coordination and aid to the victims.	Such approach is partly taken into account in the Government program of counteraction to trafficking in persons 2010 (Decree of the Cabinet of Ministers of Ukraine № 410 from March 7, 2007).	Work began on development of the National mechanism of redirecting of trafficking-in-persons victims.	Piloting of the National mechanism of redirection of trafficking-in-persons victims conducted in the Chernivtsi and Donetsk oblasts with support of the Office of Coordinator of OSCE Projects in Ukraine and with participation of the Ministry of Ukraine for Family, Youth and Sports and OSA. The new program of control of the trafficking in persons is developed up to 2015, the draft of which contains such approaches.
4.	To design and implement indicators representing the domestic distribution of trafficking in persons, database the statistics of victims.	Not done	The job was done by the Ministry of Ukraine for Family, Youth and Sports and international and public organizations. The indicators and amendments to the Government program worked out taking into account these indicators. The Cabinet set aside the amendments.	In 2010, the Ministry for Family, Youth and Sports expressed its intention to work in this direction. After the reshuffle there is no data on this activity.
5.	To amend the Criminal Code of Ukraine concerning the responsibility for using services of children, which prostitute, and production for private use, storage and use of child's pornography.	Partly done. The draft Bill has not yet been registered in Verkhovna Rada. The working group created containing representatives of MIA, NGOs, and scientists.	Done partly The draft bills have been registered in Verkhovna Rada.	Recommendations partly implemented by adoption in 2010 of amendments to the article 301 of CCU and introduction of definition "child's pornography" into Law of Ukraine "On morals protection". At the same time the adjustment of legislation of Ukraine to international documents was not finalized. Work is underway.
6.	To improve cooperation and coordination of efforts of government and public concerning trafficking in persons, at local, regional, national, and international levels.	Not done In fact, there was no coordination whatsoever.	Improvement of situation. Creation of task groups drafting project of complex law on prevention of trafficking in persons, development of national mechanism of redirecting of trafficking-in-persons victims. Joint activity, seminars, training	Insufficient coordination of activity. In 2010 it deteriorated even more.

XXI. TRAFFICKING IN PERSONS AS VIOLATION OF HUMAN RIGHTS

7.	To develop national system of assistance to the victims involving state organizations and NGOs at local and national levels, to guarantee identification and redirection of victims and secure proper aid.	Not done	The work began. Conducted research. Interdepartmental seminars held together with OSCE and Center "La Strada Ukraine" in some oblasts of Ukraine. The issue entered the project of complex law of counteraction to trafficking in persons.	<i>See commentary to par.3.</i> Many points dealing with guaranteeing aid to the victims were withdrawn from the bill "On counteraction to trafficking in persons" in the mid-2010. Supported by the Coordinator of OSCE projects the trial development of national mechanisms of redirecting of trafficking-in-persons victims is underway in Chernivtsi and Donetsk oblasts.
8.	To conduct information campaigns to promote awareness concerning trafficking in persons.	Done. Campaigns were conducted by both public and international organizations and Ministry of Labor and Social Policy of Ukraine (billboarding) and Ministry of Ukraine for Family, Youth and Sports (posters and pamphlets).	Work is underway	In 2009, in Kyiv the information and advertizing campaign was waged by DCCLTP of MIA of Ukraine. Posters were also printed by the Ministry of Ukraine for Family, Youth and Sports. The international and public organizations go on working. The section of the Law of Ukraine "On advertising" about 1% free social advertising is inapplicable.
9.	To back hotlines to inform potential migrants on the risks of crossing the border.	The call center opened at the MFA of Ukraine. The MFA of Kingdom of Denmark promotes the National hotline of "La Strada Ukraine" Center which was opened in 1997. The IOM Office in Ukraine also opened an advice line on safe migration.	The hotlines went on working due to support of foreign donors and sponsors.	The hotlines went on working due to support of foreign donors and sponsors. In 2010, the Ministry of Ukraine for Family, Youth and Sports planned to create a single short-number hotline for all Ukraine. Nothing came of it.
10.	To work out criteria of identification of trafficking-in-persons victims to grant them the status of a wronged person.	Not done	Work started.	<i>See commentary to par.3.</i> The pilot development and introduction of NMR envisages development of the system of identification of trafficking-in-persons victims.
11.	To change the wronged person examination in court and replace the direct testimony with the video-taped testimony.	Not done	Not done	The Bill 7340 was registered in November 2010. As of the end December was under consideration in the Committee on legislative support of law-enforcement.
12.	To devise and implement into the post-graduate curriculum of teachers, social workers and law enforcers the special course on control of cruelty, sexual child abuse and trafficking in persons, other forms of violence.	Partly done. The movers and participants include public and international organizations.	Done.	Work is underway. Not obligatory all over.

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

13.	To conduct training, seminars, conferences on trafficking in persons for representatives of state and non-state organizations, including personnel of hospitality industry.	Partly done. No training and seminars for the personnel of hospitality industry. Separate NGOs cooperate with the representatives of hospitality industry.	Partly done. No training and seminars for personnel of hospitality industry.	Done by sponsored international and public organizations. From 2010 there emerged problems with seminar participation permissions for representatives of state bodies, especially law enforcers, including MIA of Ukraine
14.	To conduct sociological studies of awareness of population about trafficking in persons.	During 2007 the international and public organizations made a number of surveys. The Office of Coordinator of the OSCE projects in Ukraine studied the emerging national mechanism of redirecting of victims of trafficking in persons in Ukraine. The "La Strada Ukraine" surveyed Ukrainians about their attitude to the expansion of trafficking in persons and aid to victims. There was the study conducted "Labor migration from Ukraine, Moldova and Belarus to Russian Federation: trends and links with trafficking in persons" ¹⁷ . The IOM conducted the study in Ukraine "Trafficking in persons in Belarus, Moldova and Ukraine: review, basic problems and strategies"	The studies are conducted by international and public organizations.	The studies are conducted by international and public organizations.

On top of unfulfilled recommendations contained in previous reports and recommendations on securing aid to the victims in the section on domestic violence we will add only one general recommendation: the control of trafficking in persons should be based on international documents, including the recommendations of UNO Committee on elimination of all forms of discrimination of women with application of indicators of measuring progress and budgetary financing.

¹⁷ <http://www.lastrada.org.ua/read.cgi?lng=ua&Id=216>

XXII. PROTECTION OF RIGHTS OF FOREIGNERS, REFUGEES AND ASYLUM SEEKERS¹

The stay in a foreign country is always difficult; it entails complications both for the foreigners and for the country's officials. Introducing certain legal norms, the authorities officially declare their position as regards immigrants, try to forestall and, possibly, to resolve the problems which become inevitable once people come to another country to reside in its territory. In the process every country looks for its own immigration policy models, which would not only ensure the structuring of immigration processes and overcoming adverse effects of non-controlled immigration, but would also comply with generally accepted international principles of migrants' freedoms' and rights' protection, contribute to their quicker adjustment in the new national, social/economic and cultural environment. However, the development of any immigration policy concept starts with analysis and objective assessment of immigration situation in the country and with forecasts as to the immigration flows dynamics in the future.

At the dawn of Ukrainian independence, the power fashioned its policy using the European immigration law and international human rights standards as guidelines. The goal was to establish the national legal regime, under which the foreigners staying in the country, with few exceptions, would enjoy practically the same rights as the Ukrainian citizens. This principle of relations was spelled out in the Constitution of Ukraine (article 26 and article 2 of the Law of Ukraine "On Legal Status of Foreigners and Stateless Persons").

However, due to liberalization and insufficient security of the state border, Ukraine encountered an unprecedented phenomenon — mass non-controlled arrival of aliens into its territory. Other priorities in state policy, lack or deficiency of relevant normative acts, constrained finances and economic misbalance led to certain confusion and helplessness in Ukrainian authorities' response. Till 1996 practically not a single agency, not even internal affairs bodies, officially fought illegal migration. However, the discontent with the situation, officially expressed by Western European community (the illegal migrants used Ukraine as a channel of their transition to the Western Europe) forced authorities to focus at the issues of illegal migration and to take certain measures aimed at stabilizing immigration processes. The Ukrainian government passed a number of legal and normative acts regulating the stay of foreign citizens in Ukraine, and set up state agencies authorized to implement control over foreign citizens' sojourn in the country. Militia became one of such entities. Enhancing its operation every year it started to identify and punish foreigners culpable of violations.

It is noteworthy that in its further legislative activity, with active participation of the Ministry of Internal Affairs, Ukraine gradually but firmly started to move away from the declared principles of national legal regime which regulated the foreigners' stay in the country, in the direction of restricting and narrowing their rights. Severe opposition to illegal immigration became the main trend in the state policy. Having no resources to eliminate the "transparency" of the state border, which

¹ Prepared by Volodymyr Batchaev, the Association of Ukrainian Monitors on Human Rights Observation in the Police Activities

was practically non-existent in certain areas bordering with Russia and Moldova, the state chose an alternative priority of exposing and detaining illegal migrants in its own territory, and identified the body in charge, i.e. the Ministry of Internal Affairs.

After the Programs of counteracting illegal migration for 1996–1997 and for 1999–2001 were approved by the Cabinet of Ministers of Ukraine (respectively, Decree № 83 of January 15, 1996 and Decree № 273 of February 27, 1999) the resistance to illegal migration became one of the priority tasks in the operation of the law-enforcement departments. The Ministry of Internal Affairs urgently developed respective departmental normative acts; the territorial branches received the new reporting forms on the number of illegal migrants detained and instructions concerning the reinforcement of activities aimed at exposing foreigners guilty of violations.

The operation of the Ministry of Internal Affairs in this area gained new impetus with the adoption of the “Program for counteracting unlawful migration for the years 2001–2004”. In this document term “illegal” was ominously replaced by “unlawful”. It was at this time that the Ministry devised a range of normative documents, which not only openly contradicted the declared European immigration policy guidelines, but, in some instances, provided for direct violation of foreigners’ rights and freedoms. The internal affairs bodies introduced the practice of annual special operations and campaigns (“Foreigner”, “Student”, “Migrant”, “Tourist”, “Entrepreneur” etc.), aimed at exposing the infringing foreigners; they also started the implementation of centralized fingerprinting system of monitoring “Migrant” and multi-stage control of foreigners residing in Ukraine, mobilizing the staff of passport offices, housing and communal services, district militia inspectors, village councils’ staff. The servicemen of law-enforcement bodies organized mass raids on students’ dormitories and private apartments, audits of the companies founded or staffed by foreigners, halts and check-ups of motor vehicles without any consideration for the right of inviolability of residence, privacy and personal inviolability. The practice of total passport checkups for persons of non-European appearance in public places and requisitioning of foreigners’ national passports to verify the legality of their stay in Ukraine became widely spread.

In order to report the efficient implementation of the state Program of counteracting unlawful migration the Ministry of Internal Affairs demanded of their subordinate bodies and departments constant annual growth in respective figures and indicators. Achieving these figures became the issue of special monitoring, while the heads of territorial departments, who failed in delivering anticipated results, were severely punished.

Active operation of law-enforcement entities in counteracting illegal migration and broad coverage of this relatively new topic by mass media brought to life a phenomenon known as “migrantophobia” in Ukrainian society. Justifying the necessity for most severe measures against illegal migrants, militia, supported by mass media, presented a portrait of an “illegal migrant” in predominantly dark colors — as a terrorist, a criminal, a carrier of contagious diseases, a pretender to your job. Perpetual media articles covering detaining of illegal migrants in Ukraine and crimes they perpetrated, stressing their ethnic origins, offering negative examples of inter-ethnic clashes in other countries, exaggerating the threat of terrorist attacks — this militant media campaign allowed Ukrainian militia to gain support and approval of their actions among population at large.

Precisely targeted, intensive, supported by public, long-term fight of the law-enforcement agencies against illegal migration brought certain results — by 2003 militia expelled significant number of foreigners, who arrived in the 90-ies, out of the country. Some foreigners managed to legalize their status in Ukraine or moved to the Western Europe for permanent residence. New waves of immigration were of smaller scale; the procedure for obtaining entry visas became more rigid; the state border security improved; in the meantime Ukraine earned the reputation of highly xenophobic state, which made it less attractive for the foreigners.

Therefore, the immigration situation in Ukraine eventually changed: due to geographical position and relatively low level of economic development, it became the starting and transit point for the migration flows instead of their final destination. Foreigners from so-called countries of “traditional migration”, as a rule, entering Ukraine, do not intend to reside in its territory — the immigrants are not happy with lack of economic stability, lack of governmental support in finding

employment, low rate of social protection and manifestations of ethnic discrimination in Ukrainian society. So far, one can conclude that illegal foreign migration does not present a significant threat for the national security of Ukraine, due to its transitory nature. The European Union, however, still regards it as a destabilizing factor alongside with mass entry of Ukrainian citizens into the EU countries.

The illegal migration per se, as a dynamic phenomenon, has also changed — its scope decreased; it lost its spontaneous essence and became an international criminal business, well organized and supported by corruptive network in the government. Beyond any doubt, these changes in illegal migration nature and forms require cardinal revision of the counteraction methods, and, first of all, the reconsideration of strategy. Illegal migration should be fought not by means of “raids” against foreigners in the Ukrainian territory, but through implementation of governmental well-grounded visa policy and ensuring high security level at the state border.

Nevertheless, permanent political changes and officials’ rotation, which started in 2004, left this problem outside the scope of government operation. A new state program document stipulating not violent struggle, but reasonable opposition to illegal migration, has never been developed. Profiting from the fact, the Ministry of Internal Affairs has been implementing most rigid measures in fighting illegal migration, using old methods, developed and approved in the 90-ies without any consideration for the significant changes in immigration situation. We can say that in fact the militia department unofficially prorogated the term of validity of the “Program of counteracting unlawful migration” with its obsolete goals and methods.

As of today, the law-enforcement entities face a peculiar situation: their long-term operation aimed at returning illegal migrants to the places of their permanent residence brought anticipated results, and the number of infringing foreigners from the so-called countries of “risk migration” in Ukrainian territory decreased significantly. On the other hand, the criterion, used for assessing the efficiency of militia units’ operation, i.e. comparison of last year’s indicators with respective indicators for the current year, is quite dogmatic and implacable for internal affairs agencies. That’s why an absolutely natural tendency, i.e. the decrease in the number of exposed illegal migrants in the regions is regarded among MFA leadership not as a success, but as a total failure in militia operation. Despite numerous objections from the first persons in Ukrainian militia claiming that “percentage-mania” is no longer decisive factor in their operation, accountability traditions and criteria for evaluating professional efficiency of the MIA departments’ heads in the oblast’s remain unchanged, i.e. the indicators (figures) reflecting the law-enforcement activity, including the exposure of illegal migrants, cannot go down substantially. This contrary provision can be found in numerous instructions and official letters of the Ministry of Internal Affairs of Ukraine.

Excerpt from the instructions of the MIA of Ukraine № 10841 of June 18, 2010 “On faults in professional operation aimed at counteracting illegal migration”, sent to the MIA departments’ heads in oblast’s:

“ Enhanced fight against illegal migration is recognized as one of the priorities in the Ministry of Internal Affairs’ operation for 2010 by the decision of MIA Board of April 23, 2010; nevertheless, the analysis of the MIA field service operations shows decrease in this area.

As compared to the last year, the number of exposed illegal migrants reduced by 8%; the number of persons expelled from the country both voluntarily and forcibly also decreased. The activity aimed at exposing illegal migrants in (list of oblast’s follows) also slackened.

The analysis of illegal migrants expulsion within 5 months’ period shows that the number of illegal migrants drawn out of the country reduced as opposed to the last year... This activity is most poorly organized in (list of oblast’s follows), where not a single foreigner has been compulsory expelled, while 10 persons were expelled for the same period last year. In (list of oblast’s follows) **the number of expelled persons decreased by** (quantitative data, compared to 2009 indicators follow).

All these premises taken into account, the status of opposition to illegal migration should be thoroughly analyzed and measures for improvement in this priority area should be taken.

Let it be known that the heads of the subordinate departments are personally responsible for counteracting illegal migration. The officials, who fail to undertake the required steps, will be held accountable at the meeting summarizing the outcomes of this work”.

The open pressure of MIA leadership on territorial internal affairs’ departments led to the situation when law-enforcement personnel, due to scarcity of illegal migrants from abroad, focused on CIS citizens. To reach the indicators required by the officials and earn merit with the superiors for their efficient operation, the militiamen are actually coerced to apply most rigid, and sometimes unlawful and provocative measures in their dealings with this category of foreign citizens. Minor and inadvertent breach of rules of registration, travel or residence in Ukraine is immediately classified as serious violation of the law which results in compulsory registration of a foreigner as illegal migrant, followed by his/her deportation from the country.

From an interview with A., citizen of Armenia:

“I came to Ukraine in July 2010 to visit my nephew. He has been residing in Kiev for a long period of time and has a residence permit. I intended to stay for a month, then go together [with him] to Crimea for vacation, and then return to Armenia. My nephew is a very sociable man; he has a lot of friends and acquaintances among Armenian diaspora in Kiev. On July 20 we went to visit a friend of his, Sevan, also an Armenian; he has obtained Ukrainian passport by now and has been living in Kiev since 1988, after his demobilization from the Army. He owns a small barbecue (“shashlyk”) restaurant by the highway, and that’s where we went. After the introductions everyone took to making shashlyks for dinner. Sevan as a host started to lay the table, while I stayed near brazier to oversee the shashlyk.

It was then that three militiamen approached me. They were in plain clothes but showed us some documents. My nephew said they were militia IDs. They checked my passport and it was OK. But after that the militiamen asked me whether I had Ukrainian work permit. I answered I didn’t have or need one, as I came here not to work but, on the contrary, to have some rest. Then the militiamen asked why I was working, namely selling shashlyks without work permit. First I assumed they were joking but they took away my passport and told me to get into their car. They totally disregarded our attempts to explain that I was not selling anything but we were just having a friendly party. Militiamen also took away Sevan’s Ukrainian passport and my nephew’s residence permit (allegedly, for the check-up).

After that I was taken to militia station, where they told me that after writing down a protocol they would have me deported from Ukraine as an offender, because the foreigners are not allowed to sell anything in Ukraine without permit. I was given a sheet of paper and ordered to write down that I repent that I sold shashlyks and would not violate the law again. A militiaman explained that if I consent, my punishment would be less severe. I understood there was no point in arguing, things might take even worse turn, so I began to write what I was ordered. However, eventually a major entered the room, returned me my national passport and told me I was free to go. When I left the precinct, my nephew told me that he had contacted people he knew in militia, who had helped us; if it were not for their help I would have been deported from Ukraine”

From the interview with ex-district militia inspector retired in 2010:

“The “illegal migrants” indicator was virtually squeezed from us. The investigation officers practically are not involved in this activity; the whole burden is shouldered by the district inspectors and passport offices. The big fuss starts when an operation, e. g. “Migrant” or “Market” is announced — every day there are meetings and reporting, but what can we report? No one takes into account the fact that we live in a rural area, where foreigners do not have any business whatsoever. If a Russian citizen comes to my rural area to visit family and forgets to register, I neither warn nor punish him. I have to wait for an operation or campaign, and then I’ll have data for the report. For passport office staff it’s easier, as the foreigners come to them on their own. The head of an office would look for any infringement

of passport regime — expired registration date, or unclear stamp — and, hey presto, a foreigner can be classified as illegal”.

Obviously, need to comply with the MIA requirements referring to exposure of illegal migrants in quantities at least not smaller than in the past year, resulted in respective statistical data — the number of illegal migrants detained in Ukraine does not significantly change from one year to another. This statistics, in its turn, is regarded by MIA officials as an indicator of further aggravation of illegal migration situation and increase of the threat to the national security caused by it; hence, the alleged need to use even more severe retaliation measures. Struggle against illegal migration, or, rather, struggle for better migration-related statistics goes on, gaining momentum every year. The most logical question — why the hard battle against illegal migration, started in 1996, in 15 years never brought desired outcomes or led to the decrease in the number of illegal migrants in Ukraine — is totally ignored by MIA officials.

Clearly, with such approach in place, the engine of struggle against illegal migration, once started by the authorities, is not easy to stop. It requires not only the changes in normative/legal acts and reporting system, but also a switch in the minds of personnel. Besides, the public opinion, molded by the mass media promoting stereotyped image of an “enemy alien”, requires from law-enforcement entities regular reporting on their decisive struggle against illegal migration and on the obtained tangible results, and if these results are lacking — due to objective reasons beyond militia control — disseminating in society the feeling of security achieved due to their allegedly efficient operation in this area.

To justify permanent struggle against illegal migration usually two arguments are put forward: 1) Ukraine is threatened by the “ethnic expansion”, which can affect the ethnic structure of the country, dilute Ukrainian national identity and destroy Ukrainian culture as a whole; 2) — the foreigners enhance criminality level and spread contagious diseases not typical for Ukraine.

Thus the instructions, sent to militia departments on “Actions of the internal affairs officials in regards to exposing and registering illegal migrants in the Ukrainian territory”, devised by Dnipropetrovsk State University of Internal Affairs and State Department for Citizenship, Immigration and Registration of Physical Persons under MIA of Ukraine, read as follows:

“The analysis of migration processes of the last decade shows that the problem of illegal migration becomes more and more crucial... In 2008 law-enforcement troops detained about 13.6 thousand illegal migrants, which is 11% more as compared with the same period of the past year. Driven by the ideas of better life migrants from the “third world” countries or from overpopulated regions of our planet are trying to get into Ukraine... In their majority they are uneducated people of low professional qualifications, prostitutes, former criminals or persons trying to avoid legal punishment in their country; many of them carry hazardous contagious diseases.

Migrants presently staying in Ukraine are mainly natives of African and Asian regions; naturally, they have different mentality, culture, religion and perception of the world. Communities and ethnic groups on purpose or inadvertently infringe on traditional life style of the local people, significantly affecting the development of inter-national relations and ethno-political situation as a whole. Besides, outrageous and cynical infringements or even crimes perpetrated by the migrants, effectively discredits them in the eyes of Ukrainian public. Only in **2008... 116 felonies, perpetrated by illegal migrants have been uncovered in Ukraine.**

Hence, struggle against illegal migration in Ukraine becomes more and more serious problem...”

Leaving aside openly xenophobic presentation of facts, we can critically revise two statements offered by the instructions: i. e. “migrants are mainly natives of African and Asian regions” and “migrants perpetrating outrageous and cynical crimes”.

According to the data published by the aforementioned Department for Citizenship, Immigration and Registration of physical Persons under MIA of Ukraine, militiamen expelled from Ukraine 7 thousand 847 illegal migrants over the 6-months period of 2010. The figure is rather impressive.

But who were those expelled? 88% of the general number of the expelled aliens was constituted by CIS citizens, including 40% of Russian citizens (the highest figure) and citizens of Belarus and Moldova. The natives of South-Eastern and Central Asia and Africa constituted barely 6,7% of the expelled migrants. The picture is quite similar once one analyzes the violations of Ukrainian Law committed by the foreigners. 80% of all the foreigners, called to administrative account for the violation of the rules of stay in Ukraine under the article 203 of Administrative Code of Ukraine are CIS citizens, including 35% constituted by citizens of Russia, Belarus and Moldova.

Analyzing the statistics reflecting the origins of infringing aliens one can arrive to logical conclusions: loud statements as regards the threat to Ukrainian ethnos, created by illegal migrants, are unambiguous lies; it turns out, the migrants, in their majority, are not some people with “different mentality, culture, religion and perception of the world”, but represent nations with whom we co-existed very closely since times immemorial. Besides, the quoted statistics clearly testifies to the fact that the main MIA offensive in counteracting illegal migration is aimed against Russians, Belarusians and Moldovans and, by no means, against the nationals of “risky migration” countries.

No characteristics of immigration situation aggravation can be found in Ukraine, e.g. setting up of ethnic blocs and districts; confrontation on the religious grounds, essential for both parties; organization of mass immigrants’ manifestations or protests with the goals of obtaining social benefits. Illegal migrants are practically unnoticeable in the job market, their presence does not affect the state governance system, and cannot be regarded as destabilizing factor in political or economic situation in Ukraine.

The aforementioned instructions/recommendations also claim that over the year 2008 116 crimes were committed by illegal migrants in Ukraine. However, there is no mention of the fact that this figure accounts for only 0,03% of the total number of the registered crimes (384 424) and 0,04% of the total number of crimes under investigation (295 918) for the year 2008. As to the hazard of spreading non-typical contagious diseases — no official data confirming this allegation have ever been published in Ukraine.

Therefore, a question arises, as to whether the scope of the real and not illusory, “mass illegal migration from the third world natives”, invented by militiamen, is in fact that significant for Ukraine? Isn’t its threat to Ukrainian society just a myth? Does the presence of several thousands of Russian citizens with the dubious status of “illegal migrants”, granted to them by authorities, really endanger our national security, national identity or culture?

And the principal argument — are rigid measures, used by militia today under the pretext of counteracting illegal migration, adequate or justified; can they not be classified as the persecution of foreigners? The related statistics is most tell-tale — over the 6 months of 2010 the internal affairs entities have registered 42 789 foreign nationals; over the same period of time 782 foreigners have been fined administratively under the article 203 of Administrative Code of Ukraine. Therefore 74,3% of all foreign citizens who entered Ukraine were penalized administratively on the motion of internal affairs entities. The statistics gives the impression that foreign citizens and stateless persons come to Ukraine not for sightseeing or visiting relatives, but exclusively to commit violations against Ukrainian laws.

No doubt, it’s high time for changes; Ukraine must get back on chosen and declared track of building up an appropriate national regime for the foreigners in the country, ensuring real respect of every person’s freedoms and rights regardless of his/her citizenship or country of origin. These changes, however, are out of question without relevant amendments to the legislation, as the current normative and legal basis used by MIA in counteracting illegal migration, is imperfect and obsolete. In particular, the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons”, the Cabinet of Ministers’ of Ukraine Resolution “On the Rules for Foreigners and Stateless Persons coming to Ukraine, leaving Ukraine or passing in transit through its territory”, as well as some articles of the Administrative Code of Ukraine are subject to severe criticism. The deficiency of certain provisions in these documents not only causes collisions between international and internal normative acts, but also lays foundations for militia to set up a whole system of infringement of foreigners’ rights and freedoms.

First of all, we refer to the principles of punishment for the violation of the rules of stay, committed by foreigners. Under the generally accepted legal norms, the punishment for an infringement should correspond to the seriousness of the violation and social threat represented by it. The current Ukrainian body of normative documents does not provide for the punishment of a foreigner compatible with the infringement, first of all, due to the fact that the law stipulates a number of coercive measures and penalties, which can be imposed on a migrant for one and the same offense.

Thus, a foreign tourist, detained by militia in the process of selling something in a place not assigned for it, first pays the fine established by the court for the violation of the article 160 of the Administrative Code of Ukraine. After that, in accordance with article 31 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons” and clauses 38 and 39 of the “Rules for Foreigners and Stateless Persons coming to Ukraine, leaving Ukraine or passing in transit through its territory”, (approved by the Cabinet of Ministers’ of Ukraine Resolution № 1074-95), duration of his/her stay in Ukraine is shortened for the actions incompatible with the officially declared objective of a visit (i.e. commercial activity). Then, article 32 of the aforementioned law, which stipulates that a foreigner guilty of administrative violation can be deported from the country *after paying the established penalty*, is applied to the same foreigner. So, the deportation is used by militia as an additional penitentiary measure, despite the fact that the migrant already had been penalized by the state for the committed infringement. But that is not the end of it — alongside with deportation order, internal affairs body has a right to ban a foreigner from entering Ukraine for the term from 6 months to 5 years. Consequently, a minor administrative offense, committed by a foreigner, leads to a number of various punishments — a fine, shortening of stay in Ukraine, deportation from the country and prohibition to enter its territory; three negative stamps are put into his/her national passport — shortening the term of stay, deportation, banning from new entry to Ukraine. And even then the foreigner’s tribulations are not over, as the state foresees another penal measure: article 25 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons” and clause 17 of the “Rules for Foreigners and Stateless Persons coming to Ukraine, leaving Ukraine or passing in transit through its territory” underline that foreigner cannot enter Ukraine, if a fact of his/her infringement of the law during former stay is established. This provision obviously violates the principle of unacceptability of double liability for the same offense (i.e. combining two or more types of legal liability for the same offense).

In August 2010 about 24 thousand Hasidic Jews came to Uman’ (Cherkassy obalst’) on a pilgrimage to celebrate a religious holiday. According to information published on the Ukrainian MIA Department site for Cherkassy oblast,’ a common conflict arose between an Israeli pilgrim and local residents. The essence of the conflict was that he “... staying on the 6th floor of the house № 46, Pushkin street, performed hooligan and insulting actions against the house residents, taking their pictures on his cell phone. He ignored the reprimands aimed at stopping his hooliganism.” The staff of the Uman’ city department compiled an administrative protocol in compliance with article 173 of the Administrative Code of Ukraine, and Uman’ circuit court ruled that the Israeli offender had to pay fine in the amount of 51 UAH. Later, however, the internal affairs authority decided to shorten the pilgrim’s stay in Ukraine and documents on his deportation from Ukraine were filed with further prohibition to enter Ukrainian territory. The fact that for the Hassidic Jews pilgrimage to Uman is as important as Easter visit to a church for the Orthodox Christians was simply ignored in this cruel decision incompatible with the committed offense.

The provisions concerning the procedure for shortening the duration of foreigners’ stay in Ukraine, their expulsion and defining the term, for which they cannot re-enter Ukraine, are most unclear and contrary. As of today, the legitimacy of these procedures from the legal standpoint is most dubious.

First of all, the shortening of foreigners’ stay in Ukraine, expulsion and prohibition to re-enter Ukraine as forms of punishment *are not stipulated* either in the Criminal Code of Ukraine or in the Administrative Code of Ukraine. Article 24 of the Administrative Code of Ukraine (types of administrative damages) reads that a foreigner can be expelled from Ukraine “for the commitment of

administrative offense, seriously violating public law and order”; at the same time, however, articles 24 and 25 of the Code do not enumerate *expulsion or cutting down the term of stay in Ukraine among either principal or additional administrative types of punishment*. Besides, the Administrative Code of Ukraine, admitting foreigner’s expulsion from the country for administrative offense committed by him/her, at the same time does not contain a single article, *non-compliance with which is punished by deportation from Ukraine*.

It will be wrong to assume that the Administrative Code of Ukraine envisages no punishment at all for the foreigners staying in the country illegally. Article 203 of the Administrative Code of Ukraine (*violation by foreigners and stateless persons of the rules of stay in Ukraine or transit passage through its territory*) establishes liability of non-Ukrainian citizens for residing in Ukraine without required documents or on false papers, employment without permit, violation of the established order of movement and change of place of residence in Ukraine, and for refusal to leave its territory after the expiration of granted stay. Defining the characteristics of a foreigner’s illegal status, the said article stipulates a specific punishment, i.e. fine. Cutting down the foreigners’ stay in Ukraine or their expulsion are not addressed by article 203 of the Administrative Code of Ukraine at all.

Therefore if we, after all, classify the foreigner’s deportation procedure as an administrative punishment (as this procedure is mentioned in the Administrative Code of Ukraine), then the expulsion of a foreigner after he/she has been called to account for administrative violation under article 203 of the Administrative Code of Ukraine can be regarded as a gross violation of the *article 61 of the Constitution of Ukraine (no one can be held accountable twice for the same offense)*.

Another negative feature of the Ukrainian Law on legal status of the foreigners is the fact that it gives grounds to hold foreigners and stateless persons liable for the infringements they did not commit. Oddly enough, personal and possibly biased opinion of an official as regards any foreigner can become a reason for the restriction of the latter’s rights and freedoms. Article 32 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons”, and clause 47 of the “Rules for Foreigners and Stateless Persons coming to Ukraine, leaving Ukraine or passing in transit through its territory”, authorize militiamen to draw foreigners out from Ukraine by force if “there are solid grounds to **assume** that they will try to evade expulsion”. This language is a complete legal nonsense, as it provides for use of force and penal measures not for the unlawful actions but for the potential intentions of performing such action, *while article 62 of the Constitution of Ukraine reads that conviction cannot be based on assumptions*.

It is also noteworthy that the normative acts in question do not clarify, what grounds can be considered “well justified” in figuring out the foreigner’s future intentions. Other terms and categories are not explained either. And it is this lack of clarity in the language that gives the law enforcement bodies a free hand. For example, interpreting part two of article 32 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons”, the internal affairs entities can decide upon foreigner’s expulsion from Ukraine if his/her actions “*grossly violate the law on the status of foreigners and stateless person, or if it is mandatory for the protection of legal interests of Ukrainian citizens*”. Meanwhile, no legislation supplies a list of these gross violations, so that the degree of grossness is a subjective criterion, defined by a militia official when making a decision. The concept of “legal interest” is totally moot and does not bear any legally substantial characteristic, hence, its random interpretation, not for the immigrant’s benefit in the majority of cases.

Article 32 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons”, stipulates the possibility of detainment and forced expulsion of a foreigner from Ukraine exclusively on the basis of an administrative court ruling. In practical operation the internal affairs entities at the court hearing file a motion for immediate serving of the forced expulsion ruling, and the court usually complies. As a result, the foreigner is denied his/her right to appeal the court ruling.

Another significant factor contributing to the foreigners’ and stateless persons’s rights violations is the practice when disputes between foreigners and state are resolved not by the courts, but by internal affairs agencies. While the authority of passing decision on imposing a fine for the violation of the rules of stay in Ukraine belongs exclusively to the court, (article 203 of the Administrative Code of Ukraine), the decision on his/her expulsion and banning him/her from entering Ukraine

for a given term (up to 5 years), is made by the head of internal affairs department. And it happens despite the fact that deportation, cancellation of registration and prohibition to enter the country are much more serious punishments than fines, causing more significant material and moral damages for the foreigner in question.

Granting militia the authority of deciding upon the type of punishment and coercive measures combined with the constant MIA of Ukraine requirements to enhance the quantitative indicators in counteracting illegal migration lead to disproportionate castigation of the foreigners — for the minor infringement most grave punishment, i.e. deportation from Ukraine, is applied.

From the interview with the citizen of Russia K.:

“I was born in Ukraine and went to Russia in early 80s for the “Northern earnings”. I stayed there after the collapse of the Soviet Union, planning to earn my retirement there. Eventually I brought my family to Russia too. Nevertheless, I visited Ukraine virtually every summer, for my vacation. This spring I came, as usual, and stayed with my wife’s family. I planned to go back to Russia in July, but, because of the turn of events, I had to stay for another month. When I was buying return tickets, militiamen approached me and asked to see my passport. Later I understood that they set up an ambush and noticed me on overhearing that I asked for a ticket to Russian Federation. I gave them my Russian passport for check up and they said I was staying in Ukraine illegally, as the term of my 3-months’ registration, shown on the entry stamp, has expired. I really was not aware of the fact that the stamp they put into my passport at the border control, was valid for three months only, because I planned to leave earlier anyway. I apologized to the guys, drew their attention to the fact that I overstayed my term by 5 days only, explained that I forgot to renew it and asked them to let me go. They, however, took my passport away and brought me to the militia office. There they compiled a protocol, ordered me to pay fine and bring the receipt back. When I returned with the receipt a militia official advised me that a deportation stamp would be put into my passport. I got very anxious and begged them not to do that, as I stayed unregistered only for 5 days and have already paid the fine. This militiaman, however, said it didn’t matter, and he couldn’t undo it, but considering that I was a native Ukrainian, the punishment would be minimal. He calmed me down explaining that the deportation would be just a formality. He asked me about the date on my tickets to Russia, i.e. when I planned to leave and when I intended to return to Ukraine. Then he told me that, as we were compatriots, no one would escort me anywhere, but I was to leave on my own within 30 days and not come back for 6 months. All that would be shown on respective stamps in my Russian passport. The militia official told me I lost nothing, as anyway I would be leaving in a couple of weeks to come back only next summer, when the 6 months of banning would be over. He even prompted me to exchange my passport once in Russia, to spill the ink on the stamps or simply to tell that I lost it. Then no traces of my deportation would remain. I hung around militia office for a couple of hours and received back my passport, in fact with two stamps showing that I was under deportation.

When I told my friend about it, he was very upset, said that it was illegal and I only had to pay fine for such infringement, so he suggested I appeal. I didn’t want to, because it would take a lot of time, and one couldn’t be certain as to the outcomes, while I had to go, and probably the best way would be to follow the militiaman’s advice. But altogether it was most humiliating and upsetting to be treated like that in my own Motherland”.

The internal affairs’ practice of cutting down the allowed term of stay for the foreigners deserves special attention. This measure of punishment is very specific, in a sense that it cannot be applied to the illegal migrants, as these latter are not registered at all, so the term of their stay cannot be shortened. Therefore the cutting down of registration term is not a state instrument of counteracting illegal migration, but the means of punishing foreign nationals and stateless persons legally staying in the territory of Ukraine. Taking into consideration the fact that this category, under article 26 of the Constitution of Ukraine, is guaranteed enhanced protection of their rights and freedoms, the restrictive decisions, passed by militia and not by the court as regards their right to reside in Ukraine, are inexplicable and faulty.

Under article 31 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons”, the granted term of stay in Ukraine should be cut down for law infringement not entailing

administrative or criminal liability. In real life, however, law enforcement entities use this means of punishment just for this type of infringement (administrative offense).

From the interview with the citizen of Azerbaijan M :

“I came to Ukraine on a friend's invitation and was selling watermelons and fruit. My compatriots advised me how to establish myself [in Ukraine] — I obtained the permit for the stall and other papers, but militia would always find fault. Three men, one in uniform, two plain-clothed approached me. They checked my passport for registration, permit to sell watermelons — everything looked OK. Then they said my watermelons were too close to the road and it was the violation of the law. They did not return my passport, but told me to come and fetch it in the evening. When I arrived, the militiamen gave me passport back, showed the stamp in it and explained that I had to return to Azerbaijan by the end of the week. Otherwise I would be detained, deported and forbidden to ever come to Ukraine. I was very upset, because I knew that the stamp in the passport causes all sorts of trouble, once you cross the Ukrainian border. Then a protocol was written, but the fine was small, next to nothing, as compared to the stamp which marred my passport”.

Article 32 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons” and clause 42 of the “Rules for Foreigners and Stateless Persons coming to Ukraine, leaving Ukraine or passing in transit through its territory” authorizes internal affairs bodies to define the time period during which the foreigners are prohibited from entering Ukraine — from 6 months to 5 years. The normative and legal documents, however, provide no criteria for establishing this term, so that it is decided upon by militia official at his discretion, based on his personal attitude to a foreign national, his country of origin etc.

It is noteworthy that the decision prohibiting a foreigner entrance to Ukraine is not a compulsory component of the deportation procedure. Article 32 of the aforementioned law reads: “ On the decision of internal affairs body the deportation of a foreigner or stateless person from Ukraine can be accompanied by the prohibition of entrance to Ukraine for the term up to 5 years”, thus strictly separating two procedures, i.e. expulsion from Ukraine and prohibition of entering the country in the future. Nevertheless, the senior officials in the MIA State Department of Citizenship, Immigration and Registration of Physical Persons, insist on quite an opposite procedure requiring combining each deportation of a foreign national with prohibition of further entry to Ukraine. Thus, out of the general number of illegal migrants expelled from Ukraine in the first 6 months of 2010, i. e. 7 thousand 847 individuals, 7 thousand 735 foreigners (98,6%) were prohibited from ever entering Ukraine again.

Summing up, we can argue that if militia is authorized by the state to combine two different functions, i.e. of penitentiary agency in charge of exposing and detaining infringing foreigners, and of law enforcement body ultimately defining the guilt of the detained and the means of punishment, the abuses of power are unavoidable.

Ukraine's intentions of integrating into the world community should be accompanied by larger openness of the job market for the foreign labor force; nevertheless, the national regime of labor relations does not apply to all the foreigners in Ukraine. Article 26 of the Constitution of Ukraine grants the foreigners legally staying in the country equal rights with Ukrainian citizens, including those related to work and employment. In everyday life, however, that equality applies only to the foreigners with the immigration permit, documents confirming their right to reside in Ukraine permanently and refugees (the asylum seekers are not included into this category). The policy of protecting the local labor force, implemented by our state is unjustifiably rigid and significantly complicates the job search for the foreigners temporarily staying in Ukraine or even makes it completely impossible. As a result, the foreign nationals work illegally.

The Cabinet of Ministers' of Ukraine Resolution № 322 of April 08, 2009 “On the Procedure of issuing, renewing and cancelling the permits to use labor force of foreigners and stateless persons” is unambiguously aimed not at the implementation of constitutional principles of equal rights for foreigners and Ukrainian citizens, but at the enhancing of control over the employers and working migrants.

According to the aforementioned Resolution, a strictly civil issue, i.e. granting a work permit to a foreigner, for unclear reasons, is delegated to the law enforcement entities — militia, Security Service, Border control and Tax inspection. The list of documents, needed for the work permit, has been expended, the fee for the permit has been raised, and employer's liability for his foreign employee has been increased. The job placement procedure is now more complicated, leading to further red-tape. It is inconvenient both for the foreigner and for the legal entity dealing with his/her placement.

Typically for the Ukrainian Law in force, the Resolution envisages the most severe punishment for any violation of labor contract, committed by a foreigner. The use of a foreigner's labor, not stipulated by the contract, leads to the annulment of the contract and expulsion of a foreigner, even if the breach of contract was committed by his employer. The early termination of the labor contract can be another reason for cancellation of work permit and deportation of a foreign worker; the Resolution, however, ignores the fact that the labor relations can be terminated by the employer, either on his initiative or due to his failure to comply with the contract provisions.

Another noteworthy issue is lack of clear regulations concerning foreigners' travel in the territory of Ukraine and change of their place of residence in the country. Article 3 of the Law of Ukraine "On Legal Status of Foreigners and Stateless Persons" defines, that the foreigners temporarily staying in Ukraine, when changing their place of residence, must inform internal affairs bodies, with which their passports are registered; but the procedure for submitting this information, however, is not specified in any normative acts. Lack of regulatory provisions on simple issues, i.e. after what term of absence from the registered address (a day, a week, a month) a foreigner is considered to have moved to another place of residence; should he/she inform the internal affairs bodies orally or in written form on his/her change of address — often is used by militia to hold the foreigners administratively liable.

Analysis of the MIA of Ukraine normative basis gives grounds to contend that as of today militia does not have any substantial, clearly spelled out departmental regulations on dealing with foreigners, and first of all, on counteracting illegal migration. Provisions of some MIA orders and instructions openly violate foreign nationals' rights and freedoms, are contrary to the Constitution of Ukraine, and, oddly enough, to the Law of Ukraine "On Militia".

The MIA of Ukraine Order № 829 of July 31, 2003 "On Approval of the main areas of professional operation of structural units within MIA of Ukraine and respective units of CDMIA, DMIA, internal troops of MIA of Ukraine in counteracting illegal migration" is rather characteristic in this context as the ultimate militia's attempt to regulate the process of counteracting illegal migration.

Ignoring the provisions of the Law of Ukraine "On Militia", the article 11 of which strictly defines the categories of persons, to whom fingerprinting can be applied by militiamen ("persons detained on suspicion of felony or vagrancy, persons in custody, convicted of crime, or under administrative arrest"), the paragraph 15 of the said Order requires that internal affairs expert service fingerprints the foreigners registered by militia as illegal migrants, while IT subdivisions are required to set up and maintain the respective database "Migrant".

Similar violation of the Law of Ukraine "On Militia", i. e. the requirement of fingerprinting of illegal migrants, can be found in the provisions of the General Order of the MIA and State Committee on Security of the State Border of Ukraine №723/435 of July 20, 2002 "On Approval of the Instruction on functioning of registration system in the MIA and state border security bodies in regards individuals detained for the breach of the Laws of Ukraine on state border and on legal status of the foreigners".

The MIA of Ukraine Order № 829 of July 31, 2003 due to the obsolete content of its provisions significantly contributes to the violation of the foreign nationals' rights, committed by militiamen in counteracting illegal migration. As stated above, illegal migration in Ukraine long ago lost its spontaneous nature and turned into a profitable business, well-organized people smuggling, carried out by criminal groups with clear-cut structure, rigid hierarchy, equipped with high-tech machinery, connected to corrupted officials. At the present stage the militia job should be focused at putting an end to these groups' operation, uncovering the organizers of illegal migration channels and illegal

migrants' smugglers. It is feasible only through carrying out the high-quality criminal investigations involving efficient operation of undercover agents and militia's technical resources.

The MIA of Ukraine, however, incessantly stressing the threat represented by illegal migration to Ukrainian society, issued an Order №829-2003, delegating the main functions in organizing and coordinating the branch services' operation in counteracting illegal migration not to MIA of Ukraine Chief Directorate for fighting organized crime or its territorial departments in oblast's, but to the departments of citizenship, immigration and registration of physical persons. It is necessary to understand that the passport offices, few in number and not legally entitled to go in for criminal investigation, cannot organize the functioning of field subdivisions, whose task is to fight organized and economic crimes or CID. This distorted organizational structure of the system of counteracting illegal migration results in a significant number of cases involving the violation of foreigners' rights. Quite understandable incapability of the staff working in the Department of Citizenship, Immigration and Registration of Physical Persons to organize efficient field operations, makes the isolated immigrants from CIS at the Ukrainian markets, main target for militia operations instead of organized criminal gangs.

The lack of clearly defined procedure for expulsion and cutting down the duration of stay should be also mentioned here. Not a single MIA normative document contains respective provisions; consequently, the mechanism for the protection of immigrants' rights and freedoms at the time of their expulsion or shortening of the term of their stay is not defined either. Article 32 of the Law of Ukraine "On Legal Status of Foreigners and Stateless Persons" provides for court appeal, which a foreigner can file if he/she is subjected to the deportation procedure by the internal affairs bodies; this provision, however, as well as many others, remains a mere declaration. The most important issues, — e. g. how the foreigner's rights are explained to him/her when he/she is served the deportation papers, how he/she becomes aware of deportation legal consequences and ways to appeal, whether he/she is offered a professional assistance or can use an interpreter — are not reflected in any of MIA normative acts.

In general, militia normative acts, declaring the possibility of rights' and freedoms' protection for the foreigners, provide no mechanism for this protection. Thus, item 18 of the MIA of Ukraine Order № 1456 of December 1, 2003 "On Approval of Instruction concerning procedure of renewal of registration in Ukraine for foreign nationals and stateless persons" envisages the possibility for a foreigner to appeal the decision of internal affairs body if he/she was denied registration; however, the Order does not explain, how exactly the foreigner becomes aware of this provision.

The respect of rights of refugees and asylum seekers, who traditionally are regarded as the most vulnerable category of migrants, deserves special attention. According to official statistics, published on the web-site of State Committee for Nationalities and Religions (www.scnm.gov.ua) as of January 1.2010 2 thousand 334 refugees from 44 countries have been registered in Ukraine. Analysis of the dynamics in granting refugee status by Ukrainian government shows that, starting 2002 the number of foreigners, who officially have been granted protection in Ukraine remains insignificant — over the years 2002–2009 only 536 foreign nationals were recognized as refugees. 2010 was no different in that sense — only 44 individuals (as of September 1, 2010), which is 2,8 less than in 2009, when 125 foreign nationals obtained the refugee status.

This situation can be explained by a number of factors, including deficiency of respective legal basis in Ukraine, complicated mechanisms of realization of refugees' and asylum seekers' rights, legal illiteracy among bureaucrats, their indifference to aliens' hardships, and also by periodical changes in the political situation within the country. It can be argued that despite the fact that Ukraine joined the UN Convention of 1951 on the Refugees Status and related Protocol of 1967, has its own Law "On Refugees", the rights of the foreign nationals within this category are not properly observed, which fact was stressed by many international and local experts.

It should be mentioned that the UN Convention of 1951 on the Refugees Status and the related Protocol were ratified by Ukraine as late as in 2002, after the country adopted its own legislation regulating the stay of foreigners, including refugees and asylum seekers, in the country. It is very important, however, that Ukraine joined the aforementioned Convention without any reservations;

it means that under the Law of Ukraine “On International Treaties” the legal collisions between the norms of national and international law should be resolved in accordance with the international treaty provisions. In real life it is not always the case. Thus, the issue of employment is one of the most crucial for the refugees and the difficulties in its resolving cannot be explained exclusively by unemployment level in the country, language barrier or lack of documents confirming professional qualifications; they are also predetermined by certain contradictions in the law itself. The Law of Ukraine “On Employment” (article 6, paragraph 2) covers exclusively foreign nationals and stateless persons *permanently residing in Ukraine*. Meanwhile, the refugees, under the Law of Ukraine “On Refugees” are regarded as foreign nationals and stateless persons *staying in Ukraine legally*. This, *prima facie*, minor difference in the phrasing lead to the situation when refugees sometimes are unable of getting assistance in job search through employment centers, acquiring the status of the unemployed or receiving respective benefits.

It is noteworthy that, all these difficulties notwithstanding, the legal protection of foreigners who officially acquired the refugee status in Ukraine and have respective documents to prove it is much better than that of the asylum seekers, who remain one of the most powerless categories of foreigners. It is most significant that under the Law of Ukraine “On Foreigners and Stateless Persons”, refugees are granted equal rights with Ukrainian citizens as regards employment, education and health care, while the asylum seekers are deprived of this preferential treatment. Hence, before acquiring the refugee status (and the procedure might last for many months) the asylum seekers are practically deprived of economic and social rights, and, therefore, obliged to look for means of subsistence, sometimes, in contravention of the law in force.

The decision of Svyatoshyn raion court (city of Kiev), published in mass media, drew public attention to the problem. The ruling was passed on the basis of the materials submitted by Svyatoshyn raion militia department concerning arraignment of asylum seeker from Uzbekistan X., detained by militiamen for unsanctioned commercial activity. In its decision of February 22, 2010, the court ruled that, as regards this foreigner “decision was made on processing the documents needed for granting him the refugee status”, therefore his activity lacked both the felonious actions and *corpus delicti*. This event, however, can be regarded only as an example of humane and non-biased court ruling, as acting legislation of Ukraine does not clearly specify the employment opportunities for the asylum seekers.

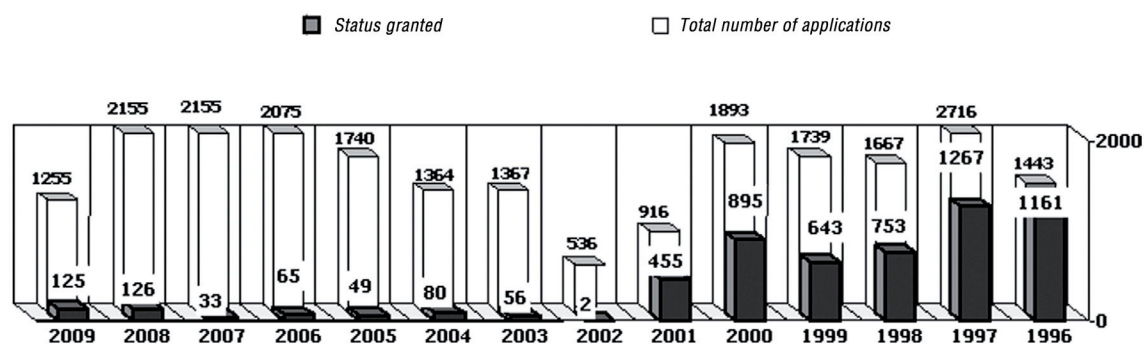
The first paragraph of article 20 of the Law of Ukraine “On Refugees” establishes that “ an individual granted the refugee status has equal rights with Ukrainian citizens as regards freedom of movement, free choice of place of residence, free exit from Ukrainian territory, with the exception of restrictions, stipulated by the law”. In practice, however, due — once again — to deficiency of relevant Ukrainian legislation, the realization of these rights is hindered by complicated bureaucratic procedure. In Ukraine the procedure of change of place of residence by an individual is regulated by the Law “On Freedom of movement and free choice of place of residence”, equally compulsory for Ukrainian citizens and for the foreigners legally staying in the country. Keeping in mind that the refugees fall under this category of foreigners, they should be able to change their place of residence quite easily. However, article 6 of the said Law stipulates that every individual, having changed the place of residence, must register at the new address within 10 days. He/she must submit an application in writing, *his/her passport (or its equivalent)* and a document confirming removal from the register. This requirement completely ignores the fact that the refugees have no passport or permit of residence in Ukraine and are, therefore, unable of complying with registration procedure. As a result, a refugee’s transfer to another place of residence in a different oblast’ is possible only by written agreement between the territorial branches of the State Committee on Nationalities and Religions and the MIA of Ukraine Department of Citizenship, Immigration and Registration of the Physical Persons at the places of actual and intended residence. This procedure takes long, and, besides, a refugee, as opposed to Ukrainian citizens, has to visit the bureaucrats of the aforementioned agencies many a time, write a lot of applications etc. Meanwhile, this problem can be easily resolved, if a foreigner in possession of a refugee’s certificate gets a temporary residence permit from a territorial branch of the MIA of Ukraine Department of Citizenship, Im-

migration and Registration of the Physical Persons. If appropriate amendments are introduced into the legislation, the registration procedure, as well as employment and health care for the refugees will be significantly simplified.

As to the asylum seekers, they practically cannot change their place of residence. Having submitted their request for refugee status to a territorial branch of the State Committee on Nationalities and Religions, and having registered respective certificate in an internal affairs office, they have to wait for the final decision on their application, which is to be passed by the same territorial branch. This situation can be classified as the violation of article 33 of the Constitution of Ukraine, which guarantees the freedom of movement and free choice of place of residence for anyone staying in Ukrainian territory legally.

Analysis of statistic data provided by the State Committee on Nationalities and Religions shows that starting 2002 the number of positive responses to the foreigners' requests for refugee status still constitutes an insignificant portion (%) in the total number of applications.

Dynamics of granting refugee status as compared to the total number of applications submitted between 1996 and 2009



In 2010 the situation did not change for the better — as of September 1, 2010, the refugee status was granted only to 5.7% of all the applicants. This statistics unambiguously proves that 1) the criteria for obtaining refugee status in Ukraine are very rigid, and 2) the legal competence of the asylum seekers must be enhanced with the help of the government. It is also noteworthy that over the years 2009-2010 the situation was aggravated by “governmental wars”, waged by the politicians around the setting up of the State Migration Service. It started, and then stopped its operation, and, finally by Cabinet of Minister’s Resolution № 559 of July 7, 2010, it was abolished completely. As a result, over the years 2009-2010 considerable number of the asylum seekers could not receive the refugee’s certificate or approach the court to appeal a negative decision.

As only an insignificant number of individuals applying for refugee status are legalized, another serious question arises, i.e what happens to foreigners seeking protection in Ukraine but not entitled to the refugee status by whatever reason stipulated by the law. The official position, in particular, that of internal affairs agencies, is rigid and implacable — these foreign nationals shall get back to their former country of residence, or, at least, just leave Ukraine. However this attitude is not only inhuman, but also unlawful, as Ukraine, joining the UN Convention against torture and other types of cruel, unusual and humiliating treatment and punishment, in accordance with article 3 of the Convention, has undertaken the obligation not to return any person to his/her country of residence if he/she faces the threat of torture in that country.

Therefore Ukraine stands in urgent need of legislative support for additional protection of the aliens, who, on the one hand, are not entitled to the refugee status in our country, and, on the other, cannot be sent back to their country of origin under provisions of the Convention against torture. This problem could be resolved either by adopting a relevant normative-legal act (similar to

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Cabinet of Ministers' of Ukraine Resolution № 674 of June 26, 1996 "On Measures of assistance to Individuals who had to leave the places of their permanent residence in the Autonomous Republic of Abkhazia (Georgia) and arrived in Ukraine"), or by amending the Law of Ukraine "On Refugees".

The fact that over 2010 the law enforcement bodies despite all the warnings, made by human rights activists concerning the illegality of their actions, persisted in the open persecution of the asylum seekers. Unfortunately, the suspicious and openly negative attitude of militiamen towards immigrants is still in place. They fail to understand the plain truth i.e. for a certain part of the foreigners in Ukraine flight from their home is not just a whim, but an attempt to save their lives and freedom. Due to the lack of legal education they still regard asylum seekers exclusively as aliens entering Ukraine for unclear reasons, thus equalizing the notions of "illegal migrant" and "asylum seeker". Taking into account almost unlimited authority of the Ukrainian law enforcement entities in deciding the future fate of a foreigner, this biased attitude of militia staff certainly leads to the violation of rights and freedoms of asylum seekers.

According to "Ukrainian Council for Refugees" and NGO "Social Action" ("No boundaries" project), in 2010 some cases of detaining Uzbek citizens who came to Ukraine to seek asylum as they were persecuted in their country of origin, by militia were registered. Thus, in June–July 2010 the militiamen in Kiev oblast' detained the asylum seekers from the Republic of Uzbekistan Umid Khamroyev, Kosim Dadakhanov, Utkir Akramov and Shodilbek Soibzhonov. The cause for detention was an action brought against them by Uzbek officials, with the goal of extraditing them to Uzbekistan. It is indicative that all the said asylum seekers were under official retrieval on charges of the Uzbekistan Criminal Code, usually brought against the members of political opposition ("encroachment on constitutional system of the Republic of Uzbekistan", "devising and disseminating materials containing threats to the public order and social system"). These asylum seekers never concealed the fact of their persecution by the Uzbek state– that's why they came to Ukraine for protection. On July 26, 2010 the European Court prohibited Ukraine from extraditing the four detainees to Uzbekistan; only this intervention gives hope that Ukraine finally will pass appropriate decision on Uzbek asylum seekers petitions, and before the decision is made they would not be returned to the Republic of Uzbekistan.

Mass tortures of people in Uzbekistan are common knowledge, as well as the fact the European Court on Human Rights many a time classified the extradition of asylum seekers to Uzbekistan as the violation of article 3 ("Prohibition of tortures") of the European Convention on Protection of Human Rights and Fundamental Freedoms. This fact, doubtless, is known to militia too, as in 2009 human rights' organizations carried out a number of manifestations against extradition of Uzbek asylum seekers to that country and conducted an awareness-raising campaign among law enforcement entities revealing unacceptability of their actions. However, till present day, negotiations with Uzbek officials concerning retrieval of their opponents, remains priority for the Ukrainian militia, which is not interested in consistent adherence to the international legal norms.

The MIA of Ukraine senior officials and Department of Citizenship, Immigration and Registration of the Physical Persons do not pay due attention to the training of militia personnel on treatment of refugees and asylum seekers; respective normative acts or instructions are neither adopted nor sent to the territorial branches by MIA. Consequently, the low level of legal culture among internal affairs personnel in many cases becomes the cause of unjustified detentions of the forced immigrants, including those who have valid permits of stay in Ukraine, stipulated by the law, but unfamiliar to and, therefore, unacknowledged by militia.

According to Kharkiv oblast' charity foundation "Social Assistance Service" which is an executive partner of UNHCR for Sumy and Kharkiv oblast's, on June 16, 2010 Moskovsky district militia inspector (Kharkiv Department of the MIA of Ukraine) detained in Kharkiv oblast' an underage citizen of Cote-d'Ivoire Soumahoro Mouloukk Souleimane. At the time of detention the alien had on him the appeal to the administrative court, stamped as filed by the court. Soumahoro Mouloukk Souleimane intended to receive the certificate confirming his filing the petition with the Department of

Migration Service for Kharkiv oblast' on June 17, 2010 (i. e. next working day) and have it registered the same day in Kharkiv oblast' office of the Department of Citizenship, Immigration and Registration of the Physical Persons.

For the whole day the underage alien was kept in the district militia office, despite the fact that NGO and Charity Foundation representatives who learned about the detention more than once called Moskovsky district office explaining the reasons for lack of identifying documents to the militiaman on duty.

While staying in militia office, Soumahoro Mouloukk Souleimane was coerced into signing the protocol on administrative infringement the contents of which remained obscure to the foreigner, as he spoke practically no Ukrainian or Russian; then he was ordered to pay fine, in violation of article 24-1 of Administrative Code of Ukraine, which does not make provisions for such damages to be paid by an underage person. Besides, no interpreter to enable foreigner's free communication was present at the writing of the protocol; Soumahoro Mouloukk Souleimane got no copies of the documents he was coerced to sign.

The cases of unjustified detention of asylum seekers are rather frequent. Kharkiv oblast' charity foundation "Social Assistance Service" registered 18 detentions of the aliens within this category just over the period January through August of 2010, in the city of Kharkiv only. The foreigners subsequently were taken to the militia departments, despite the fact that they had permits allowing them to stay in the country as asylum seekers until the final decision on granting them refugee status is passed.

CONCLUSIONS AND RECOMMENDATIONS

The Ukrainian Government, ignoring the officially declared national legal regime for the foreigners staying in the country, in real life is constantly implementing restrictive and coercive measures to the migrants, practically neglecting other, more human and not less efficient levers of controlling the migration situation — the immigration amnesty, reasonable and mutually beneficial state policy of finding employment for the foreigners, measures aimed at alleviating their adjustment in the Ukrainian community etc.

The Ministry of Internal Affairs is a vivid example of this biased policy. The real position and public rhetoric of its leaders on the issues of dealing with foreign nationals are dramatically opposite. In 2010 the militia department did not make a single step forward in securing better protection of immigrants' rights and freedoms, in spite of the fact that this agency should be the instigator of changes in the acting legislation, to make it more instrumental and humane. Militia retains its exclusively penitentiary role in the relations model "Militia-immigrant". It ignores completely its consulting/assisting function in dealings with foreigners, but is most willing to perform the functions of coercion, often justifying their cruelty by alleged or fabricated concepts of security threat, caused by illegal migration. To all intents and purposes MIA counteracts this migration only perfunctorily and ineffectively.

The Militia department must cardinaly revise the principles of its internal "migration policy" and promote the changes at the national level. The major prerequisites for that are as follows:

— cancellation of the MIA of Ukraine Order №829 of July 31, 2003 " On Approval of the main areas of professional operation of structural units within MIA of Ukraine and respective units of CDMIA, DMIA, internal troops of MIA of Ukraine in counteracting illegal migration" as obsolete and inefficient. Devising new departmental normative-legal document to reorient militia operation from monitoring the stages of aliens' stay in Ukraine to counteracting illegal transfer of foreigners to the Western Europe through Ukrainian territory. The main role in developing and implementing measures for counteracting illegal migration within MIA structure should be played not by Department of Citizenship, Immigration and Registration of the Physical Persons, but by Chief Department of Fighting Organized Crime;

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- authorizing Department of Citizenship, Immigration and Registration of the Physical Persons to provide assistance and counseling to the foreigners staying in Ukraine in addition to controlling them;
- developing and adopting new departmental instructions with detailed procedure and grounds for foreigners' expulsion from Ukraine, with a special section containing provisions for due protection of foreigners' rights and freedoms;
- developing and approving a state normative/legal document guaranteeing respect of the asylum seekers' rights in situations when they are unable of obtaining the refugee status legally; establishing procedure for their temporary legalization in Ukraine;
- preparing guidelines-recommendations for establishing legality of asylum seekers' presence in Ukraine, with mandatory addendum containing exemplary documents — permits allowing foreigners to reside in Ukraine; these recommendations shall be distributed among territorial militia offices to be used in practical operation;
- entrusting the MIA of Ukraine lawyers with the task of legal assessment of Ukrainian Laws, Administrative Code of Ukraine, other normative and legal acts regulating aliens' stay in Ukraine, as to their compliance with international law provisions, with further drafting of respective amendments to the legislation, first of all, to the Administrative Code of Ukraine and to the Law of Ukraine "On Legal Status of Foreigners and Stateless Persons".

XXIII. WOMEN'S RIGHTS AND GENDER EQUALITY¹

The gender issue, either as a component of humanitarian and social policy or as one of the aspects of human rights agenda, has never been a priority for the Ukrainian authorities (even at declaratory level). Moreover, it can be characterized as a marginal trend. The concept of gender equality, for one, has never been mentioned either among the policy implementation principles or among the goals of the "Ukrainian breakthrough"². President Yanukovich in his election promises also failed to mention gender equality as a cardinal value of a democratic society.³ Nevertheless, the developments of 2010 show that the gender policy is becoming a real policy, while the violation of women's rights and gender-based discrimination remain a part of everyday life.

The Ukrainian legislation has practically no provisions addressing discrimination of women; however, the equal rights for men and women, declared by the Constitution, do not guarantee real equality. Current practice demonstrates that the gender parity, declared by the Fundamental Law of Ukraine, is often neglected in real life, although predominantly in the latent form.

The demographic situation in Ukraine is deteriorating due to migration processes and shorter life expectancy among men as compared to women.

The difference in men's and women's wages, as another manifestation of gender inequality, remains a serious problem. The earnings of women working in the public sector of economy are 30% lower than men's earnings. According to the State Statistics Committee of Ukraine the average salary for women in January-September of 2007 amounted to 1091 UAH, which constitutes 72,2% of the salaries for men. The working day of a woman is longer than that of a man, because, alongside with going to work, women have to do the house chores. Women are the first to be fired, and, consequently, to lose the means of subsistence for themselves and their families.

We should admit that discrimination in disguised form is deeply rooted in the social consciousness and conservative gender stereotypes, i.e. the role and place of women are inalienably linked with the family, while men's role and place are associated with public activity. However, the lack of women's participation in decision-making processes is contrary to the democratic development principles and manifests once again gender inequality in Ukraine.

By number of women in the parliament Ukraine ranks 110th among 188 countries, while the education level of Ukrainian women is not lower than that of men. Family violence and human trafficking also are gender-biased.

There is not a single woman in the Cabinet of Ministers of Ukraine (2010).

Difference in men's and women's remuneration for the same type of work constitutes over 30% for the benefit of men.

The classifieds offering jobs abound in the examples of sexism (gender-based discrimination) and ageism (age-related discrimination). They contain illegal requirements as to the *age, sex and even appearance of the potential employee*.

¹ Prepared by K.Levchenko, co-authored by M. Yevsiukova and M. Legenka, International Women's Human Rights Center "La Strada Ukraine"

² (<http://vybory.org/articles/821.html>).

³ (<http://vsiyapravda.com/elections/cpr4334>)

Job refusals, based on family status and age of a woman, are common practice. Specifically, *single women, women with young children and women over 40* fall under the most discriminated category. Educational background, experience or professional qualifications are simply disregarded in these situations. Usually, girls show better academic results than boys in higher educational establishments; nevertheless, the senior managerial positions are given for the most part to men.

Report on Ukraine's fulfillment of the Millennium Development Goals (2010) enumerates main factors hindering the elimination of gender inequality in the country. The experts believe that the major obstacles include incomplete process of gender transformations, need for the further development of gender-related statistics which should address in a overarching and comprehensive manner the issues of gender developments in various areas of social life, existing gender stereotypes in the community, as well as the underdeveloped social and communal infrastructure.

Among the widely spread forms of discrimination women are facing at their working place is a refusal to grant maternity leave, child-care leave, payment of benefits stipulated by the state, restriction of professional/career growth, sexual harassment, family violence.

Women have to cope with never-diminishing double burden of work both in public area and at home. The house chores are neither considered real work, nor paid for. Women, compelled to stay at home with small children due to the lack of pre-school institutions and scanty child benefits, lose their professional skills, competitiveness at the job market, experience lack of knowledge or understanding of their labor-related and social rights.

The situation can be rectified through implementation of appropriate gender policy including establishing of gender equality; elimination of gender-based discrimination; affirmative action; ensuring equal participation of men and women in the socially significant decision-making; equal opportunities for men and women in combining professional career and family obligations; family support, promotion of responsible parenthood; raising Ukrainians' awareness and disseminating knowledge in the area of gender equality; protection from the gender — discriminatory information.

How can gender policy and gender mainstreaming become instrumental? They can serve as tools for resolving existing social problems, alleviating social tensions in the society by paying due attention to the aspirations and needs of specific social and demographic categories of population and by considering the latter's interests in the operation of public structures, local self-governments, businesses etc.

However, the required instruments and mechanisms, which have never been in place in Ukraine in the past, will hardly appear in the foreseeable future. The lack of (at the very least!) a declaration of intentions in this area can be regarded as total neglect of these instruments of mobilizing available social potential. We mean gender-disaggregated statistics at all levels and in all areas, gender-aware budgeting, gender-related legal expertise of the legislation in force and draft laws and normative acts, etc.

Ministry of Ukraine for Family, Youth and Sport is authorized to consider complaints and provide recommendations. To that end a special expert board was set up in 2009 by the Decree of the Minister for Family, Youth and Sport. Until now the board has not passed a single decision. The experts, therefore, argue that a board should be independent from any power body.

The coordination of this activity, insufficient in the past, remains poor at present; same applies to mobilization of civic society members for setting up and implementing gender policy.

Lack of high quality assistance in children care and house chores remains main obstacle for the professional advancement of women.

Persistent ideas of traditional gender roles distribution in public and private life, operation in the job market and in home-making, "masculine" and "feminine" professions and types of work, are rather characteristic for Ukrainian society. Insufficient involvement of men in performing their familial and parental duties makes it more complicated for women to combine professional operation with house chores, career growth, participation in political life and socially significant decision-making. The men are expected to be bread-winners; social unacceptability of those who don't meet the expectations contributes to their high-risk behaviors. Traditional gender-based distribution

of social roles is still enhanced in the school textbooks and curricula, reinforced by the practice of misrepresenting women in mass media and publicity, in the country leaders' discourse.

So, it follows from the above discussion that gender development in Ukraine requires providing equal opportunities for men and women in social and political life and governance, overcoming the gap in their income levels, setting up mechanisms for protection against discrimination or sexual harassment, fighting gender stereotyping, protection from violence etc.

Serious changes in political guidelines brought to life by presidential elections of 2010 give grounds for identifying two periods in the gender-related developments.

2009 — February 2010. Introduction of minor changes into the legislation after passing the Law "On ensuring equal rights and opportunities for women and men". The Decree of the Ministry of Ukraine for Family, Youth and Sport № 4374 of December 16, 2009 "On Expert board on inadmissibility of any forms of gender-based discrimination". Period of active collaboration between national, international and non-governmental organizations. Communication with UN Committee on the elimination of discrimination against women. Ukrainian support of the 6th and 7th Joint Report on adhering to UN Convention on the elimination of all forms of discrimination against women. Recommendations of the UN Committee to be addressed in the next report (planned date — 2014). The majority of Verkhovna Rada voted against gender quotas. Beijing 15.

February 2010 — present time. Changes in the national political guidelines. Gender-discriminatory discourse in the public speeches of the country leaders. Concern of the international community. Start-up of the new program for promotion of gender equality issues in the Ukrainian society. First public steps of Ukrainian government aimed at further deterioration of women's situation in Ukraine, i.e. raising retirement age, increasing social security eligibility by 10 years (from 20 to 30). Devising national report on Ukraine's fulfillment of the Millennium Development Goals and presenting it to UN. The Decree of the Ministry of Ukraine for Family, Youth and Sport № 306 of September 6, 2010 "On Expert board for the consideration of gender-based discrimination complaints" is practically identical with decree of 2009, without the latter's cancellation.

The State Program for economic and social development of Ukraine for 2010 (the anti-crisis program) contains, among other tasks of social policy aimed at family support, the provision of "ensuring equal rights and opportunities for men and women in all the areas of public life, resistance to gender-based violence and human trafficking" (p. 19).

Let us focus on anticipated program implementation results: decrease in the family violence, in the instances of gender-based discrimination, in the number of human trafficking victims (p. 21). Setting up these basically positive goals in practice will lead to falsification and concealment of data concerning gender-based discrimination, infringements related to family violence and human trafficking crimes. This conclusion follows from the fact that all these negative phenomena are latently present in the Ukrainian society of today, so that the increase in statistical data at least partly reflects their "coming out of the closet". Besides, the statistics reflect only a small portion of the aforementioned violations and crimes, that's why the increase or decrease in the figures is not an ultimate indicator of the respective increase or decrease in the actual number of the infringements. The figures can be affected by various factors. For example, gender-based discrimination has been detected only in isolated instances, so theoretically this figure has no room for decrease. Therefore, incorrectly chosen indicators can adversely affect the efficiency of various governmental structures in identifying and registering these facts.

Meanwhile, the gender factors decisive for the functioning of certain structures are neither mentioned nor registered. Thus, the analysis of social factors contributing to the deterioration of the situation in the country, points at demographic crisis as one of factors. However, one of its important characteristics, i.e. gender misbalance in men/women ratio, is not even mentioned.⁴ The same is true of significant gender differences in men's and women's salaries. (p. 8).

⁴ "Demographic crisis (the threat of work-force deficit, especially among the qualified workers; increase in demographic load on working population and socially-targeted budget lines due to the ageing of population and hampering of scientific and technical progress" (p. 8);

The program of economic and social development envisages cutting down of the state special programs to be funded from the state budget. Only those, whose implementation helps in resolving most crucial problems will remain in place in 2010 (all the other special state programs will be financed predominantly from other sources (local budgets, customers' funds etc) — Ministry of Economics, Ministry of Finance, other central governing bodies (p. 10). There are serious concerns that the new program of promoting gender equality, which is to be developed by the state, will never make it to this list.

In 2000 Ukraine became a party to the Millennium Development Goals — a document devised by the UN and approved by 189 countries of the world. It set up the principles enabling world community to achieve by 2015 results in the areas where irregularity of global human development is manifested most of all. The issue of gender equality is spelled out as one of the eight main goals. For Ukraine achieving this goal means ensuring gender correlation indicator at not less than 30% representation of either sex in representative governing bodies and reducing by half the difference in men's and women's earnings.

1. 2009–2010 DEVELOPMENTS

1. Setting up Expert board for consideration of gender-based discrimination complaints.
2. Devising and presentation of Ukrainian report on the implementation of UN Convention on the elimination of all forms of discrimination against women in the respective UN Committee on January 2010.
3. The rejection by parliamentary majority of the quotas in electing people's deputies. BYUT deputies M. Tomenko and O. Bondarenko as early as in 2007 submitted the draft law № 1232 on ensuring the equal rights and opportunities for men and women in the election process. It envisaged the inclusion of both genders' candidates into each electoral roll of five. On the basis of the parliamentary vote on February 9, 2010, this project was rejected by the majority of votes and withdrawn. (http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=31114).
4. Advent of a significant number of women — deputies of the Head in Presidential Administration, i. e. Anna Herman, Olena Lukash, Iryna Akimova.
5. Decrease in women representation in the Verkhovna Rada of Ukraine due to the Party of Regions' members' rotation and arrival of 22 new deputies with not a single woman among them. Presently there are 34 women there, constituting 7,5% of the Verkhovna Rada.
6. Exclusively male composition of Ukrainian government. The persistence of "pyramidal" tendency in women representation in power structures — the higher the level, the lesser the participation.
7. Patriarchal declarations of the state leaders — the President and the Prime Minister. For example, the President of Ukraine on May 27, 2010, in Lviv stated that "the economy is a very sensitive woman, which is not to be approached bluntly, without consideration". (<http://www.unian.net/ukr/news/news-378794.html>) It demonstrates not only the lack of understanding of the very essence of gender equality as a cardinal European value, of the principle of adherence to human rights, but also the lack of competent or highly-qualified specialists on these issues both in the Government and among the President's advisors. It's been long time since such open and public disregard for principles of democracy and civilized development have been articulated by a Ukrainian leader. Besides, while still a Presidential candidate, he sent women directly back to their kitchens (<http://www.unian.net/rus/news/news-358158.html>), while Prime Minister on March 19, 2010, stated that "reforms are not for women to address", thus restricting women's rights in a state governance. (<http://www.unian.net/ukr/news/news-368344.html>).

8. Establishment of the position of the Verkhovna Rada of Ukraine Ombudsman's representative on the issues of non-discrimination can be regarded as positive factor. It shows the attention of the Ombudsman to the gender issues which are to constitute an inalienable part of her operation under article 18 of the Law of Ukraine "On the Human Rights Ombudsman of the Verkhovna Rada of Ukraine" and article 9 of the Law of Ukraine "On ensuring equal rights for women and men". On the other hand, when the public demanded the explanation of their rights in relation to the discriminatory statements, made by M. Azarov, no clarification has been offered, even after the 30-days period stipulated by the law. No active public steps in this direction have been made so far by the Human Rights Ombudsman either.
9. On April 27, 2010, answering the questions, posed by the members of the European Council Parliamentary Assembly, V. Yanukovych declared that he was ready to take the steps, needed to raise the gender policy to the new high level in the nearest future. For the first time a high-ranking official was asked the questions concerning women's rights and gender equality. The members of the European Council Parliamentary Assembly expressed their amazement at the backward attitude of the Ukrainian leaders towards the issue of women's rights and gender equality; that's why they were asking the President these questions in the course of his presentation.
10. The first law-suit containing the gender-based discrimination complaint was filed in relation to the Prime-Minister's discourse. Qualifying M. Azarov's statement as discriminatory presented no difficulty to the experts and foreign politicians. The press service of the Cabinet of Ministers, however, (<http://novynar.com.ua/politics/108872>) as well as the Ministry of Justice, refuse to recognize the fact of discrimination in the statement. Pechersk district court in Kiev ruled that in his statement M. Azarov exercised his right to freedom of speech and personal opinion. The appeal was filed. The case is continued.
Public discussion around the statement became a test for the government, whose duty is to protect human rights, including the right to non-discrimination. It demonstrated total impotence of protective mechanisms, stipulated by the law of Ukraine "On ensuring equal rights and opportunities for women and men", in cases of gender discrimination. Thus, the Ministry of Ukraine for Family, Youth and Sport is a government body authorized to address complaints against discrimination and to provide its recommendations. A special expert board to consider these complaints was set up in 2009 by the Decree of the Minister for Family, Youth and Sport. However, when a complaint was filed against the direct superior of the Ministry, i.e. Prime-Minister of Ukraine, the mechanism for dealing with complaints demonstrated its total incapability. The response, given by the Ministry of Ukraine for Family, Youth and Sport to the female complainants, testifies to the fact. Allegedly, the discriminatory statement was a manifestation of affirmative actions, formulated in article 6 of the Law of Ukraine "On ensuring equal rights and opportunities for women and men". This case once again confirmed the accuracy of experts' recommendations on necessity for setting up and functioning of an independent board to address similar complaints.
11. Notorious case on dismissal based on sexual harassment allegations in Kharkiv. http://ukr.mediaport.ua/news/criminal/20073/Суди_через_звільнення_та_сексуальні_домогання_Харків'янка_виграла_першу_справу.
12. Ukrainian leaders' declarations concerning the opportunities and quick results in gender transformations in the country. Among others, declarations on gender issues, made at the first meeting of the newly elected Ministry of Ukraine for Family, Youth and Sport, on June 11, 2010.
More examples of such declarations can be found in Prime-Minister's Azarov speeches; e.g. after meeting the leaders of Republic of Finland he stated that he has been convinced that women are able to work in the government and will work there in the nearest future. These statements were not supported by any practical steps.

- Meanwhile, declarations on non-feasibility of achieving Millennium Goals concerning the reduction of a gap in men's and women's earnings and increase of women's representation in the higher echelons of power.
13. Setting up the position of Prime-Minister's public advisor on gender issues in early June 2010. The Ukrainian coordinator of UNDP program "Equal rights and opportunities for men and women" L.Kobelyanska was elected to that office.
 14. First, declarations on raising the retirement age of women to that of men without well-grounded clarifications as to the importance of that measure, including the increase in pensions for women, and, later, their legal reinforcement. The economic reforming program envisages the equalization of retirement age for men and women: it shall be phased in adding 0.5 a year for 10 years' period. (<http://www.pravda.com.ua/news/2010/06/2/237149/>). Public at large perceived these plans, as well as the plans for enhancing retirement age for law-enforcement staff and servicemen, most negatively, as no scientific or informational clarifications were provided.
 15. Setting up a working group to develop new gender equality program under the Ministry of Ukraine for Family, Youth and Sport Sports (June 2010). Devising the program concept. The program development continues till October. The major part, if not all the proposals from non-governmental organizations and independent experts, have been taken into account in the draft program.
 16. Further dissemination of gender stereotypes in advertising and mass media. The authorities cannot be held directly accountable for the promotion of gender-discriminatory images in current advertising; nevertheless, this is the result of total inertia and lack of reaction on behalf of the power, either on its own initiative or in response to the public appeals. Significant increase in gender-discriminatory advertising materials in Ukrainian streets and highways is another negative phenomenon. In June 2010 a regular competition for gender anti-award "Poison of the season" was carried out. This was the third time the public organization "Information and consulting women's center" organized the event. The sampled ads were judged at the competition and then submitted for evaluation to the Expert board for addressing gender-based discrimination complaints. As of mid-October no decision was passed.
 17. Expert evaluation and personal observations lead us to the conclusions that low level of gender culture and lack of required knowledge among public servants, even in the departments responsible for the implementation of gender policies in the country, make it impossible for Ukraine to achieve any success in the protection of women's rights and promotion of gender equality.
 18. The country lacks specialized research on women's rights and gender equality, especially those concerning most vulnerable groups of women who suffer various types of discrimination. Namely, these are Roma women as well as women from other ethnic minorities living in rural areas; female migrants and refugees, especially from the countries with language and culture substantially different from Ukrainian. The members of UN Committee on the elimination of discrimination against women have drawn attention to these problems. Nevertheless, draft program on gender equality promotion, ignoring the experts' recommendations, does not address them at all.
 19. Lack of state gender integration policy; the whole operation in this area is limited to the activities under the Ministry of Ukraine for Family, Youth and Sport.
 20. Discourse openly targeted against women's rights and gender equality, roused resentment among gender community and women's organizations. Gender museum (Kharkiv) site was launched and now serves as a main source of gender-related materials in Ukraine. However, lack of resources still presents a serious hindrance for Ukraine. No doubt, publications on popular sites, the beginning of a discussion and coverage of the topic in question by media can be regarded as positive developments —as the saying goes, "each cloud has a silver lining". Forums and blogs are becoming more active. At the same time, though, there is

- certain reluctance in open coverage of these issues in mass media, which once again leads one to believe that all socially significant topics and processes are closely intertwined.
21. Weakness (or virtual absence) of institutional mechanisms for gender equality implementation. Lack of specialists at raion and local levels (one person in charge of all the related issues), priority importance of programs for sports and young adults' development at the oblast' level give grounds to conclude that governance vertical in gender area is non-existent. The new government so far has not demonstrated any will to re-create, re-animate or reinforce it. Inefficient operation of the Ministry of Ukraine for Family, Youth and Sport as a structure authorized to address these issues, gives rise to a question as to the expediency of its existence at all.
 22. At the same time, we observe the collapse of an institutional mechanism for the promotion of gender equality, manifested by liquidation of the Department for the monitoring of human rights' observance under the Ministry of Internal Affairs of Ukraine (<http://umdpl.info/index.php?id=1269125507>) and absence of advisor on human rights and gender issues, although the order establishing this position is still in force (order № 1221 of 10.06.2004, <http://umdpl.info/index.php?id=1238049940>).
 23. The new government received the recommendations, issued by the UN Committee on the elimination of discrimination against women, expressing concern with regards to low level of women's representation in the higher echelons of power, prevalence of gender stereotypes in the society, violence against women and human trafficking. (<http://umdpl.info/index.php?id=1275745690>). Specifically, "The Committee recalls the State party's obligation to systematically and continuously implement all the provisions of the Convention, and views the concerns and recommendations identified in the present concluding observations as requiring the State party's priority attention from this date until the submission of the next periodic report. Consequently, the Committee urges the State party to focus on those areas in its implementation activities and to report on action taken and results achieved in its next periodic report. It calls upon the State party to submit the present concluding observations to all relevant ministries, to the Parliament (Verkhovna Rada) and to the judiciary in order to ensure their full implementation".
So far these recommendations haven't been made public by the Ministry; measures for their implementation have not been discussed. Experts participating in the development of the new draft program for the gender equality implementation in the Ukrainian society insist that the program should take these recommendations into account. The reports on implementation of two recommendations i.e. counteraction to human trafficking and enhancing the role of women in decision-making processes (respectively, articles 31 and 33 of the final recommendations), should be submitted as early as 2012.
 24. Election of the judge of the European Court of Human Rights. The debates, which started in Ukraine on gender issues, insufficient representation of women in power structures and neglect of this issue by Ukrainian government, exceeded the bounds of the country and, to a certain extent, affected the election of European Court Judge of Human Rights by Parliamentary Assembly of the Council of Europe on April 27, 2010.: Hanna Yudkivska, supported by human rights organizations in Ukraine and outstanding human rights activists from other countries, who sent their letters to the Council of Europe, was elected from Ukraine. It is noteworthy that her competitor was a very strong politician, people's deputy of Ukraine from the Party of Regions, former Minister of Justice Serhiy Holovaty.
 25. Passing of the order № 155 of the Cabinet of Ministers of Ukraine "On approving recommendations on the appearance (dress-code) of the Secretariat of the Cabinet of Ministers' of Ukraine staff" (<http://www.kmu.gov.ua/control/uk/newsnpd>), recognized as gender-discriminatory and contradicts the right to privacy. Its content is at variance with article 8 of the European Convention on the protection of fundamental rights and freedoms (http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=995_004), article 1 of the Protocol № 11 to the Convention (http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_537) and article 5 of

- the UN Convention on the elimination of all forms of discrimination against women (http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=995_207).
26. In 2010, religious organizations, for the first time, showed interest to the gender-related issues. They organized first anti-gender manifestations in the western regions of Ukraine, claiming that gender equality leads to the destruction of families.
 27. Proposal, submitted by the members of Ternopil city council on the initiative of the council secretary Taras Bilan to the President and the Prime-Minister, under which the childless men over 25 years of age should pay the issuelessness tax. In Bilan's opinion, this measure would help to improve demographic situation in Ukraine. The proposal suggested that not less than 6% of the men's earnings should go to the orphanages, kindergartens and schools. (<http://forum.mediaport.ua/read.php?103,763433>).
 28. In September 2010, parliamentary majority voted for exclusion of maternity leave from the total term of the continuous service, required by pension plan. Experts argue that this step by no means will contribute to the budget revenues (which was the main supportive argument offered by the members of parliament); neither will it improve demographic situation, but, on the contrary, will further aggravate economic situation of women and workers with family duties. (<http://www.dw-world.de/dw/article/0,,6004731,00.html>).
 29. Management and coordination challenges in gender policy. Coordination of gender policy is realized through Inter-departmental coordination council on counteracting human trafficking, home violence, gender and family policy, protection of children's rights. This monster was created in 2007 to coordinate the operation of various governmental agencies and has undergone no changes till 2010. The council was criticized a lot for its inefficient operation. The efforts were made to improve it by setting up specialized expert groups. Besides, all the decisions of Inter-departmental council, which is, in its essence, an advisory-consultative body, should be officially registered as orders and decrees of the Cabinet of Ministers; thus they would become mandatory for all the executive power bodies, oblast's state administrations and local self-governments. This council should be restructured and then its impact should be enhanced. Its authority is almost nil; nevertheless, with due political will (indispensable in this and all other areas) the devising of protocol order by the Cabinet of Ministers is feasible; this practice was formerly in use. Involvement of specialized international and non-governmental organizations into the discussions and decision-making process remains an important factor contributing to the efficiency of operation. Lack of interaction between the executive and legislative power, and, in particular, with sub-committee on gender issues and international operation under Verkhovna Rada Committee on human rights, ethnic minorities and inter-ethnic relations presents another coordination challenge. Efforts, made in this area, have been insufficiently harmonized both in the past and present. In many cases we are dealing mainly not with the deterioration of operation, but with prolongation of inertia and preservation of the imperfect situation, characteristic of the former government. Promised improvement never happened, while aggravation of the situation can be registered. The above characteristics of the state of things in the Ministry of Ukraine for Family, Youth and Sport, higher echelons of power, absence of concepts or provisions on gender equality as an inalienable principle of a society respecting social equality, confirms that the integration of the gender component in all political areas consistent with both international obligations, undertaken by Ukraine, and international recommendations, specifically those made by the UN Committee on the elimination of discrimination against women and Council of Europe. We face a situation, where concept, theory, ideology and practices of the gender mainstreaming remain beyond the scope of the country's leadership and are not used by it.
 30. In fact, the whole activity in this area (with few exceptions) has been realized till now by international and non-governmental organizations on their own initiative. That's why the

openness of power structures for the dialogue, their readiness to cooperate with these organizations and to delegate certain authorities is an important prerequisite of success or very existence, in fact, of this activity as part of the state policy.

Asserting women's rights and the right to gender equality, non-governmental organizations more than once submitted collective appeals and letters to the country leaders, demanding due attention to these issues. More detailed information can be found on the site of Kharkiv gender museum (www.gender.at.ua).

31. In order to evaluate the changes occurring in the implementation of gender policy a survey of experts' opinion was carried out⁵. The research does not lay claim to comprehensive approach; nevertheless the opinions of the activists in women's rights' protection and gender equality promotion were instrumental in identifying the gender policy tendencies over the years 2009 and 2010.

The questions, offered to the respondents, mainly referred to evaluation of national and oblast' authorities' operation in the development and implementation of gender policy, cooperation between the state structures and non-governmental organizations, as well as the level of involvement of the international, donors' and public organizations in tackling these issues.

№	Indicator	Number of experts-respondents and average rate for 2009	Number of experts-respondents and average rate for 2010	Results dynamic: 2010 vs. 2009
1.	Ministry of Ukraine for Family, Youth and Sport's cooperation with non-governmental organizations (national level).	45 3,42	38 2,67	-0,75
2.	Ministry of Ukraine for Family, Youth and Sport's cooperation with non-governmental organizations (oblast' level).	51 3,13	50 2,6	-0,53
3.	Ministry of Ukraine for Family, Youth and Sport's cooperation with international organizations (national level).	37 3,68	27 3,4	-0,28
4.	Ministry of Ukraine for Family, Youth and Sport's cooperation with international organizations (oblast' level).	46 2,92	42 2,62	-0,3
5.	Activity of central executive bodies in the gender approaches promotion	52 2,53	46 1,97	-0,56
6.	Oblast' state administrations' activity in gender approaches implementation	52 2,48	51 1,88	-0,6
7.	Level of coordination in gender policy implementation at the national level	47 2,85	45 2,1	-0,75
8.	Level of coordination in gender policy implementation at the oblast' level	51 2,68	49 2,04	-0, 64
9.	Qualifications of specialists in charge of gender policy implementation at the national level in the Ministry of Ukraine for Family, Youth and Sport	38 3	27 2,48	-0,52

⁵ About 60 experts from 18 oblast's of Ukraine participated in the survey. They represented researchers specializing in gender studies, activists from public organizations, journalists covering gender issues, former assistants to the Minister of Internal Affairs of Ukraine on human rights in charge of counteracting gender-based discrimination, members of international organizations, independent experts. The majority of the experts (18) reside in Kiev. The survey was done on-line between May 23 and June 3 2010. The experts were not obliged to answer all the questions, hence the number of answers differs from question to question.

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10.	Qualifications of specialists in charge of gender policy implementation at the oblast' level	52 2,61	45 2,46	-0,15
11.	Coverage of women's rights and gender equality by mass media at the national level	55 2,83	52 2,4	-0,43
12.	Coverage of women's rights and gender equality by mass media at oblast' and local levels	53 2,32	53 1,97	-0,35
13.	Activity of non-governmental organizations promoting women's rights and gender equality at the national level	54 3,68	49 3,54	-0,14
14.	Activity of non-governmental organizations promoting women's rights and gender equality at oblast' and local levels	54 3,27	48 2,9	-0,37
15.	Donors' attention to gender issues	40 3,34	35 2,93	-0,41
16.	State leader's attention to gender issues	55 2,64	54 1,42	-1,22
17.	Operation of the Ministry of Ukraine for Family, Youth and Sport as a state body authorized to deal with gender policy issues.	46 3	38 1,94	-1,06
18.	Cooperation and interaction between NGOs, including women's organizations	56 3,24	50 3,13	-0,11
19.	Public awareness of women's rights and gender-based discrimination problems in Ukraine	57 2,64	52 2,44	-0,2
20.	Verkhovna Rada Human Rights Ombudsman response to the infringement of women's rights and gender discrimination	50 1,77	44 1,4	-0,37
21.	State power bodies' response to the infringement of women's rights and gender discrimination	55 2,22	51 1,38	-0,84

The data, represented in the above table, demonstrate that the indicators, assessed in all categories, decreased in 2010 as compared to 2009. The indicator of “ Verkhovna Rada Human Rights Ombudsman response to the infringement of women's rights and gender discrimination” ranked among the lowest — 1,77 points in 2009 and 1,4 — in 2010. The indicator “State power bodies' response to the infringement of women's rights and gender discrimination” turned out the worst in 2010 — 1,38 points. Most negative dynamics was registered in the indicators “State leader's attention to gender issues” — minus 1,22 points and “Ministry of Ukraine for Family, Youth and Sport's operation” — minus 1,06 points.

The indicators “Activity of non-governmental organizations promoting women's rights and gender equality at the national level” and “Ministry of Ukraine for Family, Youth and Sport's cooperation with international organizations (national level)” ranked among the highest — respectively 3,68 points in 2009 and 3,54 points in 2010 for the former, and 3,68 points in 2009 and 3,4 points in 2010 for the latter. It should be kept in mind that the number of experts-respondents decreased in 2010 as compared to 2009.

2. CONCLUSIONS

The area of gender policy and ensuring the women's rights is characterized by a controversial combination of positive public declarations and promises, made by the government, and

negative practical measures which lead to the further deterioration of women's status in society, perfunctory bureaucratic steps and non-compliance with the proclaimed declarations, attempts to mislead the international community and Ukrainian citizens as to the official standpoint on these issues.

3. RECOMMENDATIONS

1. Devising and implementing action plan focused at fulfilling the recommendations of the UN Committee on the elimination of discrimination against women.
2. Setting up efficient and independent mechanism of response to the complaints regarding gender-based discrimination.
3. Calling off Order № 155 of the Cabinet of Ministers of Ukraine "On approving recommendations on the appearance (dress-code) for the staff of the Cabinet of Ministers' of Ukraine Secretariat"
4. Organizing practical training for public servants on gender policy issues.
5. Introducing tests and exams for the public servants of all levels on their knowledge of the Law of Ukraine "On ensuring equal rights and opportunities for women and men".
6. Introducing the practice of public debates for politicians and senior public servants on social issues, including the issue of gender equality.

XXIV. PROBLEMS OF THE RIGHTS OF THE CHILD IN UKRAINE¹

In 1991, Ukraine adhered to the Convention on the Rights of the Child, thereby pledging to implement at the national level and ensure the protection of the rights of the child.

1. NATIONAL ACTION PLAN TO IMPLEMENT THE UN CONVENTION ON THE RIGHTS OF THE CHILD

A positive event occurred on March 5, 2009: the Verkhovna Rada of Ukraine adopted the Law of Ukraine “On National Program ‘National Action Plan to implement the UN Convention on the Rights of the Child’, which had been under consideration in the Verkhovna Rada since 2006. This National Plan is intended to combine state efforts to protect the rights of the child. It should optimize the integrated system of rights-of-the-child protection in Ukraine according to the UN Convention on the Rights of the Child and allow for the development objectives promoted by the UN Millennium Declaration and strategy of the Resulting document of the Special Session of UN General Assembly on Children “The World Fit for Children”.

The main task in this area should include higher effectiveness of prevention and outreach to parents to prevent abuse of children, improved finding of children prone to sexual exploitation and other forms of cruel treatment, creation of the system of rehabilitation and reintegration of children, which suffered from trafficking, sexual exploitation and other forms of abuse; provisions for the system protecting children from abuse, and carrying out of prophylaxis.

The National Plan was adopted without the list of proper measures, which should be worked out annually; according to the Decree of Verkhovna Rada the ending date in 2009 would be June 5, 2009. It is a shaky decision, as the annual planning prevents introduction of long-term measures.

2. MONITORING OF IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD

The Art. 44 stipulates that in compliance with the provisions of the Convention every 5 years the participant countries are expected to submit their progress report to the UN Committee on the Rights of the Child describing measures taken on their territory to promote and protect the rights of the child.

¹ Prepared by experts of the International Women’s Human Rights Center “La Strada Ukraine”: Levchenko K., Bochkor N., Yevsiukova M. The authors used the materials of the Alternative report on implementation by Ukraine of the Convention on the Rights of the Child (2002-2008) prepared by Ukrainian NGOs; the report “Human Rights in the work of Ukrainian militia — 2010” prepared by the Association of Ukrainian monitors of human rights in law enforcement agencies; documents of All-Ukrainian NGO “Child Protection Service” and other.

Ukraine has prepared the combined third and fourth periodic report, which will be considered by the UN Committee on the Rights of the Child during its 56th session held in Geneva from January 17 to February 4, 2011. By results of consideration of this report the Committee on the Rights of the Child will make concluding remarks about Ukraine. The experts on children's rights think that there will be a lot of criticism taking into account the real state of affairs in Ukraine concerning the rights of the child and only partial implementation of previous concluding remarks.

In 2009 the NGOs of Ukraine published "The alternative report on implementation of the Convention on the Rights of the Child"². It provides an overview of compliance with the whole complex of rights dealt with in the Convention. Its conclusions and recommendations are relevant for the late 2010 as well. According to the Alternative Report, the preliminary recommendations of the UN Committee on the Rights of the Child are taken into account only partially. This particularly applies to the general government policy approaches securing children's rights. This policy does not consider the child as a subject of his/her rights, but as an object of protection only.

Accordingly, the Ukrainian legislation on the rights of the child remains declarative; moreover, not all children's rights as defined by the Convention are legally guaranteed.

The state lacks a systems approach to ensuring that the opinion of children is taken into account at all levels of society. The principle of the best interests of the child as the basis of public policy holds only in the field of child protection and regulation of family relations. The government policy tends to combat discrimination of vulnerable and marginalized groups, particularly in access to education and healthcare.

Financing government programs and plans for children's rights uses the leftover principle rather than providing fixed expenses in the budget for their implementation.

In Ukraine, there is still no ombudsman on children's rights, no civil institutions carrying out comprehensive system monitoring of children's rights, no publicizing its results.

There is a blow-up in the number of orphans and children deprived of parental care and cared for by foster families or some other kinds of families. The development of family upbringing and the 2005 Ukase of the President of Ukraine "On Priority Measures to Protect Children" contributed to the introduction of foster care funding from the State Budget of Ukraine. But there still exists a topical need of improvement of legal access to alternative forms of family placement of children.

Most articles of the Convention on the Rights of the Child are appropriately reflected in national legislation; though the practice remains but formal and fails to fulfill government's obligation under the Convention.

For example, the definition of child in national legislation complies with the standards of the Convention, however, there still remain such unaccounted for Committee recommendations as difference in marriageable age between boys and girls, age reduction for early ambulation without parents' consent, and determination of minimum age for initiation of sex relations. There also exists a serious problem of ensuring children's rights to individuality protection in cases of adoption.

The alternative report provides another example. The measures and actions of the state intended to overcome the child and infant mortality are not effective. On the surface there are such problems as inadequate training of medical staff in rendering healthcare to the mother and child, understaffed rural medical institutions, lack of systems approach to tackling problems of logistics, and introduction of advanced technologies. Instead of real and concrete plans and error analysis for immediate correction, the state resorts to declarations and descriptive generalizations.

The child's right to privacy is totally ignored: the national legislation contains no interpretation and, therefore, guarantees of protection of the privacy of the child. There is no general understanding of the concept of privacy of a child; the child is treated as an object external tutorial or educational work.

There is the habit of total violation of children's right to privacy in the comprehensive secondary schools and residential schools (toilet cubicle with open doors, opening and inspection of cor-

² Альтернативний звіт про реалізацію Україною положень Конвенції ООН про права дитини (2002–2008). — с. 6–11.

respondence and notes, public disclosure of personal information, nearly free access to registers and health records) due to complete lack of understanding of the rights of children and their value, and frequent attempts at one's own discretion to determine and protect the interests of the child.

The children in Ukraine continue to suffer violence: the humiliation of child's dignity often happens in comprehensive secondary schools, in family, in contacts with law enforcers, at children's homes and family-type orphanages. There are no effective mechanisms to effectively identify and control incidents of violence as well as mechanisms backing existing legal norms prohibiting corporal punishment. The questioning of children (witnesses, victims and defendants in a crime) remains imperfect and traumatic for a child.

There is no mechanism of early detection of affected families and evaluation of child's needs. The family situation is evaluated by the board of guardians practically based on a single document — i.e. the inspection report on housing and living conditions. Ukraine also failed to fulfill the Committee's recommendations on financial assistance to vulnerable families with children. Though the principle of "money follows the child" is considered progressive, it does not support various families with children, covering only a small proportion of children who need help. The Committee's recommendation to place children in child welfare institutions only temporarily and in extreme necessity is not fulfilled.

The current legislation does not provide for implementation of the Constitution of Ukraine concerning proper funding and creating conditions for free and adequate medical care. The consequences are clear: the health of children from 0 through 14 years is still unsatisfactory; there is a rise of venereal diseases and unhealthy habits among young people, HIV awareness remains superficial.

In Ukraine, HIV-positive mother is not advised to breast-feed; at the same time there are problems with underdelivery of surrogate breast-milk. The NGOs point that the rights of HIV-positive children are constantly violated in health care institutions.

We can conclude that the State has failed to ensure access to education for homeless children, children of migrants and refugees, eliminate discrimination in realization of the right to education of children with HIV / AIDS, provide for full access to preschool education in rural areas, and integrate all Roma children into the public education system. Over 20,000 children of school age do not go to school.

There exists a serious problem of full realization of the right to education of children with mental disorders and children with disabilities (handicapped children). There is no mechanism for including these children into formal education system. The system of individual training is nearly out of work. There is a shortfall of textbooks and specialized literature for children with impaired vision and hearing.

There is no access to education for children supported by the state at children's houses, boarding schools managed by social protection system which does not provide education and training and has no proper professionals and educators on its staff list. There were many cases registered when children of refugees did not go to school.

Very little attention is paid to training teachers in the rights of the child, training of specialists capable of working with children with developmental disabilities.

Therefore, the actions of the state to provide adequate children's rights in Ukraine in accordance with the standards of the UN Convention on the Rights of the Child is insufficient, the degree of fulfillment of recommendations of the Committee on the Rights of the Child remains unsatisfactory.

3. ISSUES OF PROTECTION OF VULNERABLE CHILDREN³

The analysis of information collected by Human Rights Center "Postup" and NGOs "Human Rights Protection of Children-of-Donbas Network" proves that Ukraine has no mechanisms of le-

³ <http://postup.lg.ua/news/za-zhorstoke-povodzhennya-z-ditmi-ukrayini-nalezhit-vidpovisti-pered-on>

gal protection of vulnerable children. The legislation contains no regulations that allow considering such children as representatives of vulnerable groups that need special protection. The violation appeals of children at risk are not considered with due care and diligence. The refusal to take into account special needs of children from this group and lack of fixed law on effective legal measures intended to ensure special protection allow concluding that this group of children is discriminated.

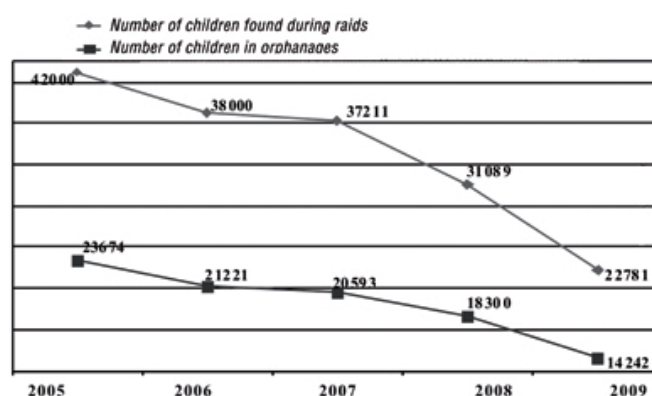
The experts suggest that, if children are taken care of by legal representatives who are not motivated to restore children's rights (managers of special institutions, distant relatives, demoralized relatives etc), the facts of violations are investigated formally and in most cases the rights of children cannot be restored. There are no mechanisms of departmental control of the quality of militia investigation and prosecution of violations of the rights of children at risk. It is especially evident, when the children's rights are violated by law enforcers. The dependence of children and pressure on them by law enforcers significantly complicates attempts to restore the rights of children. Under the impact of pressure and threat of militia officers they do not dare to protest violation by law enforcers. The children often refuse to incriminate the law enforcers.

It is also necessary to pass a law on special procedural due process in cases of complaints about violations of the rights of the child by law enforcers. It is important to provide for opportunities of departmental and inter-agency as well as NGOs' control. It is essential to avoid termination of investigation on the facts stated in such complaint, if the complainant waives claims and requests to withdraw an action. These and other recommendations were submitted by the group of Ukrainian, German and Polish experts as a part of the project "Action for Children at Risk."

4. THE SITUATION WITH HOMELESS AND NEGLECTED CHILDREN⁴

In Ukraine, the phenomenon of child homelessness and neglect has been minimized. In recent years, the number of homeless and neglected children has been slipping down by 15-20% annually. Today the orphanages are only 60% full. The conditions have been created to reduce the network of orphanages and return of their premises to the preschool.

Putting an end to homeless condition and neglect of children



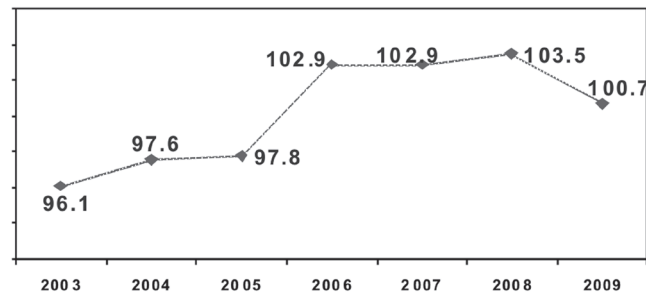
In recent years, there has been a positive downtrend in the number of child abandonment. During the period 2004–2008, the number of abandoned babies fell by 41,3% (2004 — 1549 newborns, 2005 — 1246, 2007 — 1027, 2009 — 909).

⁴ Prepared on the basis of case studies by All-Ukrainian Public Organization "Child's Protection Service".

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As a result, in 2009, for the first time since Ukraine's independence, the number of orphans and children deprived of parental care dropped.

*Total of orphans and children w/o parental guardianship
(end of the year, in, 1,000)*



Risks:

1. The social protection of children slips down the list of priorities in Ukraine. The Ministry for Family, Youth and Sports states the shift of accents despite the fact that the rights of the child that has lost parental guidance is the basic function of this Ministry.
2. Anxiety-provoking is the information about 20% reductions in the number of personnel of oblast and regional state administrations. Typically, the term "at the discretion" of the regional top administrator means priority cuts of structures working in the field of social protection of children. Therefore, there is a great risk of losing gains in branch personnel policy, since in 2007, for the first time in history, they allocated USD23M from the State budget for staffing of regional (and only, rather than oblast) services for children. Actually, all positives of recent years were due to personnel support of state targets.
3. 2010 priority consists in the quality of creation and functioning of families with adopted child, foster care, and foster care children homes. This is a common task of local Services for Children and Social Services for Family, Children and Youth. The quantitative indicators were upping in 2006-2009. If they sack personnel, the task of working with children and families will become overwhelming.
4. The inhibition of reform of boarding schools for orphans and children deprived of parental care, what is underway for the last nine months due to recruiting of children from poor families to the boarding schools, results in higher social orphanhood.
5. Until now both orphans and children deprived of parental care need social backing.

5. COORDINATION OF THE RIGHTS-OF-THE-CHILD ACTIVITIES. CHILDREN'S OMBUDSMAN

There are both legal and systemic problems of ensuring children's rights. And the first one is coordination in the field of child protection against the background of current administrative reform. What will be the executive agency effectively coordinating and organizing activities providing for child's rights in Ukraine?

The children will never get the deserved recognition and attention, if they are not treated as a priority. The structure, working methods, information and style needed for effective dialogue with children are substantially different from those intended to protect the rights of adults.

Today in Ukraine the responsibility for children is shared by various ministries and departments with poor or nil cooperation.

Beside the executive body there must be an effective agency monitoring execution of children's rights and providing for necessary urgent response. Therefore, there is a topical problem of implementation of the Institute of Children's Ombudsman repeatedly recommended to Ukraine by the UN and Council of Europe. Ukraine should devise an effective mechanism for monitoring and ensuring children's rights, which is now virtually absent. Obviously, the rights of the child are not a priority of the Commissioner of the Verkhovna Rada of Ukraine.

To provide effective monitoring and implementation of children's rights the Ombudsman for Children should be capable of influence on the development of legislation, policies and practices ensuring their compliance with the rights of children; examine individual complaints concerning violations of the rights of the child, encourage enquiry and investigation into the cases dealt with, and by all possible means to promote awareness of adults and children about the rights of the child. But both current Commissioner for Human Rights and majority in Parliament are against the introduction of Children's Ombudsman.

There is also a need to secure the rights of children and protect them against infringements by law enforcers. During recent years the issue of withdrawal of criminal militia for the rights of children from the criminal subordinate unit to the block of public security and discontinuation of their operational activities was repeatedly on the agenda; it might significantly improve the level of protection of children, permit advance identification and keeping of preventive records of the families, which had committed violence against children, examine causes of family problems and, if necessary, remove children from dangerous environment. However, instead of withdrawal from criminal unit and subordination to the public security militia, the MIA chiefs decided to liquidate this department and redistribute a part of its functions associated with a criminal bloc among different divisions; they will leave untouched prophylactic work only. Together with the declared axed jobs from the IAA, these steps look like destruction of this direction, contrary to logic and international obligations of Ukraine.

6. PROBLEMS OF INTRODUCTION OF JUVENILE JUSTICE

Back in 1991, ratifying the UN Convention on the Rights of the Child, Ukraine has assumed an obligation to establish juvenile justice at the national level. However, until now, this issue remains unsolved; moreover, its public aspect has worsened. While drafting reforms, nobody bothered to carry out explanatory work for population, which led to public opposition. Even the draft Concept of development of juvenile criminal justice in Ukraine, which was prepared by the Ministry of Justice of Ukraine, is not optimal, since it takes into account only the rights of those children, who are in conflict with the law, paying no attention to the interests of children, who are in contact with the law, i.e. those children, who suffer from law infringement.

Once and again the UN Committee on the Rights of the Child and the Committee of Ministers of the Council of Europe drew attention of Ukraine to the absence of national procedures friendly to children. It is necessary to conclude that current criminal procedure legislation does not take into account the interests of children, who have suffered from or witnessed crimes. The analysis of the current criminal procedure legislation of Ukraine indicates that legislators, using international legislative standards, often provide unprecedented protection and empowerment of perpetrators, while the victims of crimes, including children, are left without proper state aid and attention. The current Ukrainian legislation does not take into account the vulnerability of wronged children and has no procedures adapted to recognize their special needs. Based on the analysis of art. 171 CPC of Ukraine, even the most widespread pretrial investigatory procedure — interrogation of a minor victim — may be carried out like the interrogation of an adult.

In October and November, in the Verkhovna Rada of Ukraine, two bills were registered intended to improve current criminal procedure legislation in terms of the rights of children who had suffered from or witnessed crimes during the pretrial investigation and judicial scrutiny: № 7340 “On Amendments to the Criminal and Criminal Procedure Codes of Ukraine (concerning the interrogation of minor victims and witnesses)” and № 7391 “On Amendments to the Criminal and Criminal Procedure Codes of Ukraine (on protection of children from trafficking and exploitation). It is very important that the Verkhovna Rada accelerates consideration of these bills.

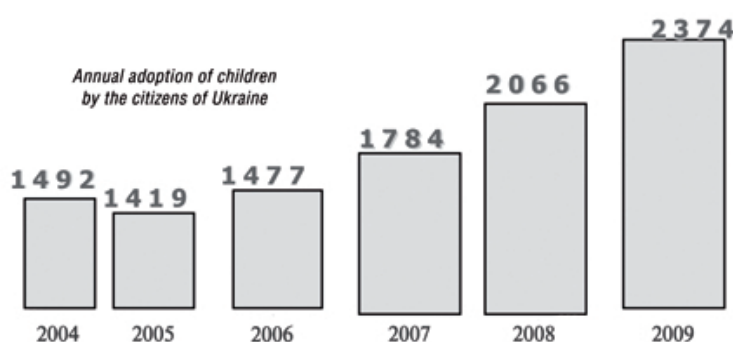
However, certain political entities supported by the Russian Orthodox Church initiated the movement against the implementation of juvenile justice. They create special websites, provoke and hold street protests; they actively participate in various online forums and social networks.

7. STATE POLICY IN THE ADOPTION AND DEVELOPMENT OF FAMILY-BASED CARE FOR ORPHANS AND CHILDREN DEPRIVED OF PARENTAL CARE⁵

The child’s right to a family has been written down in legislation and, above all, in the UN Convention on the Rights of the Child, Constitution of Ukraine, and Family Code of Ukraine etc. Only family education is in the best interests of the child. Despite the fact that over the past five years the number of orphans and children deprived of parental care remains significant, there is a considerable increase of the number of children adopted by Ukrainian citizens, taken to foster homes and family-type children’s homes.

The shift became possible due to changes in the government policy regarding upbringing of orphans and children deprived of parental care. In 2005, the President of Ukraine initiated several measures related to reform of custody and guardianship of children and intended to protect the rights of orphans and children deprived of parental care. The chain of executive command was created: regional, urban and oblast services for children. Their staff tripled. Major progress was achieved in the adoption of orphans and children deprived of parental care. Over past four years the annual number of adopted children has increased by almost 70%.

Adoption of orphans and children w/o parental custody by citizens of Ukraine

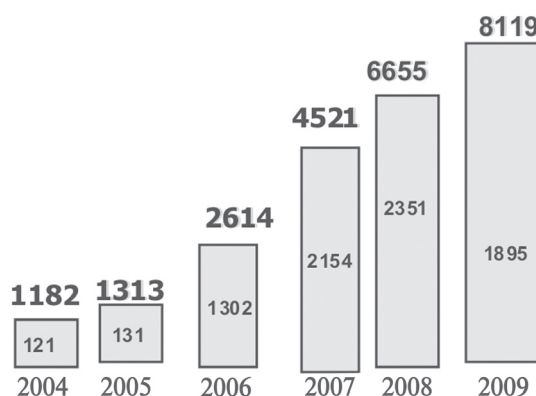


The one-time adoption relief at the rate of aid extended at first child birth was introduced on January 1, 2009. Also, one parent gets two-month paid leave. The family upbringing is becoming ever more popular. The new social institution took five years to appear in Ukraine: foster families and family-type children’s homes. In comparison with 2005, the total number of children covered by such care has increased 8 times, the annual number of children covered by family care increased

⁵ This section has been prepared by I. Savchuk, All-Ukrainian Public Organization “Child’s Protection Service”.

15 times. As of 01.01.2010, the foster families and family-type children's homes provided for upbringing of 8119 children, 86% of them aged over 10 years.

*The number of children fostered in foster families and family-type orphanages
(at the end of the period)*



8. THE NEED FOR RATIFICATION OF THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND INTERSTATE ADOPTION⁶

Because of the rising adoption of children by the citizens of Ukraine, the annual interstate adoption of children is slipping down, as there remain no little (under 7 years) and healthy children, which are in greatest demand for adoption by foreigners. Concerning the interstate adoption in Ukraine the society is polarized: from categorical “yes” to categorical “no”. The same about politicians. The international community criticizes the organization of this process in Ukraine, because it failed to ratify the Hague Convention on these issues. Ukraine, annually providing about 2m children for foreign adoption, failed to accede to this Convention. Today in Ukraine foreign nonprofit organizations control adoption.

Meanwhile the Ukrainian legislation makes no provision of foreign adoption organizations at home and prohibits mediation at adoption (Family Code of Ukraine: art. 216, “Prohibition of mediation, business activity during adoption of children”, the Criminal Code of Ukraine: art. 169 “Illegal activities relating to the adoption (adoption)”. And Article 32 of Hague Convention provides that in case of adoption the intermediaries — lawyers, interpreters and other consulting services — may not receive unjustified award. So, the intermediary adoption service, settled in a special way in Ukraine, is prohibited. At the same time, art. 244 of the Civil Code of Ukraine “Proxying” entitles one party to represent the interests of another before third parties without limitations of activity. As there is no definition of the term “mediation” in legislation, it is impossible to classify the actions of certain entities as intermediary.

Although it is not regulated by the state, adoption mediation takes place in Ukraine. De facto, such services are provided, and ultimately could not be withheld, as all foreigners adopting children from Ukraine are citizens of the country-member of Hague Convention (except for Greece and the U.S., which signed the Convention but not yet ratified it) and are bound to adhere to its provisions. But Ukraine, allowing adoption of children to the country-member of

⁶ Prepared together with I.V. Savchuk, All-Ukrainian Public Organization “Child’s Protection Service”.

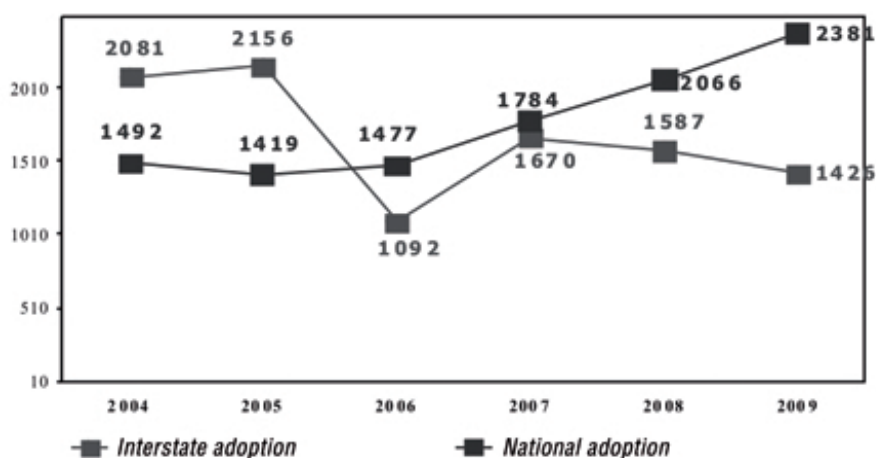
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Hague Convention, on the one hand, recognizes that the adoption by Hague “principle is in the interest of the child and ensures its rights and interests, and, on the other, refuses to unify adoption procedure in Ukraine with the procedure in countries whereto the children go from Ukraine.

To ensure that the interstate adoptions are taken away from the shadow structures, it is necessary, taking into account international experience, to introduce registration and authorization of organizations that are properly accredited in the host countries and government agencies of Ukraine, and bring their activities in Ukraine under state control.

One of the fundamental principles of the Hague Convention is that adoption is not a personal matter that can be left in the competence of the child’s relatives, his/her legal representatives or prospective adopters. This is a social and legal way to protect the child. Therefore, the responsibility for the international adoption must rest with the States involved who must ensure that adoption is equitable to the interest of the child and his/her basic rights. The paradox of Ukraine consists in the fact that in 1996 the legislative branch of government empowered the executive branch to carry out interstate adoption in Ukraine. For 14 years, the Cabinet of Ministers of Ukraine kept suggesting to improve these practices, implement new procedures meeting the child’s best interests and international standards. But four times the Verkhovna Rada of Ukraine voted against the ratification of the Hague Convention on Protection of Children and Cooperation in Interstate Adoption.

Realization of the child's right to family fostering



To ensure that interstate adoptions are taken away from shadow structures, it is necessary, taking into account international experience, to introduce a system of registration and licensing of organizations properly accredited in recipient countries and government agencies of Ukraine, and put their activities at home under control of the state.

Now Ukraine can reject interstate adoption (and put an end to ungrounded allegations about trafficking in children) by the way of working to develop national adoption; bringing up the number of children in foster families, family-type orphanages, guardianship; introducing the new financing mechanism of the needs of orphans on the principle “money follows the child” (the Bill is ready), which will stop “enslaving” of children by children’s residential institutions. The fewer orphans and children deprived of parental care (specifically those who may be adopted) stay at boarding schools, the more convincing will be the stand of Ukraine on the closure of interstate adoption for international community.

9. ORPHANS IN UKRAINE⁷

The legislation of Ukraine guarantees a range of benefits and aid to orphans and children deprived of parental care. Any state should strive to ensure decent conditions of their life. But despite the increase in the number of such children, many orphanages and boarding schools have poor material and technical resources, both living and working premises need repairing. The provision of the house clothing and footwear makes 60–70%. The administration has to satisfy material needs of children at the expense of sponsorship, which is very difficult to obtain.

There are also problems with job placement of graduating seniors. The issue of housing is a priority: they are put on the waiting list, but nobody knows, when a social dwelling will be available. There is a partial solution for the period of vocational and higher education training, which means a possibility to get a place in the dormitory, financial support in the form of grants and other benefits. The situation is more difficult for children going to work upon graduation. Both housing and job placement issues are legally defined, but in practice these guarantees remain on paper. In case of refusal of employment of young people within the established quota, the public employment service, in accordance with Article 5 of the Law of Ukraine “On Employment”, may apply penalties for each such refusal to the tune of 50 times non-taxable minimum income.

The school, at its own expense, provides graduating orphans and children deprived of parental care with clothing and footwear, as well as one-time cash assistance amounting to twice the cost of living. The standards of clothing and footwear are approved by the Cabinet of Ministers of Ukraine. At the request of the graduates they can receive monetary compensation in the amount required to purchase clothing and footwear. The cash equivalent of the payment is determined in accordance with the Law of Ukraine “On minimum of subsistence.” It is not enough.

10. VIOLATION OF THE RIGHTS OF CHILDREN RAISED IN LARGE FAMILIES⁸

So, early past fall the families formed by remarriage of a parent and joint upbringing of three or more children from previous marriages without their adoption started meeting with refusals to be registered as large families and to get appropriate certificate, under which benefits are provided to such families. The families that had already received this certificate had to return the documents. The agencies of the Ministry for Family, Youth and Sports found grounds for these actions in the letter of the Ministry of Justice of Ukraine № 4254-0-26-10-21 from 25.05.2010. According to the above letter, the large family is considered as such, when it goes about three or more children (own and adopted children, children under tutelage or guardianship). Hence it follows that the families formed by remarriage of one parent and together bringing up three or more children from previous marriages without their adoption are no longer considered large families. However, the reference to the provisions of law mentioned in the letter does not lead to such conclusion. The Article 1 of the Law of Ukraine “On Protection of Childhood” maintains that the large families consist of parents (or parent) and three or more children. According to Article 3 of the Family Code of Ukraine the family consists of seven persons living together, run a household together, and have mutual rights and obligations. Family is founded on marriage, adoption, or on other grounds not prohibited by law and those that are not against public morality. Therefore, there is no reason to exclude from the category of large families those formed by remarriage of a parent and common upbringing of three or more children from previous marriages without their adoption.

In this regard, the Ukrainian Helsinki Human Rights Union issued an appeal to the Ministry of Justice of Ukraine in order to obtain clarification of legal position of this public authority. And the response read that the Ministry of Justice made no conclusions on the categories of families that do

⁷ <http://postup.lg.ua/news/problemi-prav-ditey-v-ukrayini>

⁸ Maxym Shcherbatiuk, www.helsinki.org.ua

not belong to large families. And the Ministry for Family, Youth and Sports is to blame. It was also noted that the letters of the ministry were not normative legal instruments and were explanations only. So, in fact, the Ministry of Justice transferred the responsibility to another ministry, which had used its document as direct instruction and acted unlawfully depriving large families of benefits. It is noteworthy that some families deprived of benefits appealed to the court to protect their rights.

11. STATEMENTS ON VIOLATIONS OF THE RIGHTS OF THE CHILD

On March 11, 2009, in protest against violation of the rights of the child in the show of singer Alina Grosu, the letters were sent to the Minister of Ukraine for Family, Youth and Sports Yu. Pavlenko, Commissioner of the Verkhovna Rada of Ukraine on Human Rights N. Karpachova and Head of UNICEF Office in Ukraine Jeremy Hartley. The texts and answers were posted on the website of the Commissioner of La Strada — Ukraine: [www.lastrada.org.ua/content/doc/letter to Karpachova.doc](http://www.lastrada.org.ua/content/doc/letter%20to%20Karpachova.doc) and www.lastrada.org.ua/content/doc/VR.doc.

On April 6, 2009, in protest against violation of the rights of the child in the advertising of VIANOR Co the letters were sent to the Ministry for Ukraine for Family, Youth and Sports, State Committee for television and radio broadcasting of Ukraine (www.lastrada.org.ua/read.cgi?lng=ua&Id=223). The reason for such complaints was the VIANOR tires advertised on Ukrainian TV. More than half of verbal and visual message of the TV advertising puts together kids' imagery and adult wording, introduces children as manipulated artificial objects. The letter requested to stop broadcasting the ads and advise the chief executives of information and advertising agencies and media against such information and advertising products.

On May 15, 2009 the open letter supporting the closure of gambling biz in Ukraine and initiatives for placing such institutions outside the cities was published. The letter recommends the VRU to pass a law limiting gaming in Ukraine (www.lastrada.org.ua/readnews.cgi?lng=ua&Id=1649).

On October 10, 2009, in the wake of children rape scandal in the International Children Center Artek, the La Strada Ukraine Center came out in opposition to disclosure of confidential information about abused children (www.lastrada.org.ua/readnews.cgi?lng=ua&Id=1743).

On May 18, 2009 the public organizations of Ukraine joined the annual *World Day for the Prevention of Child Abuse* initiated by the international Women's World Summit Foundation (WWSF) (www.lastrada.org.ua/readnews.cgi?lng=ua&Id=1654).

12. LEGISLATIVE INITIATIVES IN THE FIELD OF CHILD RIGHTS PROTECTION

In 2009, they went on working on previous projects intended to improve legislation on combating trafficking in persons, especially children, and propagation of child pornography on the Internet. The Verkhovna Rada of Ukraine prepared two bills to combat child pornography. On June 11, 2009 they adopted the Law of Ukraine № 1520-17 "On amendments to article 301 of the Criminal Code of Ukraine" (bill № 3221) intended to amend the Criminal Code of Ukraine, which provide for making criminally liable for possession of works, images or other pornographic items meaning to sell them or distribute, that is one of the international legal obligations undertaken by Ukraine at ratification of the Optional Protocol to the Convention on the Rights of the Child Concerning Trafficking in Children, Child Prostitution and Child Pornography. Its pros and cons were carefully analyzed by experts.

The Bill № 3271 was adopted in 2010. The main amendments include the introduction of the concept of "child pornography" to the Law of Ukraine "On protection of public morality"; amendments to Article 301 of the Criminal Code of Ukraine concerning fixation of responsibility for distribution of pornographic products made with participation of a child or using his/her image,

providing access to such products with the help of telecoms as well as purchase, exchange and storage of such products in any form or in any way, etc.; making it incumbent upon telecom operators and providers, on the ground of court decision, to limit access of its subscribers to the resources carrying out distribution of child pornography.

In 2010, experts and working groups prepared and submitted to deputies of Verkhovna Rada of Ukraine a number of bills that directly or indirectly relate to protection of children from trafficking in children and human trafficking in general.

Bill 7132⁹ “On amendments to the Law of Ukraine “On protection of public morality.” The purpose and objectives of the Law are to define the legal framework of protection of public morality, creation of appropriate legal, economic and organizational conditions promoting rights to cyberspace free of materials that threaten physical, intellectual, moral and psychological state of population, transparent conditions for business entities dealing in sexual or erotic products, erotic show biz, separation of responsibility for the protection of public morality and improvement of state regulation, supervision and control in the area of public morality. The bill suggests to draw a new version of the Law of Ukraine “On protection of public morality” allowing for clarification of definitions and adding new definitions, stating principles for protection of public morality and public policy in the area of public morality, bringing the Law into compliance with international law, including the Convention on Human Rights and Fundamental Freedoms to ensure the right of everyone to freedom of expression, the Convention on Cybercrime; ensure the right to cyberspace free from materials threatening physical, intellectual, moral and psychological condition of humans; ban upload and distribution telecom networks of products which harm public morality; improving mechanisms to protect children from negative impact of products banned or restricted for circulation in Ukraine, and preventive and educational measures intended to protect public morality, introduce monitoring of protection of public morality; and get public involved in protection of public morality.

Bill 7340¹⁰ “On Amendments to the Criminal and Criminal Procedure Codes of Ukraine (concerning the interrogation of minor victims and witnesses).” The Bill was drafted to improve current criminal procedure legislation of Ukraine regulating procedures of investigation of cases involving children, who are either victims or witnesses of crimes. The main objective is to improve legislation, which should be beneficial to the child and provide the least psychological injury to a child during the preliminary investigation and inquiry, and also at the trial. The bill also introduces into national legislation generally recognized standards set by international instruments for protection of children from any acts of violence.

The draft proposes changes to Article 49 of the Criminal Code of Ukraine, Articles 85-1, 85-2, 167, 171, 172, 206, 308, new versions of articles 168 and 307 of the Criminal Procedure Code of Ukraine, and proposes to amend this code with a new art. 167 — 1 concerning alleviation of procedures of juvenile interrogations and interviews with victims and witnesses of crimes during pretrial and trial in order to align it with European standards in protecting children’s rights. These changes include special procedure for criminal proceedings against juvenile witnesses and victims until they are 18, setting standards for the use of videotaped initial questioning of a juvenile victim and a witness rather than questioning him/her in future and the ability to attach to the proceedings of criminal case materials without direct participation of minors in trial; questioning of the child, if necessary, especially in child abuse cases, in the specially equipped room; presence of child’s attendant as his/her legal representative or, where appropriate, adult chosen by a child, if there is no motivated objection; compulsory participation in the interrogation of minors of a psychologist, not a pedagogue; carry out interrogation by the same persons; interrogate the child by a specially trained person; the determination of the number and length of interrogation of minors victims and witnesses; establish rules, according to which, in the case of nonage mental retardation, the victims

⁹ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38551

¹⁰ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38959

of juvenile crime can not testify, stop pre-trial investigation in criminal cases and establish statute of limitation for perpetration etc.

Bill 7390¹¹ “On amendments to the Code of Ukraine on Administrative Infraction (about protection of children)” registered on November 19, 2010. The Bill has been drafted by the working group under the La Strada Ukraine Center. The Law is intended to improve the administrative legislation of Ukraine and bring it in line with international standards in combating child trafficking, child prostitution and child-pornography and ensure the best interests of child victims and witnesses of crimes. The Bill proposes the following changes to the Code of Ukraine on Administrative Offences: to cancel administrative responsibility of persons under 18 for prostitution amending art. 13 of CUAO.

To define the responsibility of parents or their alternates persons substituting them for evasion of their legal duty to ensure the safety of the child to prevent his/her involvement in prostitution, porno production and distribution, involvement in human trafficking by amending art. 184 of the CUAO. Public works should be made a significant punishment. The responsibility should be envisaged for disclosure of information about persons affected by trafficking, child porno, involvement in prostitution and other crimes against sexual freedom and sexual inviolability of the person through the introduction of the new art. 183-15 in CUAO.

Bill 7391 “On Amendments to the Criminal and Criminal Procedure Codes of Ukraine (concerning protection of child trafficking and exploitation)”¹² registered on November 19, 2010. The Bill was drafted by the working group under La Strada Ukraine Center. The purpose of the Bill is to improve the criminal and criminal procedure legislation of Ukraine and bring it in line with international standards in combating child trafficking, sexual or labor exploitation, and ensure the best interests of minor victims of these crimes. The draft proposes the following amendments to the Criminal Code of Ukraine on the protection of children from trafficking and exploitation. Criminal legal prohibition of child labor exploitation is transferred to Article 172-1, which according to its content is named “child labor exploitation”. So, the Article 150 of the Criminal Code of Ukraine “Exploitation of children” is stricken out. In addition to actions that were criminalized under Article 150 of the Criminal Code of Ukraine the new criminal law regulations stipulates the responsibility for employment of a child who has not attained the age at which employment is permitted by law, intended for profit or use of forced labor of a child of any age. The crime qualifications include the use of child labor at hard work and in jobs with hazardous environment. The amended Article 156 of the Criminal Code of Ukraine will permit to hold criminally liable not only for direct lewdness toward a person under the age of sixteen, but also the same committed with the help of telecom or other means of communication. Improvement of this rule is especially important in terms of punishment of adults who corrupt children and prepare them for cybersex.

The Article 301 has been brought into compliance with the Law of Ukraine “On protection of public morality” in terms of terminology agreement, particularly the art. 301 will now contain the concept of “pornographic products” as defined by the Law of Ukraine “On protection of public morality” replacing the concept “pornographic articles” which is not defined by Ukrainian legislation. The added aggravating circumstances include responsibility not only for forcing minors to participate in making of pornographic products, but also involving in it without use of force or coercion; getting minors involved or forced into making porno products. The separate article of the Criminal Code of Ukraine provides responsibility for the use of child prostitution. Articles 168 and 304 of the Criminal Procedure Code of Ukraine are being improved in accordance with the principle of development of child-friendly procedures. In particular, it is suggested to regulate the procedure of questioning a child witness to a crime, and child-victim of crime in Art. 168. This article introduces provisions on mandatory participation of a specialist in general and child psychology or pedagogue, parents or other legal representatives of a minor and, if necessary, a doctor. This should

¹¹ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=39070

¹² http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=39071

apply to all persons under 18 years of age. The time of interrogation will be limited now. Thus, the total duration of interrogation of a nonage witness or victim during the day should not exceed six hours. It is proposed that the re-examination of the child may occur in exceptional cases only.

13. PREPARATION FOR RATIFICATION OF THE CONVENTION OF THE COUNCIL OF EUROPE ON PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION AND SEXUAL ABUSE

In 2009, they appointed the working group to prepare ratification of the Convention of the Council of Europe on Protection of Children from Sexual Exploitation and Sexual Abuse. The working group included the representatives of the Ministry of Internal Affairs, Ministry of Foreign Affairs and the Ministry of Education and Science, Ministry of Family, Youth and Sports, Ministry of Public Health and the General Prosecutor's Office (the order of the Ministry of Justice of Ukraine, September 8, 2009, № 764/7). However, the representatives of NGOs and independent experts were left out despite requests at various meetings, including the TRES Project "Protection of Women and Children in Ukraine" which was commissioned by the Council of Europe and supported by the European Commission during 2008–2010 and one of the tasks of which was preparation of ratification documents and legal expertise for ratification of the Convention № 201 of the Council of Europe.

The Ministry of Justice of Ukraine has drafted the Bill "On amendments to some legislative acts of Ukraine in connection with the ratification of the CE Convention on Protection of Children from Sexual Exploitation and Sexual Abuse." Since the ratification of this Convention is topical for effective system of child protection against sexual exploitation and abuse, it is worthwhile to recommend to the Cabinet of Ministers to expedite consideration of the Bill by Verkhovna Rada of Ukraine together with correct translation of the said Convention, since at present the translation of the Convention does not meet the source.

On the basis of proposals of the working group the Ministry of Justice developed a draft Bill of Ukraine "On amendments to some legislative acts of Ukraine in connection with the ratification of the CE Convention on Protection of Children against sexual exploitation and sexual abuse." The objective of this project is to include into the legislation of Ukraine the provisions of this Convention. The project is intended to create legislative conditions for implementation of the Convention in Ukraine, including liability for crimes related to sexual exploitation of children, to resolve procedural peculiarities of the investigation of cases involving children — witnesses and victims of this dangerous phenomenon — and prevention of perpetration against children by those working in regular contact with them.

Since the ratification of the Convention № 201 demands amending current legislation of Ukraine, the ratification bill provides for amendments concerning responsibility for crimes related to sexual exploitation of children, resolution of procedural peculiarities of the investigation of cases involving children — victims and witnesses this dangerous phenomenon — and prevention of illegal activities related to children by persons who are in constant contact with them to the Code of Criminal Procedure of Ukraine, Criminal Code of Ukraine, Law of Ukraine "On Protection of Childhood", Law of Ukraine "On protection of public morality". By tradition the draft instrument reads that the implementation of the draft Act does not require additional budget spending, as will be financed at the expense of budget item for upkeep of government agencies in charge of implementation of proposed measures. In fact, funds are needed for creation of an aid system for children-victims of sexual exploitation, their rehabilitation and reintegration into society, creation and support of respective centers for social assistance and social rehabilitation of such children.

Besides, there sounded a repeated demand to change the name of the Convention, as its Ukrainian translation does not match the original. For example, the appropriate letter was sent to the

MFA Contract Law Department. It read: “The members of the expert group consider the official translation by the Ministry of Foreign Affairs of Ukraine of the CE Convention (CED № 201) titled “Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse”, which is not accurate, because the title of the Convention in English includes the term “sexual abuse”, which means that a child is pressurized, forced or tricked into (Russian: *совращение*) taking part in any kind of sexual activity. Meanwhile the official Ukrainian translation uses the term the etymology and strict legal meaning differs from the above, namely — “розбещення”. The “розбещення” is rendered into English as “debauched actions”, “corruption”. We call your attention to the fact that the Convention contains a separate Article 22 “Розбещення дітей” (Corruption of children)¹³. The contents of this article reflects the corpus delicti, which in Ukrainian criminal legislation fully corresponds with corruption. Therefore the expert group insists on another version of Ukrainian translation of the title of the Convention, which corresponds to its spirit and essence, i. e. “Конвенція Ради Європи про захист дітей від сексуальної експлуатації та знуцань сексуального характеру”. Clearly, the timely editing of the translation of the title of Convention will protect against eventual further errors and distortions in the process of improvement and application of relevant legislation of Ukraine on protection of children, who are the most vulnerable segment of population of our country.”

14. PROBLEMS OF PREVENTION OF TRAFFICKING IN CHILDREN AND ASSISTANCE TO AFFECTED CHILDREN

The issue of protection of children from trafficking, child prostitution, child porno and sexual violence is topical for Ukraine. According to the Ministry of Internal Affairs of Ukraine, only for 9 months of 2010 250 criminal cases were entered against human trafficking. 268 trafficking victims were brought home, including 31 nonage and 5 minor children. 356 crimes against sexual inviolability and freedom of children were detected. However, these figures do not reflect the real picture, as sexual exploitation and sexual abuse of children are latent phenomena. It may be also supported with information in the media.

Today Ukraine cannot efficiently respond to this flagrant violation of children’s rights, both at the legislative and practical level. The examination of the regulatory framework to determine the compatibility of Ukrainian legislation with the requirements of the Optional protocol on the trafficking in children, child prostitution and child pornography recently conducted by the La Strada Ukraine Center supported by UNICEF in Ukraine found numerous flaws and omissions in current criminal legislation in this area. However, the problems are still there on practical level. Ukraine has no system of prevention of sexual violence and sexual exploitation of children and support system for the wronged children. Unfortunately, school curricula contain no courses on developing skills of children to counter risks of sexual abuse against them. Today, Odessa hosts the only one Ukrainian center for social and psychological rehabilitation of girls affected by sexual violence and exploitation. However, it is not backed the state; it is sponsored by NGOs and donors. And as it became known in November, in 2011 this center may cease functioning, as there will be no funding. The problem combines absence of centers and skilled personnel to provide professional assistance to the affected children.

While amending laws and improving protection of the rights of the child, it might be worthwhile not to forget about working with people. Today, Ukrainian society is too tolerant about the violation of the rights of the child. You must teach people to show zero tolerance to minimal violations of the rights of the child. Only then we can fulfill children’s rights in Ukraine and prevent violations of these rights.

¹³ Here the authors agree with the translation.

15. EQUIPMENT OF GREEN ROOMS

In 2010, the La Strada Ukraine together with the Kyiv Department of Ministry of Internal Affairs and criminal militia for children in Kyiv, as well as Kyiv Solomensky criminal police department for children equipped *the room for psycho-social work with children affected by sexual exploitation or sexual abuse*. Two more rooms, including one in Odesa, are on the waiting list. To make the project more efficient, they are working to develop *guidelines for criminal militia pros on querying children affected by sexual exploitation or sexual abuse*. The guidelines will be ready for publication in February 2011. The trainings have been started already.

16. E-HOTLINE TO CONTROL CHILD PORN ON THE INTERNET

The e-hotline intended to control child porn on the Internet was inaugurated at the La Strada Ukraine Center on November 19, 2009. It is intended to monitor (calls from the public) information about child porn on the Internet, especially on the servers of Ukrainian providers in order to respond in accordance with legislation of Ukraine and improve the system of protection of the rights of the child and combat crimes against children and, if possible, to block such content. The e-mails are directed to the password-protected address: in-fo@internetbezpeka.org.ua.

The efficiency of the e-hotline (as of 11/30/2010)

Messages on child porn (total)	Info for 2010		Messages on adult porn	Other messages	Total messages
	Messages on child porn (Ukrainian Internet)	Messages on child porn (Foreign Internet)			
147	8	115	75	146	368

By placement of child porn on the Internet (common sites, porno sites, message boards, etc.) the messages can be classified as follows:



During the year the site had 3877 hotline users.

17. ACTIVATING BUSINESSES

The businesses and private sector became more active in protection of children, particularly from sexual exploitation in the net. The Coalition on Children's Internet Safety, initiated by Microsoft in 2008, has increased its membership up to 26.

18. CODE OF CONDUCT

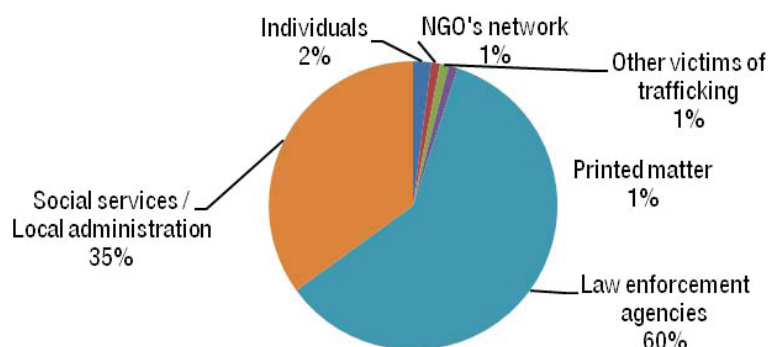
The Code is a social initiative of business and human rights community aimed at detecting and combating child sex tourism. Since 1998, over 900 tour operators, carriers, hotels and other companies have signed the Code and made a commitment to stick to six criteria: establish an ethical policy regarding commercial sexual exploitation of children; to train the personnel in the country of origin and travel destinations; to introduce a clause in contracts with suppliers, stating a common repudiation of commercial sexual exploitation of children; to provide information to travelers by means of catalogues, brochures, in-flight films, ticket-slips, home pages, etc; to provide information to local “key persons” at the destinations; to report annually on their efforts to protect children from sexual exploitation in tourism.

Any travel company — tour operators, hotels, travel agents, airlines, excursion offices, air carriers, sea carriers, etc — may sign the Code. The Code has been signed by 949 companies worldwide; they include hotel networks Accor, Regent, Park Inn, British Airways, Air France, travel agencies Lot Travel, FreeWay Brazil, Apollo (Sweden) and others. These companies are listed as socially responsible. The information about them is placed on the site of the Code of Conduct: www.theCode.org. In 2009, the La Strada Ukraine Center has joined the international campaign for implementation of Code of Conduct in travel and hotel business in order to combat child sex tourism and became a national partner of the international organization TheCode in Ukraine. Today in Ukraine there are no signatories to the Code yet.

19. ISSUES OF ASSISTANCE TO MINOR VICTIMS OF TRAFFICKING

The International Organization for Migration claims that from April 2009 to September 2010 they identified and registered 117 minor victims of trafficking within the reintegration aid program. The main destination country in the detected cases is the Russian Federation (55), while Ukraine is second on the list by the number of trafficking cases at home and in-coming trafficking (53). Five minor victims of trafficking returned home from Poland and one child from Israel. Three children were residents of Moldova and safely and voluntarily returned to their homeland. Of 117 identified victims 68% are girls and 32% of boys. In 28 cases the trafficking was prevented (26 girls and 2 boys were identified); in 32 cases those were instances of sexual exploitation and pornography; in 18 cases the forced labor was the target, in 33 cases begging, in 5 cases various forms of exploitation — forced labor and begging, and in one case a child was forced into criminal activity. The sources of referral of trafficking victims in this project are given below:

The sources of referral of minor victims of trafficking



The following table illustrates the types of assistance provided to child victims of trafficking up to certain period¹⁴:

¹⁴ Without regard for the victims of trafficking identified in June, as at the time they had not received any assistance.

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Type of assistance	Number of cases
Help for re-employment	22
Family support	79
Psychologist	35
Housing	18
Assistance in employment	23
Medical care	49
Transportation	67
Legal assistance	36

At this stage it is too early to draw any conclusions about the success of reintegration of victims, as they still draw on support. Between April 2009 and June 2010 the monitoring was conducted at homeless placement centers in four pilot oblasts (Zakarpatska, Luhansk, Kharkiv and Mykolayiv), as well as shelters for children in 5 oblasts (Chernivtsi, Zakarpattia, Luhansk, Kharkiv and Mykolayiv). The NGO experts interviewed 262 children, among whom 22 (8%) were identified as victims of trafficking. This information was brought to the Ministry of Internal Affairs to the criminal militia for nonage persons and children were referred for assistance in reintegration. Of 22 identified minor victims ten were involved in criminal activities related to trafficking and became witnesses or victims.

Since September 2010, due to significant changes in legislation regulating the work of criminal militia for nonage cases, the children aged 11 and more can be sent to homeless placement centers on court orders only. As a result, the number of children currently in homeless placement centers is much smaller compared with that a year ago; thence the poorer identification of child victims of trafficking in the homeless placement centers. On the other hand, the local shelters for children report increased number of children; therefore in the next quarter we will monitor not homeless placement centers, but transit shelters. In August 2010, the agreements were signed on inauguration of regional pilot projects on the mechanism of trial for the reintegration of child victims of trafficking.

20. RECOMMENDATIONS

1. To elaborate on inauguration of Child Ombudsman and to draft an appropriate bill.
2. To recommend the Bills of Ukraine, registration №№ 7390 and 7391, 7340.
3. To amend the legislation about education, particularly the laws of Ukraine “On Education” and “On General Secondary Education” with provisions for the mandatory notification about the rights of the child, training in the prevention of perpetrations against the child, their harmful effects, about risks of sexual exploitation and sexual abuse, as well as ways to protect themselves in a form appropriate to their age abilities.
4. To fix the definition of “child trafficking” in the Law of Ukraine “On combating human trafficking”.
5. To fix the definition of “child prostitution” in the Law of Ukraine “On protection of the childhood”.
6. To develop amendments to the Criminal Procedure Code of Ukraine: provisions for compulsory participation of a psychologist at all stages of trial involving a child; provisions for free legal assistance to children, who are recognized victims and witnesses, which are necessary to protect their rights; responsibility of pretrial investigators to reveal informa-

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- tion about threats to the child, for which there is information that s/he became a crime victim, and ensure her/his protection, prior to recognition of the child a victim despite the availability or absence of statement or report informing about the threat of her/his safety from her/himself or from another person; immediate referral of materials containing information about a crime against a child to the investigator to decide upon institution of legal proceedings and for the period of examination to go about child's security before trial; special section in the criminal procedure legislation of Ukraine, which will regulate procedural matters securing the best interest of the wronged child.
7. To draft a new Supreme Court ruling on application of legislation by courts about the responsibility for sexual crimes against children.
 8. To ratify the Hague Convention on Protection of Children and Cooperation in Interstate Adoption.
 9. To approve the concept of introduction of juvenile justice in Ukraine, paying considerable attention to the rights of the children, who became victims and witnesses of crimes.
 10. To ratify the Convention on Protection of children against sexual exploitation and sexual abuse.
 11. To rally nationwide awareness for Ukraine's juvenile justice.
 12. To develop a system of provisions and protection of the rights of the child; to develop a mechanism of interaction of different bodies and institutions to protect the child.
 13. To set up specialized centers of social and psychological rehabilitation of child victims of sexual violence and sexual exploitation.
 14. To charge the Ministry of Justice of Ukraine and the Ministry of Foreign Affairs of Ukraine with making correct translation of the European Convention № 201 into Ukrainian.
 15. To take into account all recommendations contained in the alternative report on implementation by Ukraine of the UN Convention on the Rights of the Child (pp. 69–78).

XXV. RIGHTS OF THE SERVICEMEN¹

1. SOME GENERAL ISSUES

Systemic transformations in various areas of governance and public life have been taking place in Ukraine since its independence was declared. It is noteworthy that in this context the problems, faced by the Army, seemed somewhat insignificant. Sometimes it even looked as if the military led their own life, totally isolated from the rest of the world. This state of things, naturally, led to the consequences, which are quite obvious. There is no need to join the Ukrainian Armed Forces or any other military unit to see the difficulties related to the operation of the state military organization and service in the army. Unfortunately, not only Ukrainian citizens but the world community as well could witness the instances when non-compliance with service regulations resulted in disasters. Thus, for example, in the course of exercise, the rockets launched by the soldiers hit the civil airplane carrying foreign citizens on one occasion and a residential building on another.

At Sknyliv airfield (Lviv oblast') a plane crashed during a demonstration flight taking the lives of 77 people.

Unfortunately such examples are numerous. One can also recollect the explosions at the ammunition depots in Novobohdanivka (Melitopol raion, Zaporizhzhya oblast'), which caused the death of 5 persons and injuries of various severity of another dozen. In 2008 a number of ammunition depots explosions occurred nearby Lozova town (Kharkiv oblast'). Safe maintenance of these depots is also the responsibility of the military. In land forces training center 169 "Desna" a tragic event, caused by violation of the tank shooting regulations, happened in 2005. As a result two soldiers were killed and one was injured.

Therefore, one can see that such occurrences happen rather often, and unfortunately there is no guarantee that they won't happen in the future.

Very often these tragedies, permanently occurring in our country, are caused by the violations of service regulations and negligence of professional duties by military personnel. However, first and foremost, they demonstrate the systemic problems present in the Ukrainian Army, inefficient functioning of the state military organization, inadequate conditions for the regular service, lack of tradition of public control over the developments "inside the barracks" and many other crucial issues in this area. The officials of various ranks, however, are reluctant to admit their mistakes or to learn from them, while the law enforcement bodies are just looking for the scapegoats to make them legally liable.

The primary mission of the military organization of any state is ensuring national security. In order to fulfill this complex task it is not enough to set up respective structures. It is necessary to ensure the appropriate military service and appropriate performance of functions by each and every serviceman. This is the first prerequisite of military efficiency in any armed forces service unit, and, therefore, in a state military organization as a whole. However, in real life ensuring

¹ Prepared by Yevhen Grigorenko, senior lecturer of State and Law chair of V.N.Karazin Kharkiv National University.

appropriate service in the armed forces is a complex task, which encompasses a whole range of measures undertaken by the state, society and individuals. Meanwhile, these issues have never been researched on theoretical level, while practical expertise has been accumulated, but never systematized.

Besides, it is worth mentioning that Ukraine as an independent state did not have to set up all the aforementioned structures, as it inherited them as Soviet Union legacy. Under the rigid inheritance laws the young state received not only a huge military organization, but also the whole set of its problems. Moreover, these problems aggravated and increased in number due to the changes in the military structures' "surrounding". Namely, the state tried to make transition from administrative-command economic system to the market economy, from ideological monism to ideological diversity, from totalitarian regime to the democratic one. Despite of the fact that this goal was not achieved even till present time, this transition led in the military area to ruination and decay of the old but well-developed mechanisms of the internal army operation, without providing for the new effective mechanisms to replace them.

Due to the lack of a clear program for the Ukrainian army reform, authorities undertook the measures aimed at promoting the policy (unfortunately, mostly foreign) of integration into North-Atlantic security space. This policy can be judged in different ways, but it shows more or less clearly the tendency of development in the military organization of Ukraine. This tendency was spelled out in the numerous normative and legal acts, including the Law of Ukraine "On the Basics of National Security of Ukraine".

However, presently current administration rejected this course of action. The Law of Ukraine "On principles of domestic and foreign policy", passed on July 2010, testifies to the fact. The essence of the problem, however, consists not in the rejection of NATO-integration course, but in the total absence of any general course for getting army structures out of systemic crisis, overcoming the negative aspects of the difficult legacy Ukraine inherited in this area.

2. LEGAL REGULATION ASPECTS — ISSUES OF OBSERVANCE AND PROTECTION OF SERVICEMEN'S RIGHTS

Ensuring adequate operation of the state military organization and service in the armed forces is a complicated national function subject to maximum normative regulation, due to a number of factors. Under the Constitution of Ukraine, the military organization is entrusted with accomplishing rather specific and, at the same time, large-scale and complicated tasks. These ambitious and important tasks envisage involvement of substantial power resources; significant forces and resorts of the military organization are required for their implementation.

The tasks, defined by the Constitution of Ukraine, mainly consist in repulsing armed aggression of other states, acting in case of armed conflicts and also undertaking certain preventive measures, aimed at safeguarding national security of Ukraine, avoiding war, maintaining world peace and safety. However, the misuse of the power and resources of the military organization creating the threat for the state sovereignty, human rights, law and order, globally recognized principles and norms of the international law, can lead to unexpected consequences, which will write a black page in the history of the country or even world history and throw the state several years or even centuries back in its development.

The military sphere is regulated, alongside with the Fundamental Law, by a number of laws: "On Military Duty and Military Service"², "On Defense of Ukraine"³, "On Armed Forces of

² On Military Duty and Military Service: Law of Ukraine of March 25, 1992 № 2233-XII // Bulletin of the Verkhovna Rada of Ukraine— 1992. — № 27. — P. 386.

³ On Defense of Ukraine: Law of Ukraine of December 6, 1991 № 1932-XII // Bulletin of the Verkhovna Rada of Ukraine — 1992. — № 9. — P. 106.

Ukraine”⁴, “On Social and Legal Protection of the Servicemen and their Families”⁵ etc. Moreover, another Law of Ukraine was passed and made public — the Law “On Democratic Civilian Control over the State Military Organization and Law Enforcement Structures”⁶, which was to become instrumental in promoting active participation of the civil society in exercising control over the security agencies of the Ukrainian state, namely, over the military and the law enforcement structures, as well as over the individuals serving in the army, and ensuring their compliance with the rigid norms, established by the Constitution. It is noteworthy, that despite of rather detailed regulation of the army-related issues, the legislation defining this area is rather obsolete and inconsistent. This situation not only complicates the resolving of major issues, but, first of all, does not provide for the guaranteed implementation of rights and freedoms of the servicemen.

In particular, despite of the declared transition to the contractual basis of army service, the respective law still underlines the compulsory nature of the conscription. The Law of Ukraine “On Military Duty and Military Service” from its very name to the spelling out of the procedure for armed forces’ and other military units’ formation (article 4) — stresses the compulsory nature of military service as opposed to the contractual conscription and does not declare the right of the equal access to this latter. Besides, this Law equates the military duty with the right of the equal access to military service. Thus, article 1 of part 3 stipulates that military duty includes both voluntary enlisting (under the contract) and compulsory conscription to the army. As to the last provision, it is indeed included into the concept of “military duty”, while voluntary joining the army can under no circumstances be regarded as “duty”. The contractual enlisting of a Ukrainian citizen to the army, by its legal nature is a constitutional right (not obligation), defined as potential and not compulsory individual behavior, aimed at establishing legal relationship between and individual and the state in reference to the service in the army.

Such normative regulation of the issue not only fails in accelerating the process of transition to the contractual basis of army service, but incessantly creates additional problems related to the realization of Ukrainian citizens’ right of the equal access to the service in the army (p. 2 article. 38 of the Constitution of Ukraine) The fact that professional military service is not competitive in current job market further aggravates the situation. However, if, according to the reports of Ministry of Defense of Ukraine for 2009, the upkeep costs for one contractual soldier serving as a shooter almost equal the respective costs for a conscript at the same position⁷, then obviously competitiveness of such profession is out of question.

The Statutes of the Armed Forces of Ukraine compiled to regulate all the aspects of the service not only in the armed forces, but also in all the other units (State Border Service of Ukraine, Security Service of Ukraine, Internal Troops of the Ministry of Internal Affairs and some others) deserve special attention. In practical operation these statutes aggravate significant problems concerning realization and protection of the constitutional rights and freedoms of the servicemen.

The Statute for the Internal Troops of the Armed Forces of Ukraine defines the servicemen rights in fragments, without paying any attention to the fundamental, basic or underlying principles of an individual’s status. Such fundamental constitutional principles as equality, respect of human dignity and some others are often neglected in the army service. Meanwhile, not only should they be declared legally, first of all, in the Ukrainian Armed Forces’ Statutes, but they should become a guiding principle in the operation of senior officers in the state military and every serviceman equally. These principles should be imprinted in the consciousness of all those serving in the army

⁴ On Armed Forces of Ukraine”: Law of Ukraine of December 6, 1991, № 1934-XII // Bulletin of the Verkhovna Rada of Ukraine. — 1992. — № 9. — P. 108.

⁵ On Social and Legal Protection of the Servicemen and their Families: Law of Ukraine of December 20, 1991 № 2011 with amendments introduced in compliance with the Law of Ukraine of November 3, 2006. № 328-V // Bulletin of the Verkhovna Rada of Ukraine. — 2006. — № 51. — p. 519.

⁶ On Democratic Civilian Control over the State Military Organization and Law Enforcement Structures: Law of Ukraine of June 19, 2003 № 975-IV // Bulletin of the Verkhovna Rada of Ukraine — 2003. — № 46. — P. 366.

⁷ White book 2009, Armed Forces of Ukraine. — K. :Ministry of Defense of Ukraine, 2010. — p. 12–13.

as well as those intending to serve in any military units. The essence of the problem is that the principles of human rights are often ignored both in admitting people to military service and in serving.

In actual operation the exercising of these rights entails a whole range of problems, arising from either lack of awareness or wrong perception of the rights. Thus, for example, in a fixed-term service the equality principle is ignored because for many years it's been neglected in everyday military operation. This neglect was manifested in granting completely unlawful privileges to the servicemen, based on principles of seniority, soldier's nationality and other "criteria". No privileges of that sort are stipulated by the law; nevertheless, they are widely spread in practical operation and sanctioned by sergeants, first sergeants, ensigns and even officers with the goal of absolving themselves from the performance of their duties, establishing a semblance of law, order and discipline, thus ensuring training and upbringing of young generation.

These practices, however, lead to adverse consequences, devaluation of human rights, discrediting of military services, deformities in sense of justice among servicemen, detriment to combativity of military units and other negative effects. The violation of equality principle leads to the abuse of these unlawful privileges by servicemen who have them. They become deeply convinced that they have essential superiority over other servicemen. Demonstration of this superiority is manifested in all types of physical and moral violence, humiliation of honor and dignity of other soldiers, as well as in threat to their lives and health. On the other hand, it leads to health deterioration in servicemen (including mental illnesses), sleeping disorders, phobias etc.

The violence can be used even for minor digressions, committed by new soldiers. "Sometimes small things, like attaching the collar or doing the bed incorrectly, grow into serious problems and become a cause for humiliations, and sometimes, open tortures, which can undermine young man's self-esteem and lead to the unpredictable consequences"⁸. These concerns are absolutely well-grounded, as this situation remains most typical, including years 2009 and 2010.

Thus, servicemen who have served longer and were charged by superiors with training the young draftees, in their desire to prove their alleged superiority over such soldiers, order them to do the types of job that sometimes are within the boundaries of military service and sometimes are not. On the other hand, when the soldiers make even slight mistakes in doing the job, first they are reprimanded verbally and then, in violation of the established rules of relationship between servicemen, regularly subjected to physical violence. This violence results in various consequences, including severe bodily injuries and sometimes death of a serviceman. Sometimes humiliations, harassment, beatings and persecutions lead even to suicides.

Taking into account that Armed Forces Statutes not only regulate all the aspects of army operations, but are comprehensively studied by the servicemen, the inclusion of fundamental constitutional principles concerning rights and freedoms of servicemen into them is absolutely necessary, as well as their most detailed elaboration and interpretation.

Besides, the duties of commanding officers (superiors) spelled out in the Statute, do not stress their natural paramount duty, i.e. to ensure rights and freedoms of servicemen, subordinate to them. Some Statute provisions define that an officer in command must implement the measures aimed at ensuring soldiers' safety in a military unit; however, it says nothing about the duty of ensuring appropriate everyday life, health, honor and dignity, inviolability and safety of every serviceman and military personnel as a whole.

The biggest problem, though, lies in the fact that the statutes "contribute" to the closed nature of the army, to the concealing of real situation concerning rights and freedoms of servicemen, especially those who serve fixed terms. A large number of statute provisions significantly complicate the protection of rights and freedoms of servicemen, and sometimes make it totally impossible. There are certain "hidden" norms and even the norms which can be used by a "capable commanding officer" to restrict the use of basic means of protecting rights and freedoms by a serviceman.

⁸ Monitoring of the servicemen's rights violations / Compiled by M.A.Kryukova — Kh.: Folio, 2004. — P. 186.

To begin with, the daily routine, regulated by the article 201 of Statute of the Internal Troops of the Armed Forces of Ukraine does not envisage any time for a serviceman to approach law enforcement bodies, other governmental structures and non-governmental organizations to protect his rights and freedoms. The only thing, stipulated by the statute is the time when commanding officers are available to listen to the personal problems of servicemen. This is an administrative provision, which in practice proves to be inefficient. The thing is, any civilian also can approach authorities for the protection of his/her rights and freedoms administratively, and, in case of failure, go even further — file complaint in court. The daily regulations for the servicemen of fixed term do not provide for any other instruments for quick response to rights and freedoms' related violations apart from approaching their direct superiors.

Prima facie, a serviceman, whose rights were violated, can share this fact with his visitors. Indeed, at the time of the visits, the servicemen of fixed term the latter can not only complain of the violations of his rights and freedoms and tell about specific abuses, but parents have an opportunity to physically examine their child, and to see, as the case may be, the results of physical violence used against him in the course of service. Here, however, we face another obstacle, created on purpose by military statutes.

Thus, article 228 of the said Statute establishes general rule for the servicemen of fixed term and contractors, i.e. that they can be visited in time envisaged by the schedule, in special premises designated for that purpose in a military unit. On the other hand, the same article (part 2) specifies that the visitors, wishing to see a serviceman, are let into the room by permission from the guard at the check-point.

Thus, one needs a permit to visit at a certain time, in a certain room. In fact, such visit can be refused, even if a visitor complies with all requirements. So, it deprives a soldier of the opportunity to inform anyone about violation of his freedoms and rights.

Another opportunity arises when a soldier goes on leave and can inform relevant agencies of the assault and be examined for the evidence of battery. The problem is to obtain the leave. Moreover, the Statutes allow commanding officers to refuse granting the leave to such servicemen without any cause, so that permission to go outside the military unit deployment can also become a problem. In this case the Disciplinary Statute of the Armed Forces of Ukraine can be very “instrumental” for commanding officers. This normative/legal act, establishing disciplinary liability of the servicemen, lacks the most important characteristics of the offence and the guarantee against illegal bringing to account, recognized by the whole civilized world — i. e. illegality principle (there is no offence if it is not defined by the law).

It means that the Statute does not define an offence, but foresees only the types of punishments and defines who should measure them and in regards to whom. This engenders subjectivity, lack of objective judgment and rather often unjust use of disciplinary liability measures. This legal provision allows for depriving a serviceman of his right of leaving the boundaries of a military unit deployment, including the serviceman whose rights were violated and who must tell about his disaster “outside the barracks”.

Thus, it becomes evident that the Armed Forces Statutes set up an order, under which a serviceman of fixed term, whose rights are violated, will have tough time trying to break out from the barracks and inform law enforcement agencies and public organizations, let alone his own parents, of the offence. The statutes, therefore, do not promote realization and protection of rights and freedoms of servicemen, especially those of fixed term service.

They also lead to the whole range of human rights-related problems.

These issues acquire utmost importance for military service and military operation, especially for observance and realization of the servicemen's rights in the light of the fact that undivided authority, subordination stipulating the possibility and necessity of issuing orders are characteristic prerequisites of military service. Under the article 11 of the Statute of the Internal Troops of the

Armed Forces of Ukraine⁹ each serviceman must unconditionally obey commanders' (superiors') orders, while disobedience leads to legal liability, including the criminal one, spelled out in the articles 402 and 403 of the Criminal Code of Ukraine¹⁰.

At the same time the Constitution of Ukraine (article 60) also addresses this issue and establishes a general rule, under which no one shall obey obviously criminal orders or instructions. Giving and obeying obviously criminal order or instruction entails legal liability. In accordance with legislative logic this rule should be elaborated at current legislative level.

Thus, article 6 of the Disciplinary Statute of the Armed Forces of Ukraine establishes that the commander's right is to issue orders and commands, while the duty of a serviceman is to obey them, unless they are of obviously criminal nature. The problem, however, lies in the fact that the said Statute does not offer a mechanism for refusal to obey such an order; on the contrary, it stresses only the importance of obeying the orders and envisages serious punishment for those who fail to do so. Therefore, the Statute does not elaborate on the constitutional provision concerning refusal to obey obviously criminal orders, as it does not offer a real mechanism for the refusal to obey such orders. This presents a real threat for those who serve in the army for a fixed term, specifically in the domain of observing rights and freedoms of servicemen and other individuals.

It is noteworthy that this issue found better regulation in the Law of Ukraine "On Public Service"¹¹, as well as in the Disciplinary Statute of the Internal Affairs Agencies¹². These normative acts stipulate that a subordinate not only shall disobey such orders, but also shall report his/her refusal to the person who issued the order. If this latter insists on obeying the order — refuse again to do it and report, instead, to the superior commanders. Similar provisions should be included into the Statutes of the Armed Forces of Ukraine.

The statutes, however, also contain provisions which are complete nonsense. Thus, article 241 of the Statute of the Internal Troops of the Armed Forces of Ukraine specifies that every serviceman should take care of his health, adhere to the norms of personal and public hygiene, while each commander (superior) must ensure adherence to the norms of personal and public hygiene in his military unit (detachment). Alongside with that, article 242 of the said Statute spells out the meaning of the concept of "strict adherence" to norms of personal hygiene: 1) morning and evening washing with teeth-cleaning; 2) washing one's hands before eating; 3) timely shaving, cutting one's hair and fingernails; 4) weekly bathing in a bathhouse with change of underwear and bedding, foot-wraps and socks; 5) keeping one's uniform, boots and bedding clean; timely changing of the under-collar.

Hence, a logical question — how is it possible to strictly observe norms of personal hygiene, washing in a bathhouse and changing underwear, socks etc once a week!?! Can a person that has not washed for a week, having strenuous physical exercises every day, preserve his human dignity? Can this person be healthy? Altogether, what this provision has to do with the notion of "hygiene"? This Statute provision makes one think that its authors have never seen the Constitution of Ukraine, as it, alongside with other similar provisions, not only defies common sense, is contrary to normal existence of a human being and elementary hygienic rules, but also is at conflict with a whole range of constitutional provisions. For example, article 3 (a person, his/her health and dignity are recognized as highest social value in Ukraine); part 5 of article 17 (the state ensures social protection of the citizens of Ukraine serving in the Armed Forces of Ukraine and other military formations); article 21 (all people are free and equal as to their dignity and rights. Rights and

⁹ Statute of the Internal Troops of the Armed Forces of Ukraine: approved by the Law of Ukraine of March 24, 1999, № 548-XIV // Bulletin of the Verkhovna Rada of Ukraine — 1999. — № 23–24. — p. 194.

¹⁰ Criminal Code of Ukraine: Law of Ukraine of April 5 2001 // Bulletin of the Verkhovna Rada of Ukraine — 2001. — № 25–26. — P. 131.

¹¹ On Public Service: Law of Ukraine of December 12 2006 № 432-V // Bulletin of the Verkhovna Rada of Ukraine — 2007. — № 9. — p. 69.

¹² Disciplinary Statute of the Internal Affairs Agencies: approved by the Law of Ukraine of February 22 2006. № 3460-IV // Bulletin of the Verkhovna Rada of Ukraine. — 2006. — № 29. — p. 245.

freedoms of a person are inalienable and inviolate); article 24 (citizens have equal constitutional rights and are equal in the face of the law); parts 1 and 2 of article 28 (every person is entitled to respect of his/her dignity, no one can be subject to treatment humiliating his/her rights); part 1 article 41 (every person has a right to health care) et al. These norms become even more relevant, once we consider the fact that we are talking here about young persons between 18 and 25 years of age, that is, young men drafted to the Army and performing their duty for the benefit of their country and society at large.

Violence still remains another serious issue in the functioning of the Armed Forces of Ukraine and other military units. It is noteworthy, that of late it has become less widely spread due to various factors (limiting the service term to one year, permanent public attention and monitoring of this problem, more responsible [though far from adequate] attitude of official bodies). According to the Ministry of Defense of Ukraine, recently the number of deceased servicemen also decreased. Thus, in 2008, 14 servicemen perished in the course of their service, and 62 — out of service, while in 2009 these figures amounted to 8 and 51 respectively. In 2008, one soldier died as a result of “non-statutory relations”, while in 2009 — 0. At the same time the number of soldiers who committed suicide increased from 12 in 2008 to 17 — in 2009¹³.

On the other hand, the official statistics leaves “on the margins” a large number of servicemen’s assaults. However, the whole system of divulging and identifying such infringements (army and generally criminal offences, committed in the military and seriously affecting the constitutional guarantees of servicemen’s rights and freedoms) is not helpful. Same applies to the Statutes of the Armed Forces of Ukraine. The system dates back to the soviet times, and has not undergone any significant changes since, either in 2009 or 2010 in particular. We are talking about the investigation procedure, which constitutes the basis for initiating actions aimed at uncovering offences and their perpetrators. In this case it means undertaking urgent measures by the respective bodies, which must quickly and efficiently respond to situations that occur. To that end, they should have direct connections to the venue and potential perpetrators.

That’s why it is a commanding officer of a military unit, who is the person in charge of investigating the offences, committed by servicemen subordinate to him. One should, however, keep in mind that a commanding officer, under the Statutes of the Armed Forces of Ukraine, is in charge of many other tasks, investigation being only one of them. The officials in charge must, first and foremost, provide guidance and ensure order in their respective areas of operation. At the same time, they are responsible for maintaining discipline and order and preventing criminal activities. That’s why the law charged them with the duty to investigate.

Thus, the substantial list of the duties of a regiment commander (captain of I and II class, special battalion commander), defined by the article 67 of the Statute of the Internal Troops of the Armed Forces of Ukraine¹⁴, part 16, includes his duty to ensure legal education of the servicemen, to bring an action and carry out the investigation in case of criminal offence, committed by a serviceman.

Alongside with that, there are certain obstacles to carrying out appropriate discovery and investigation of the crimes, committed in a given military unit. They root in the fact that the commander as investigator is not interested in discovering a crime in a unit subordinate to him, as it deteriorates the unit’s prestige, for which he is also responsible. Parts 16 and 17 of the article 67 of the aforementioned Statute, among other duties entrust him with a duty to educate soldiers in legal area and take measures to prevent crimes and other offences. If he uncovers a crime, his superiors immediately will accuse him of inadequate performance of his duties.

That’s why the unit commanders rather often hush up or hide the committed crimes, both from public at large and from governmental bodies, including the prosecutor’s office. One should be aware of the fact that in this case they are committing a crime themselves, under the article 426

¹³ White book 2009, Armed Forces of Ukraine. — K. :Ministry of Defense of Ukraine, 2010 — p. 15.

¹⁴ Statute of the Internal Troops of the Armed Forces of Ukraine: approved by Law of Ukraine of March 24 1999 № 548-XIV // Bulletin of the Verkhovna Rada of Ukraine. — 1999. — № 23–24. — p. 194.

of the Criminal Code of Ukraine¹⁵, which establishes criminal liability for conscious non-prevention of a crime, committed by a subordinate, or other purposeful inactivity, committed by a military, charged with certain duties, if it led to substantial damage.

However, despite of the possible legal consequences, i. e. criminal liability, military units' commanders persist in their attitude. This conclusion is supported by the results of a study carried out by V.V. Bondarev, who states that on the average only 13% of the whole bulk of crimes, related to violations of statutory requirements on relations between the servicemen in the Armed Forces, end up in official conviction; it means that at least 80% of the total bulk of criminal offences get no response — the appropriate criminal lawsuits are not brought against the perpetrators¹⁶.

To begin with, the offences consisting in violations of statutory requirements on relations between the servicemen apart from relations of subordination, manifested in beatings, other forms of violence leading to slight body injuries, harassment, jeers and some other offences, are often hushed up by unit commanders.

These latter often suppress even graver offences, involving, for example, medium or heavy body injuries. The military authorities go to unprecedented lengths to conceal and cover the crime. The cases are known when commanders sent the victims on vacation leave out of turn and placed them in private civilian clinics on the preliminary agreement with the victim, his parents and other persons concerned, demanding non-divulging of the information.

These issues become especially crucial considering the fact that discovery of crimes constitutes most important element in the struggle against criminality in the army. If the investigation entity uncovers a crime, documents it in due procedure, investigates it and submits the case to the court, then the offence will definitely become known to the public at large, as the trial is open and transparent. However, if in real life, instead of uncovering an offence, the investigation entity covers it, then, accordingly, the case is not filed in court, the perpetrators go unpunished, the public is unaware of what happened and no new offences can be prevented. According to criminologists, the reliable statistics on "*dedovshchina*" does not exist, while lenient attitude often leads to the further deepening of disrespect to human rights and freedoms; this disrespect, once rooted in a soldier's consciousness, can later become a criminogenic factor¹⁷.

Unfortunately this practice persists and is still in place despite all the efforts to do away with it. In particular, a special law enforcement structure — Military Office of Law and Order with the mission of maintaining law and order and military discipline among the servicemen, preventing crime and law violations, detecting and stopping them, performing other important tasks, was set up within the Armed Forces of Ukraine. However, the problem at hand is not about creating new law enforcement agencies, although it is a positive sign on the part of the state trying to fight the crime in the military, but about raising of legal awareness among all the servicemen, getting rid of the adverse legacy left to the military by many years of its functioning within a totalitarian regime, first of all, in the area of legal regulation.

These are just few examples of existing gaps and shortcoming in the "guidelines for the servicemen"; they demonstrate, however, that there are a lot of unresolved problems in this domain. The most crucial among them is that the principal postulate of modern constitutionalism, i. e. that a person and not a state represents the highest social value — is neither taken into account nor reflected in the Statutes.

¹⁵ Criminal Code of Ukraine: Law of Ukraine of April 5 2001 // Bulletin of the Verkhovna Rada of Ukraine— 2001. — № 25–26. — P. 131.

¹⁶ M.I. Karpenko. Criminal liability for the violation of statutory rules concerning relations between the servicemen apart from subordination-based relation (criminal law and criminological research)— M.I. Karpenko / editor V.K.Matviychuk : monograph. — K. : KHT, 2006. — P. 56.

¹⁷ Ibid — P. 266.

3. DOES A STATE HAVE RIGHT (MORAL AND LEGAL) TO COERCE UKRAINIAN CITIZENS TO SERVE IN THE ARMY?

As of today, the issue of transition to exclusively contractual military service has become most topical. In other words, the state should provide the opportunity for Ukrainian citizens to serve in the army only on the voluntary basis. It is noteworthy that the current Constitution of Ukraine as opposed to the former one (i.e. the Constitution of the UkrSSR of 1978) does not contain any imperative requirements as to the army draft and allows to legally embrace any principle for Armed Forces and other military units' formation.

At the same time, mandatory fixed-term service in the army is still stipulated legally. The Law on the principles of foreign and home policy (article 6) stipulates that one of the basic principles of the home policy concerning national security and defense is eventual transition to the Armed Forces formation on contractual basis, especially for the specialties, decisive for battle-worthiness of the units. Characteristically, certain political forces formulated immediate transition to the contractual principle as their priority task. The problem, however, cannot be resolved at once, so no positive changes have been achieved over the years 2009 and 2010.

Currently the legislation of Ukraine is developing a model, under which Ukrainian citizens can become soldiers not only voluntarily, but also through mandatory conscription, because the law, as stated above, envisages citizens' compulsory draft as a means of military units' formation at the time of peace. The draftees must meet the requirements spelled out in the law. Thus, under the article 15 of the Law of Ukraine "On military duty and military service"¹⁸ healthy male citizens of Ukraine, who completed 18 years before they day of their joining military units, are drafted for fixed-term service at the time of peace, as well as older persons, who have not completed 25 years and do not qualify for exemption or draft deferment.

It must be clear that the military anticipates that the persons within its sphere of operation not only have all the necessary and sufficient skills and knowledge, but are also willing to perform the military duties, as any area of human activity will be successful and bring positive results only if the persons involved are interested in willing to do it. In its turn, the military service is not only a complex, responsible, and even dangerous type of human activity. Not every male person in this country has the necessary inclinations to perform it, even if he meets all the requirements stipulated by the law. The practical experience shows that forced activity without permanent control or strong coercion does not bring high quality results.

Moreover, even under total control and threat of punishment the job can be done only technically, as any creativity or initiatives are out of question. According to V.V. Rechytsky, "historically and legally creativity evolution is closely linked to the transition from forced work to work, delivered on the basis of freely signed contract (agreement). The principle of work remuneration at a certain point became more efficient than the fear of punishment and decided the fate of many creative endeavors. As to the role of law in the process, it replaced the imperative labor regulation model with dispositive model, substituting legal duty with subjective right"¹⁹.

Similar transition should take place in the military sphere, as this area of human activity needs creative thinking and approach as much as any other. Doubtless, the measures taken by the state to provide appropriate motivation for the service in the army are of utmost importance. In any case it is desirable that the ranks of the military organization of our country are remanned by conscious and willing citizens. The world practice "confirms that professional armed forces formed on voluntary contractual basis are the best in safeguarding country's security"²⁰.

¹⁸ On Military Duty and Military Service: Law of Ukraine of March 25 1992 № 2233-XII // Bulletin of the Verkhovna Rada of Ukraine — 1992. — № 27. — P. 386.

¹⁹ V.V. Rechytsky. Symbolic reality and the law / V.V. Rechytsky— Lviv: VNTL-Klasyka, 2007. — P. 269–270.

²⁰ V.Z. Gushchyn. Military service as a constitutional duty of the Russian Federation citizens/ V.Z. Gushchyn// Pravo i Politika. 2000. — № 12. — P. 67.

The fact that, under the norms of international law and part 3 of article 43 of the Constitution of Ukraine, the service in the army is not considered forced labor does not make it an easier or less specific type of human activity. One can, therefore, conclude that cancellation of mandatory service is, on the one hand, called for by state interests, as it affects the quality of military service and performance of every serviceman's functional duties, and, finally, the fulfillment of ambitious tasks entrusted to the military organization. On the other hand, it is for the benefit of an individual, because when a person is forced to do something he is unwilling to do, when he lacks required skills or inclination etc., the negative consequences might follow (mental disorders etc.). Besides, the question of whether the state has a right to force its citizens to serve in the army becomes even more topical presently, when the state, unfortunately, is incapable of offering safe service environment for the citizens. In this context it becomes absolutely clear that the state is fully responsible for the citizens who were drafted.

So, the current legislation in force ignores the individual's interests, his desire to serve or not to serve in the army, his inclinations, skills, talents and abilities. Therefore, an absolutely positivistic approach can be traced here. As H. S. Skovoroda once wrote, sometimes the people are born inclined neither to marry nor to serve in the military, but to teach others freely wisdom and honor without which no social estate is viable ²¹. It means that every individual must chose his/her own way in life with due consideration to one's inclinations, abilities, convictions and desires, and then follow it, fulfilling all his internal potential for the benefit of the people, society and country.

Legislation provisions concerning the draft of Ukrainian citizens to the army for fixed term date back to the past, i.e. to the times, when our state was the part of the Russian empire, and later, of the Soviet Union. Due to geopolitical situation and bipolarity dividing the world, the Soviet Union, claiming to be the mightiest superpower, pursued rigorous militarization policy, increasing the size of its military organization in order to create the necessary conditions to confront the countries with different ideological platforms and to realize its imperialistic ambitions, though the official soviet stand-point was quite different.

Ukraine, however, after declaring its independence, proclaimed the peace-loving nature of its foreign and domestic policy, which permeates its whole legislation, including article 18 of the Constitution of Ukraine²², which reads that foreign political activity of Ukraine is aimed at safeguarding its national interests and security through peaceful and mutually beneficial cooperation with the members of world community in compliance with the universally recognized principles and norms of the international law.

Besides, Ukraine declared its Military Doctrine²³, which is of exclusively defensive nature, adheres to the principle of non-use of force or threat of force and strives to resolve all the international disputes and conflicts by political means only. The quoted democratic provisions do not undermine the significance of the military organization and all the measures taken by the Ukrainian state to ensure its military security.

With all that in mind, we believe that the state should undertake additional measures for accelerating army reform aimed at the transition to professional army and all military units' formation exclusively on contractual basis. Presently, the respective decision stipulates transition to the contractual service by the year 2015; however, considering the actual situation and budgetary funding, achieving of this goal seems next to impossible.

²¹ H. Skovoroda. Works : in 2 v. / H. Skovoroda — K.: "Vydavnytstvo Oberehy" LTD, 2005. — II ed., amended / Foreword O. Myshanych. — P. 109.

²² Constitution of Ukraine, adopted at the V session of the Verkhovna Rada of Ukraine on June 28 1996// Bulletin of the Verkhovna Rada of Ukraine — 1996. — № 30. — P. 141.

²³ Military Doctrine of Ukraine, approved by the Presidential Decree of June 15, 2004, № 648/2004 // Presidential bulletin. — 2004. — № 14.

4. CONCLUSIONS AND RECOMMENDATIONS

The issue of servicemen's rights has remained crucial over the years 2009 and 2010. It is noteworthy that, starting 2010, Ukrainian army is left without any cardinal guidelines. Normative regulations which practically did not change since soviet times present a serious hindrance to the resolving of this problem. The amendments to normative acts regulating this area have been made sporadically and inconsistently, without due consideration to requirements and standards established by the Constitution of Ukraine.

Once the course towards transition to professional army and all military units' formation exclusively on contractual basis is proclaimed, the very philosophy and concept of the Law of Ukraine "On Military Duty and Military Service" should be revised — the main stress being laid on contractual and not draft-based army service, with ensuring appropriate guarantees which would make it possible. The said Law lacks the clause concerning equal access to military service; it only stipulates the opportunity to sign a contract for the military service (articles 19 and 20).

The Statutes of the Armed Forces of Ukraine must undergo dramatic changes. They should be seriously revised in the sections concerning the protection of servicemen's rights and freedoms, especially for the soldiers serving a fixed term. Moreover, the whole military legislation should be similarly revised, taking into account basic constitutional principles proclaimed in our country.

Therefore, the following measures can be recommended.

1. Defining cardinal course of development for the state military organization on the legislative level, identifying main guidelines and parameters which need immediate reforming²⁴.
2. Doing the utmost to ensure transition to the exclusively contractual basis for military service.
3. Amending Chapter I of the Law of Ukraine "On Military Duty and Military Service" with the respective article which would guarantee Ukrainian citizens the right of equal access to the military service regardless of color, political, religious and other convictions, gender, ethnic and social background, property status or other characteristics
4. Amending article 6 of the Disciplinary Statute of the Armed Forces of Ukraine with provisions clearly regulating the procedure for refusing to obey obviously criminal order, similar to the way it is regulated, e.g. in the Law on Public Service and Disciplinary Statute of the Internal Affairs Agencies.
5. Amending the Statute of Internal Troops and Disciplinary Statute of the Armed Forces of Ukraine with provisions, which would not only exclude any negative consequences for a military unit commander who, as a person in charge of criminal investigation, discovers criminal offence or law violation in his military unit, but also envisage a form of incentive for doing so.
6. Devising new version of Disciplinary Statute of the Armed Forces of Ukraine, based on the principle of illegality of disciplinary violation (the deed is considered a disciplinary violation only in cases directly spelled out in the Disciplinary Statute).
7. Including respective norms clearly spelling out and interpreting basic constitutional principles (equality, respect of human dignity etc.), the adherence to which shall be mandatory for all those joining military service and those in active service into all Statutes of the Armed Forces of Ukraine, Laws "On Military Duty and Military Service", "On Social and Legal Protection of Servicemen and Members of their Families".
8. Analyzing and revising Statutes of the Armed Forces of Ukraine in the focus of their compliance to the Constitution of Ukraine; establishing the necessary guarantees for the servicemen, especially those in fixed term service.

²⁴ Military area is rather multifaceted, that is why trying to resolve the whole range of problems at once will not bring positive results in any segment of the intended reforms.

XXVI. THE RIGHTS OF PRISONERS¹

1. SOME GENERAL DATA

This section dwells on some aspects of observance of rights of the persons deprived of rights who are kept in establishments controlled by the Government Penitentiary Service of Ukraine (hereinafter referred to as Penitentiary Service), i.e. investigatory isolation wards (IIW) and penal institutions (EEP).

According to the Penitentiary Service² as of the 01.01.2011 in the institutions of confinement there were 154 027 persons (which is 5,24% more than in 2009—145 946 prisoners, and 2,81% more than in 2008 — 149 690 prisoners) in 184 establishments, including 39 363 persons in 32 IIW, among which 18 148 confined before trial and 918 under arrest.

113 230 persons are in 141 penal colonies: 10 minimal security colonies with common conditions for men contain 6 925 persons, 11 women's colonies keep 5834 persons, 37 medium security colonies for first timers deprived of liberty — 36 196 persons, 39 medium security colonies for repeatedly deprived of liberty — 43 497 persons, 8 maximum security colonies — 4 414 persons; 9 minimal security colonies with weak conditions — 1 188 persons; 1 696 lifers under valid judgment are kept in 4 establishments, 28 are in investigative isolation wards and 13 strong security sectors; 21 penal centers hold 4 716 persons; 22 medical institutions keep 6071 persons; 10 approved schools train 1 434 minors.

The penal facilities keep over 6,5 m persons convicted not for serious crimes; over 40m persons convicted for medium severity offences; 6.9m women; 1.5m invalids of the first and second groups; 1.1m men and 270 women of retirement age; over 6m convicted tubercular and about 6m HIV/ AIDS patients. For the first time in seven years, in 2010 there evolved an upping trend in the number of convicts: additional 1051 persons (+0.97%). The certain sign of stable increase is the fact that only June there were 689 convicts, that is two thirds of annual increase.

The same tendency is valid for convicted women. The yearly increase made 94 persons (the first six months), and by the year end there were 6.9m already. Only in the approved schools the number fell by 37 persons (-2,46%) that means annual rate decline -5%. In 2009 this index made -6,7% and in 2008 15,6%. The number of lifers increased by 90 persons and made 1696 persons, including 17 women. For the last three years the total increase of lifers made +12, 9%.

2. CHANGES OF PERSONNEL POLICY

On 20.03.2010 the Cabinet of Ministers sacked the Head of the State Department of Ukraine for Execution of Punishment (hereinafter referred to as Department) Olexandr Halinsky. Olexandr

¹ Prepared by Andriy Dydenko and Yevhen Zakharov, Kharkiv Human Rights Protection Group.

² http://www.kvs.gov.ua/punish/control/uk/publish/article?art_id=78360&cat_id=66312

Halinsky was assigned to the post of the Department Head in August 2009. For the first time during independence the designee to the post of department leader was endorsed with the human rights organizations, which might be a progressive sign on the way to public transparency of the department. After his appointment Halinsky promised to make domestic penitentiary system democratic and open for public. He stressed that his establishment would rely on public human rights organizations in order to get information about suppresses shortcomings of the system.

After presidential elections of 2010 the penitentiary department management was changed. On April 1, 2010 Minister of Justice Olexandr Lavrynovych introduced the newly-appointed department head 52-years-old Olexandr Lisitskov to the tom managers of the department. The Minister said that the respective assignment was accepted at the meeting of the Cabinet of Ministers on March 31, 2010.

Olexandr Volodymyrovych Lisitskov, colonel of militia, is a former assistant to the MIA department head for Donetsk Oblast, Manager of the Personnel Department. Meanwhile Sydorenko Serhiy Mykolayovych, b. 1959, major-general of militia was appointed the First Deputy Department Head; before early 2008 he worked as the Department Chief of the Government Custodial Service under MIA of Ukraine.

The new management of Penitentiary Service initiated personnel rotation in regional administrations of the Department and at the headquarters replacing staffers with servicemen with experience at different jobs at MIA. In this way, without regard to the obligations of Ukraine undertaken on November 9, 1995 at entering the CE listed in the conclusion of the CE Parliamentary Assembly № 190, including the demilitarization of execution-of-punishment agencies and bringing it under the Ministry of Justice, the Penitentiary Service building up executive personnel from former MIA officers.

We would remind that the Decree of the President of Ukraine № 248/99 of March 12, 1999 removed the Department from under temporal command of MIA. However, the adopted legislation, including the CEC of Ukraine and Law “On State Custodial Service” to name a few, failed to place it under command of the Ministry of Justice of Ukraine.

The decree of the President of Ukraine № 1085/2010 of December 9, 2010 “About optimization of central authority” created the Government Penitentiary Service on the basis of reorganized State Department of Ukraine for execution of punishment, as Decree puts it, “with the aim of optimization of the system of central authority, removal of duplication of their power, executive staff and living expenses reduction, increase of state administration efficiency”. Commenting upon the Decree, the President stressed that in the name of Penitentiary Service there should be no mention about the submission of this department to the military structure that would help, in opinion of the President, to create the society-friendly civil institution and make the Penitentiary Service more humane, and personnel more qualified, which would promote resocialization of convicts, change their attitude toward committing crime and return to society from places of confinement of valuable citizens.

Unfortunately, all these measures are but declarations, and in actual fact the philosophy of public policy of the system of execution of punishment remains unchanging and has obvious punitive signs. All these newly-appointed leaders pursuing personnel policy of Penitentiary Service arouse concern about increasing closedness of Penitentiary Service for public control. Under such conditions it is all the more impossible to assist a convict doing a term at these establishments to change his/her attitude toward committing crime. It is well known, as in the days of submission of the system of execution of punishment to MIA, the punitive repressive mechanism preserved since GULAG times was used to suppress honor and dignity of convicts, ruin personality, exploit slavery and render ineffective any legal instruments intended to restore violated rights and freedoms.

3. PUBLIC CONTROL

In 1987 Ukraine ratified the UNO Convention against tortures and other cruel, inhuman or dignity humiliating types of behavior and punishment and on 16.01.1998 also European Convention

about prevention of torture or inhuman or humiliating behavior or punishment becoming the party to these agreements. In addition, the Verkhovna Rada of Ukraine ratified the Optional Protocol to the above UNO Convention, and, on 22.06.2006, the President of Ukraine signed the law on ratification of Optional UNO protocol against tortures.

The ratification of the said protocol foresees introduction by the state of the Protocol terms into the national legislation, as the problem of tortures and inhuman behavior, in particular, in the case of institutional confinement, both was and remains topical for Ukraine. The system of execution of punishment is closed for society; the cases of tortures of convicts and persons under investigation in establishments subordinate to Penitentiary Service have uncontrollable latent character. It may be seen in the lack of correspondence between the public policy of Ukraine and challenges in the area of provisions and observance of human rights, especially freedom from tortures, prohibition of cruel and humiliating behavior and punishment. Maybe, to mend the situation in this area Ukraine did not use the right of member-countries by article 24 of Protocol to postpone realization of its obligations.

It means that less than in a year after this protocol took effect, the country supports, introduces, or creates one or several independent preventive mechanisms averting tortures at the national level. Almost three years passed by, but Ukraine failed to introduce independent mechanisms of public control. It is noteworthy that according to Protocol the ratifying countries undertake: a) to create the system and mechanisms of national control by independent national and international bodies in the places of visit; b) to create the global system of regular visits by independent international and national bodies to the places of confinement in order to prevent tortures. To this end the UNO has the Subcommittee for prevention of tortures which is a coordinating organ.

Still in 2006, the Verkhovna Rada Ombudsman gave up working in this direction which was recorded in the transcripts of the round table held on December 22 in Verkhovna Rada.

Therefore the NGOs and Ministry of Justice stepped in and during 2008–2009 jointly drafted a bill about national preventive mechanism of averting tortures envisaging involvement of public to in visiting places of confinement by creation of permanent monitoring groups in all oblasts of Ukraine coordinated by the committee of 6–8 experts.

By the bill the Committee and monitoring groups had to have a mandate for unimpeded visit to any establishments of confinement. But, unfortunately, the said bill was not fixed for consideration in Verkhovna Rada and, therefore, was not accepted.

Thus, by law the public control of observance of the rights of convicts may be carried out only by monitoring commissions set up by local authorities and act in accordance with the “Regulations about monitoring commissions”. For the most part these commissions demonstrate formal attitude and execute functions rather unusual for effective public control; for example, they reconcile appeals of penitentiary administrations to courts concerning conditional early discharge. At the same time they have almost no impact on execution of administrative punishment or placement of convicts under harder conditions.

Even such formal functions of monitoring commissions do not cover the persons kept in IIW. It is noteworthy that one can scarce remember, when public had information on violation of rights and freedoms of convicts due to assistance or initiative of commission representatives of these, for the exception of commission in Chernihiv Oblast.

At the same time the Penitentiary Service once again initiates creation of Public Council under Penitentiary Service and its regional departments that, according to department heads, must create an atmosphere of public control in penitentiary system. However, these councils have no legal authority for unrestricted visits to penitentiary establishments, ways to influence the Penitentiary Service. Even if the penitentiary chiefs permit the visits of representatives of public councils to penitentiary establishments, their conclusions will have no binding force for the Penitentiary Service.

Therefore it is possible to conclude that, unfortunately, the new administration of Penitentiary Service does not understand that not declarative concepts, but real assistance in setting up national preventive mechanisms can bring up respect and trust to the department, make its work authoritative and useful for the society, and also promote observance of rights and freedoms of convicts.

Summing up it is worth noting that the state must guarantee rights and freedoms determined by Constitution and international agreements ratified by Ukraine, first of all those guaranteeing freedom from tortures, including tortures by confinement conditions. By article 9 of Constitution of Ukraine these international agreements are part of national legislation binding Ukraine to immediately pass a law on creation of national preventive mechanism of averting torture in accordance with Optional Protocol to UNO Convention against tortures that must be publicly discussed.

4. AMENDING LEGISLATION

On January 21, 2010 the Verkhovna Rada approved a bill about making alterations to the Criminal Procedure and Criminal-Executive Codes of Ukraine (on protection of the rights of convicts in the penal institutions).

The law envisages a number of changes in relation to the confinement conditions, in particular, lifting restrictions on the amount of received parcels for convict and lifting restrictions on telephone conversations, although the convicts will be able to speak without limitations only after January 1, 2012. It is explained by the necessity of technical equipment for unlimited telephone communication, however the Verkhovna Rada admitted the very fact of the convict's right for unlimited communication by phone.

There will be easing of restrictions for lifers as well. Indisputably, these are important and long-awaited steps for improvement of confinement conditions and bringing them closer to European standards.

One could but welcome these changes, if not for the new reduction of part 3 of the article 121 of the CEC of Ukraine. Prior to the Law this norm envisaged that "convict — persistent work shirkers will cover the cost of food, clothes, footwear, linen, public utilities and other services at the expense of their personal accounts. In the case of moneyless personal account a penal colony has sue him/her." Sure, this norm applies to "work shirkers" only.

If there were no money on accounts the colony could recover upkeep costs of shirking convict — certainly, if the administration provided for proper working environment — after his/her release. The amendments of January 21 cardinally changed the situation. The rephrasing of part 3 of art.121 of CEC specifies that the costs of food, clothes, footwear, linen, public utilities and other services for shirking convicts (except for the persons mentioned in part 4 of art.115 of this code) should be compensated at the expense of their personal accounts. In the case of nil personal account a penal colony has a right to is authorized to sue him/her and get compensation paid.

After coming of the Law into effect the administration of establishments can levy exemplary upkeep damages suing every shirking convict. As of now it is inessential whether the establishment (state) provides for convict's earning his/her living or not, whether s/he is eager to work or not (although labor is a right of convict, and not a duty, and the state in the person of administration of establishment has to promote and motivate the convict's wish to use his/her right to work), everybody will have to pay for his/her upkeep in the colony. They will be able to make the upkeep compensation paid at the expense of jobless convicts' accounts financed, for example, by their relatives. In the case if there is no money account, the administration will be empowered to sue the ex-convict for failure to pay. And then being released in present hard times, having neither roof over his/her head, nor job, nor possibilities to find it, nor documents (militia suppressed his/her passport during arrest and failed to return), the ex-convict has often to make money and pay off a debt by court's order.

It is noteworthy that the majority of convicts do not work against their will, because during 18 years the state did almost nothing for creation of sufficient amount of modern jobs in penal institutions. Now for this ineffectiveness of the state, its indifference to convicts the convicts must pay.

Such step of Verkhovna Rada contradicts art. 5 of CEC of Ukraine that proclaims the principle of mutual responsibility of the state and convict among other principles of criminal executive

legislation. The decision of Verkhovna Rada of Ukraine to lay responsibility on convicts to pay for the consequences of failure of the state to create working environment in a colony is irresponsible. Moreover, the real threat of such bringing a charge by the administration of penal institutions can be an element of pressure on the convict.

The said amends to the Law excluded paragraph 5 of part 1 of the article 132 of CEC of Ukraine stipulating extraordinary cleaning up of premises as a penalty for a convict. The administrations of penal institutions widely used this very administrative punishment in order to artificially find a pretext and create artificial grounds to initiate a new action against convict imposing as a charge violation of art. 391 of the CC of Ukraine (malicious disobedience to the legal requirements of administration of penal centers).

We have reiterated that the construction of disposition of this norm contradicts proclaimed concepts of the Criminal Code accepted by Verkhovna Rada as early as in 2001. Because exactly the legislator's renunciation of referring to administrative prejudice as condition of criminal responsibility is a progressive novel in the CC.

In accordance with the part 1 art. 2 of the CC of Ukraine, "The commission of socially dangerous criminal act foreseen by this Code makes grounds for penal liability", i. e. criminally punishable act. The article 391 of the CC of Ukraine reads: "The malicious disobedience to the requirements of penal center administration or other counteraction to legal functions of administration by a convict doing term with restraint of freedom or deprivation of freedom, if, during a year, for violation of custodial control this person was awarded a penalty of transfer to the cell-like room (solitary cell) or more severe mode of punishment." A convict can be incriminated by art.391 of the CC on condition of his/her punishment with transfer to the cell-like room (CLR), or disciplinary cell (DC) for actions aimed at avoidances of further serving his/her sentence.

But there are cases, when persons are incriminated which were transferred to CLR or DC for other reasons: for example, for refusal to clean premises out-of-turn, or "non-standard bed making", or "improper behavior with the representative of administration", or "changed a bed in a cell", or for refusal to carry out instructions of personnel of the institution, which the administration of the institution considers a legal requirement. The incrimination and even pre-trial investigation in these cases takes place on the territory of the colony, and the chief of the institution may be an interrogating officer, who submits incriminating materials to the investigator and on to the court as criminal case materials. The very fact of placement of the convict in the CLR the court considers as sufficient grounds to legitimately apply art.391 of the CC.

Thus, having adopted the amendments, the Verkhovna Rada eliminated one of the elements of application of administrative offence, which are basic for criminal prosecution of a convict, while the norm of art. 391 of the CC remained unchanged.

Even those convicts who have been held criminally liable by art.391 of the CC and now serve the sentence, in those cases, when the basis for their being nailed on charge included a number of such administrative offences as refusal to tidy up premises out-of-turn, the courts never revised case materials and judgments were not abolished, which led to system violations of part 1 of article 5 of the CC of Ukraine stipulating: "The Law on criminal responsibility abolishing criminality of an act softening criminal responsibility or in some other way improving condition of a person have reverse action in time, i. e. it covers persons that had committed corresponding acts before the law became operative, including those serving or having served sentence, but still have a former record."

Also on January 21, the Verkhovna Rada allowed the convicts to freely correspond with their advocates. Particularly, the accepted amendments forbade the administrations of penal institutions to peruse the correspondence of prisoners sent to or received from their advocates. Such correspondence is dispatched within twenty-four hours. The bill envisages that correspondence addressed by the convict to the Verkhovna Rada Ombudsman, European court on human rights, and public prosecutor, as well as advocate, is not perused and is dispatched within twenty-four hours. The correspondence received by the convict from the above bodies and persons is not perused as well.

Pardon was also affected by the said amendments. Pardon means the official release from any, or any further, punishment of somebody who has committed a crime or wrongdoing. According to

the Constitution of Ukraine the pardoning power rests with the President of Ukraine and is applied to the individually selected person. The pardoning power of the President is limited by part 2 of art. 87 of the Criminal Code. The Presidential pardon can replace life sentence of the convict by deprivation of freedom for 25 years and more.

Pardon is executed if a convict appeals for pardon, and the President approves the procedure of pardon. The documents are prepared by the special subdivision of Administration of the President and passed over to the Presidential Commission for Pardon (hereinafter Commission). The commission examines the documents and makes suggestions to the President. And the President issues a decree about pardon of the person(s). Pardon is a prerogative of the President; therefore no wonder that President Yanukovich approved new pardon regulations and new composition of the Pardon Committee.

President Viktor Yanukovich approved new regulations about the procedure of pardon by Ukase № 902/2010 from 16.09.2010 and renewed composition of the Committee by Ukase № 827/2010 from 19.08.2010. How does the new regulation differ from that effective from July 19, 2005?

1. According to the Regulations of 2005 the right to appeal for pardon rested with the convict (art. 3); the lawyer, parents, wife (husband), legal representatives, public organizations, etc could also appeal for pardon (art. 4). The new regulations stipulate only the convict. All other persons are not even mentioned in the Regulations of 2010.
2. Art. 8 in the Regulations of 2005 included the norm that stipulated that “In the cases when the convict is not held in custody, execution of a sentence in relation to him/her may be stopped according to the established procedure of consideration ... of the appeal for pardon.” The Regulations of 2010 contain no such possibility. Article 9 in the Regulations of 2005 starts with words: “the identity of convict, his/her behavior...”, while the same article in the Regulations of 2010 starts with words: “the gravity of the crime...” It might seem that rewording changes nothing, but now the accent is on the gravity of crime and not on the identity of convict, which means that during consideration the crime comes first, and not the identity of convict.
3. The Regulation of 2010 takes into account the “active assistance in crime detection” that was not taken into account in the Regulations of 2005.
4. The terms changed as well: if before the person convicted for a grave or gravest crime could repeatedly appeal for pardon in a year, and those sentenced for other crimes in six months, now everybody, except for lifers, can repeatedly appeal for pardon not earlier than in a year, and lifers not earlier than in 5 years.
5. There remains in the regulations the possibility of appeal before five- or one-year term, if there are new circumstances worth attention.

The Cabinet of Ministers also adjusted its own decision from April 1, 2004 about adoption of regulations about monitoring commissions in accordance with current legislation. In particular, its decree was coordinated with the Law of Ukraine “On amendments to the Criminal Procedure Code of Ukraine concerning ensuring of the rights of convicts in penal institutions”.

Minister of Justice Olexandr Lavrynovych commented that amendments to the decree were drafted by the Ministry of Justice. In particular, the new redaction of the regulations about monitoring commissions determines the composition and procedure of formation of commissions.

Moreover, the new redaction permits the members of monitoring commissions to visit penal institutions without special permissions.

The amendments oblige monitoring commissions to inform public through media about their work and observance of human rights, fundamental freedoms and legal interests of convicts during execution of punishments etc.

The Minister of Justice stressed that the amendments were intended to improve organization of public control of observance of human rights, fundamental freedoms and legal interests of convicts and released persons. Moreover, the implementation of new regulations should help to reform and resocialize convicts and creation of proper upkeep conditions by penal agencies and institutions.

However, these amendments do not help the state to report on introduction of national protective mechanism of torture prevention.

5. RIGHT TO LIFE AND RIGHT TO MEDICAL TREATMENT

The life of man is everything that matters. Probably, the right to life is the top human value and deprivation of life is an indisputable crime. "The right to life is inalienable right of every person. This right is protected by law. Nobody can be willfully deprived of life." Thus reads the International pact on civil and political rights, and the Convention on protection of human rights and fundamental freedoms stresses: "The right to life is protected by law. Nobody can be intentionally deprived of life, exclusive for the case of capital punishment according to the conviction in court, if the law foresees such punishment." These are international standards ratified by Ukraine and are a part of national legislation.

At the same time the Constitution of Ukraine reads in the third article: "The human being, his or her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value." And in the article 27: "Every person has the inalienable right to life. No one shall be arbitrarily deprived of life. The duty of the State is to protect human life."

What is human life worth in Ukraine? Does the state really protect the life of a convict, i. e. of a person who fully depends on the state and is in the charge of the state? On order to answer these questions, let us do some investigation and find out what convicts life is worth and that of the alleged offender at IIW. A person, who has committed a criminally punishable offence and is serving his/her term in a place of imprisonment, despite the social danger of the offence, remains a human being and "enjoys all human and citizens' rights, with the exception of restrictions determined by law and established by a court verdict."

Thus reads the article 63 of Constitution. That is the state guarantees the right to life of everybody, even when this person committed a crime, was adjudged guilty and serves a term for committed crime. Also an implicit is right to life of a person suspected, accused of a crime and still not adjudged by court guilty, i. e. it is possible that s/he can be acquitted. As they say, no one can be safe from poverty or prison. It is the more impossible to protect prisoners against fatal illness under contagious conditions in cells and barracks with no sanitation, medical attention, bad food, absence of fresh air, quality potable water, living under great strain and nervousness; in fact, all of it are characteristic of Ukrainian penal colonies and IIW.

In such conditions over one hundred and fifty thousand Ukrainians are threatened with fatal illnesses. According to the Government Penitentiary Service, there are 6 thousand of consumptives, although the actual number is believed to be much higher. The above number does not include the early stage TB, or undiagnosed cases, or those who try to hide the state of health and stay in common premises.

The agencies of Government Penitentiary Service absent work undertake no diagnostics or treatment of patients with infectious liver diseases, except for specialized establishments. Therefore there is no statistics on prisoners with viral hepatitis and no prophylaxis in these cases. In the institutions of Penitentiary Service there are about 6 thousand prisoners with HIV/AIDS, which need antiretroviral therapy. However the State budget does not cover the cost of antiretroviral preparations for prisoners with HIV/AIDS. Such neglect of sick people in need of increased attention, professional medical service, and urgent medical treatment in the first place, is nothing but humiliation and torture with upkeep conditions; moreover, in many institutions there is even no infectiologist. It is noteworthy that every tenth HIV/AIDS patient out of all prisoners in need of such treatment, i. e. 600 persons, gets necessary life-support medications due to the UNO Global Fund and money of charity organizations.

Now, we will make some example, when prisoners got no medical treatment.

Pavlo Shcherbyna, b. 1973, HIV patient for ten years already. Held in custody in Novhorod-Siversky IIW of Chernihiv Oblast since August 2010; as yet he has not undergone thorough medical inspection, antiretroviral therapy and other treatment he badly needs. During the last three months in custody he has his teeth fell out, he constantly runs high temperature, feels faint, dizzy and other signs of worsening health.

Olexandr Kulinichenko doing a term in Alchevsk penal colony № 13 got HIV, TB, lung emphysema etc. He had no proper conditions for treatment in the institution; he constantly ran high temperature; it was very cold in his cell: +12°C. His height before conviction was 1,87 m, and now 1,74 m.

Dmytro Brius has HIV, TB, hepatitis C, serves his term in the penal colony № 14 in Odesa. For 18 months now he has been demanding that doctors make analyses and carry out treatment.

Vladislav Velichko is under investigation and is kept in IIW of Izmayil City, Odesa Oblast. He has HIV for 15 years already, cirrhosis, advanced stage of hepatitis C, lasting inflammatory process. He was not examined and got no medical treatment.

Ruslan Bardonov is in IIW in Odesa. He has HIV, TB, hepatitis C, no medical treatment.

There are zillions of cases, when people are doomed to painful and helpless death.

According to Penitentiary Service, in 2010 739 persons died in IIW and penal institutions. If the state cannot treat ill prisoners, why does it not transfer them for treatment to specialized establishments outside prisons and colonies?

By part 1 of art. 84 of the CC of Ukraine mental patients should be exempt from penalty, as “s/he is not able to control her/his actions (inactivity).” Part 2 of the same article reads: “A person, who after committing a crime or bringing in verdict became gravely ill, which prevents doing a term, should be exempt from penalty or further serving a term. Considering this question the court takes into account gravity of a crime, character of disease, identity of convict and other factual background.”

Thus, one of the grounds of exemption the legislator names convict’s illness. If the convict became ill and this illness prevents correctional control, such convict should be released. It is explained that in this case punishment will not attain the aim, because it is impossible to rehabilitate and resocialize the convict. That means that the disease changes consciousness and behavior of the convict so that s/he stops perceiving punishment, as such, or actually quits her/his antisocial ways.

The decision about early discharge of a convict on grounds of illness or about compulsory medical treatment of mental patients belongs to a court. In order to determine, whether the illness prevents serving the term, the Department for Execution of Punishment together with the Ministry of Health of Ukraine issued a joint order № 3/6 from 18.01.2000 listing diseases giving grounds for courts to award judgment on early discharge. It is noteworthy that diagnosis of a listed disease does not mean unconditional early discharge.

The medical examination of convicts, diagnostics and medical report and possibility of early discharge are carried out by medical-labor commissions (MLC) set up at hospitals for convicts. The MLC follows the above Order of the Department and Ministry of Health № 3/6 from 18.01.2000, which had approved the Statute of the medical-labor commission. The section 2.2 of this order obliges the MLC to select persons, whose health makes them liable to be discharged early.

Taking into account the MLC conclusions the chief of penal establishment (agency) prepares and submits document for consideration of early discharge in court. The submission is accompanied with conclusions of MLC and convict’s personal file. The submission also includes data on convict’s behavior in confinement. Further consideration rests with the court. Considering early discharge on the grounds of illness the court takes into account the gravity of crime, character of disease, identity of convict and other factual background.

If a person sentenced to do communal work or restraint of freedom was recognized an invalid of the first or second group, the penal institution makes submission for court consideration about

early discharge. The submission is accompanied with the MLC conclusions. If the convict fell ill for psychical or other grave disease before correctional work or fine, the judge in all cases takes makes a decision about early discharge. Following the early discharge verdict the corresponding documents are sent to the administration of penal institution, which releases the convict.

Therefore the terminal patient, being a prisoner, because of such duration and exhausting procedure of early discharge on the grounds of poor health and lack of professional and timely diagnosis and medical treatment, is doomed to death from the non-rendered medical assistance that is, by the way, a punishable offence.

Anyway people released on poor health grounds, are mostly doomed to death and die almost at once after discharge.

For example, as there is no proper personnel in medical units of penal institutions, an under-trained doctor's assistant or even a common prisoner may act as a doctor.

There was a typical case tried in the European court of law on human rights — *Khudobin vs. Russia* — when the court found the violation of the article 3 of Convention, and accepted as a proof a written appeal signed by the applicant's cellmates. The appeal read that on April 26, 2006 the cellmates had to make him an injection to stop epileptic fit. Answering the arguments of the Government that this statement cannot be used as a proof, because the cellmates were not specialists in this area, the Court noted that it needs no professional knowledge to assert that the injection was not done by the medical unit personnel at the isolation ward. The court decided that there were no grounds to believe that the cellmates signing this appeal lied. On the other hand, the Government produced no records of this incident. Accordingly, the Court agreed with the applicant's version of the events concerning the incident. Consistently the court reminded that the medical treatment rendered by unskilled persons cannot be considered as proper one.

As a result, it is worth noting that the health care and execution of punishment are two different areas. The medical units and hospitals on the territories of penal institutions must be brought out of submission to the Penitentiary Service and submitted to the Ministry of Healthcare in order to expertly perform their professional duties for public money. Moreover, the procedure of early discharge on health grounds should be simpler and quicker, which would give the convicts a chance to survive and take the cure after discharge on health grounds.

The problem of ungranted real medical assistance, in addition to the lack of proper upkeep and medical equipment for treatment, consists in the fact that investigation initiates and the court eagerly sanctions too hard preventive measure of suppression as detention in custody, when the offender is brought before the bar for minor and medium offences, which pose no social danger. Such preventive measure is handy for an investigator and is widely applied.

6. THE RIGHT TO PROTECTION BY THE COURT³

By article 55 of the Constitution of Ukraine everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers. Constitutional human and citizens' rights and freedoms cannot be restricted, except in cases envisaged by the Constitution of Ukraine (art. 64).

Article 124 of Constitution reads: "The jurisdiction of the courts extends to all legal relations that arise in the State." Despite this peremptory norm, the officers of court actually came to the conclusion that there are legal relations in Ukraine which are not covered by the court's jurisdiction. These are real relations in the area of execution of punishments.

³ This section contains material from the article of Candidate of Law "Judicial reform: changing judicial practice or rewrighting the Constitution what is the easier way?" that can be found at: <http://hr-lawyers.org/index.php?id=1276005187&w=%C8%F0%E8%ED%E0%20%DF%EA%EE%E2%E5%F6>

It should be noted that in accordance with the art. 63 of the Constitutions of Ukraine a convicted person enjoys all human and citizens' rights, with the exception of restrictions determined by law and established by a court verdict. Proceeding from the understanding that it is necessary to observe human rights in relation to everybody without exceptions, including convicts, in January, 2010 the Verkhovna Rada of Ukraine amended art. 5 of the CEC of Ukraine with the principle of respect to human rights and freedoms, and stipulated at legislative level, that the "convict enjoys all human and citizens' rights foreseen by the Constitution of Ukraine with the exception of restrictions determined by this Code, laws of Ukraine and set by the sentence of court" (art. 7 of the CEC of Ukraine).

It shows once more that the process of execution of punishments tends to comprehensively provide such rights and equalize all persons deprived of rights with the rest of citizens (except for certain limitations). The CEC of Ukraine (as well as other normative acts) does not restrict the convict's right to appeal to court to protect his/her rights. While in art. 8 of the CEC of Ukraine the right to appeal to court is on the list of the convict's rights, and in art. 7 of this Code there is the stipulation that "the state respects and protects the convict's rights, freedoms and legal interests..."

In practice there are numerous violations by administration and officers of agencies and penal institutions that stress the importance of problems of convict's access to a court.

There is a question: if the current legislation enables to appeal against decisions, actions or inactivity of administration of agencies and penal institutions to convict, then before what court should s/he bring an action? The administrative court should be the first choice; the practice is different, though.

For example, the convict T. believed that disciplinary measure imposed on him during his doing a term was illegal and appealed to the administrative court suing the administration of the penal institution. He thought that as far as the colony administration is authorized and acts for the state (including official violence against convicts), the protection of his rights and legal interests must be carried out in the course of administrative legal proceedings. However, the judge of Kharkiv Circuit Administrative Court Bartosh N.S. on February 13, 2008, considering the case № 2a-3157/08, declined to accept a matter for processing an appeal against administration of penal colony on two basic grounds.

1. The law stipulates another procedure of appeal against imposed penalties (which one?). Here the judge quoted art. 134 of the CEC of Ukraine: "A convict can appeal against the imposed penalty; however, the submission of complaint does not stop the execution of penalty. The officer prescribing punishment, if there are proper grounds, can repeal it or substitute for a milder one. The top officer can repeal the punishment, if the officer prescribing a punishment abused his/her authority or the punishment was prescribed in the absence of convict's breach of duty." That is, by a court decision the convict "enjoying the right to appeal against punishment" must assert his/her rights at other instances, while s/he was denied relief at law.
2. The administration of penal institutions is not the subject of the powers of authority by the Code of Administrative Proceedings of Ukraine.

The Judicial Board of Appellate Administrative Court including judges Filatov Y.M., Vodolazhska N.S., Gutsul M. I. by their decision from 27.05.2008 fully agreed with the conclusions of the first instance court.

The proceedings of the Superior Administrative Court of Ukraine in appeal about the appeal against the above decisions took over two years. Finally on December 21, 2010 the Judicial Board of the Superior Administrative Court under the chairmanship of judge Smokovych M. I. and with participation of judges Horbatiuk S. I., Myronenko O. V., Moroz L. L. and Chumachenko T.A. concluded that "By section 2, part 2, art. 17 of the KAC of Ukraine, the jurisdiction of administrative courts does not extend to public-law cases that should be tried in criminal court proceedings", i. e. it fully confirmed the validity of decisions of courts of the first and appellate instances.

Judge of Kyiv Circuit Administrative Court Vynohradov O. I. based his refusal to institute action on appeal of convict A against the administration of penal colony about acknowledge of il-

legality of actions and abolition of punishments a bit differently, but with the same consequences (decision from 22.07.2009 in the case 2a-8474/09/1070): “The jurisdiction of administrative courts extends to litigations listed in part 1, art.17 of the KAC of Ukraine, which is exhaustive. At the same time part 2 of the said norm contains the list of public-legal cases to which the jurisdiction of administrative courts does not extend. By stipulations of section 2 part 2 of this norm the list includes cases belonging to criminal proceedings.

Present materials of the case show that the subject of the claimed litigation is an appeal against the actions of penal colony officers during the term of imprisonment of A. as punishment under criminal law that by art. 4 of the CEC of Ukraine is a basis for execution and serving of the said punishment. By art. 407, 408, 411 of the CPC of Ukraine the stage of execution of sentence is a stage of criminal process; therefore the issues of execution of sentence should be tried in criminal proceedings.”

In the above examples the administrative courts are unanimous in their decision that the questions of appeal against actions or inactivity of administration of agencies and penal institutions cannot be tried by them. They refer to the local courts jurisdiction over such litigations.

But there is a different practice. By verdict of Lviv circuit administrative court from August 28, 2008 on the case № 2a-2236/08 of convict P. suing the administration of penal center as a subject of powers of authority with a requirement to abolish the groundless, in opinion of the plaintiff, punishment applied to him by the institution chief, judge Foma O. P. refused to sanction proceedings in this case as the latter does not belong to examination in administrative proceedings and opined: “By section 2 of the part 2, art. 17 of the KAC of Ukraine the jurisdiction of administrative courts does not extend to public-legal cases which should be examined in the course of criminal proceedings.”

At the same time, the Lviv Appeal Court (judge Yavorsky I.O., Popko Y.S., Nos S. P.) on 06.11.2008 declared illicit the verdict of Lviv Circuit Administrative Court and adjudicated: To disaffirm the decision of the Lviv Circuit Administrative Court of August 28, 2008 and pronounce the new judgment about the transfer the case to the first instance of the same court for examination according to the norms of the Code of Administrative Proceedings of Ukraine.” This is how the Lviv Appeal Court justified its judgment: “The judge failed to take into account that the case of administrative jurisdiction is the public-legal litigation submitted for examination in administrative court, when at least one of the parties is an executive body, local self-government administration, officer thereof or other authorized subject responsible for public management on the basis of legislation, the specific powers included. In accordance with art. 104 of the KAC of Ukraine, a person who believes that his/her rights, freedoms or interest in the area of public legal relations have been violated can commence an action in the administrative court. The said article specifies the stipulation of art. 55 of the Constitution of Ukraine.” Over two years went by, but the decision of the Lviv Appeal Court was not carried out, and the lawsuit of convict P. against the administration of the establishment was not examined in its essence.

But the problem of protection of convict’s rights consists not only and not so much in the above reasoning of judges of administrative courts, because local courts also do not acknowledge their jurisdiction over these types of litigations resorting to tricky arguments. The problem consists in the approach of the state to protection of the rights of citizens: the officers of public bodies are doing their best not to find grounds for their jurisdiction over citizens’ appeals addressed to them, but to ground that their jurisdiction does not extend to these appeals, i. e. they work hard to refuse to examine the lawsuits and not to tackle the problem.

As a result, the constitutional norm about cognizance of all courts of all legal relationships is not a simple declaration now, but a practically ignored senseless formulation. The above court judgments seem all the more interesting as they actually change the fundamental approach to aims, tasks and essence of criminal procedure and nonidentical practice of application of rules of law by administrative courts. There are certain doubts concerning the possibility of extension criminal and/or criminal procedure law to litigations between the administrations of penal agencies and penal institutions.

The criminal proceeding is the activity of organs of inquest, investigator, public prosecutor, judge and court for institution of an action, investigation and judicial trial of criminal cases, as well as solution of problems of enforcement of a sentence. But the convicts' lawsuits have to deal only with administrative activity of the administration of penal institution as an authorized subject. Such activity is one of the basic directions of functioning of administrations of penal institutions. Both personnel and management of colonies carry out administrative and organization and legal functions. The administration of colonies is a kind of authoritative activity performed on behalf of the state that authorized them to enforce special administrative measures, which are not used by other public bodies on a regular basis.

The public-legal litigation mentioned in the KAC of Ukraine is an administrative conflict on the basis of administrative legal relationships. The characteristic signs of such litigation include the right to defend public rights of physical persons against actions of public bodies taken on their own that prevent realization of rights and freedoms of citizens. These actions and inactivity of the authorized subject — administrations of penal institutions — were appealed by convicts. As the principle of mutual responsibility of the state and convict is fixed in art. 5 of CEC of Ukraine, such legal relationships, namely the appeals against actions and inactivity of colony administration should be heard in an administrative court.

At the same time it is noteworthy that this type of conflict must not be examined in criminal proceedings. In the above decisions the courts allege that this dispute must be heard in criminal proceedings by articles 407, 409, 411 of CPC of Ukraine. The exhaustive list of issues tackled by a court while executing the sentence is in the fifth section of CPC of Ukraine: "Execution of a sentence, court decisions and rulings." Chapter 33 of this act stipulates that a local court is authorized to decide the issues listed in art. 405-1, 406, 407, 407-1, 408, 408-1, 408-2, 408-3, 410, 410-1, 411-1, 413, 414.

Art. 409 of CPC of Ukraine ("Court that decides the execution-related issues") stipulates: "The issues of doubts and contradictions arising during criminal law enforcement with retroactive effect of art 5 of CC of Ukraine are tackled by the courts pronouncing the sentence."

Therefore, the criminal procedure law makes no provisions for the procedure of consideration of litigations between a convict and administration of a colony.

In the end, it is possible to assert that legal relationships between EEP and convict are not a point of regulation by penal and/or criminal procedure law and cannot be examined by local courts in criminal proceedings.

The issue of whether the EEP administration is a subject of powers of authority is tackled as follows: the authorized subject is a public authority. An administration of penal institutions is a public authority. An administration of penal institutions is such a subject, therefore conflicts with it are within jurisdiction of administrative, and not any other court. According to part 2 art. 18 of KAC of Ukraine ("Subject cognizance of administrative cases"), the jurisdiction of circuit courts extends to administrative cases, when one of the parties is a public authority, other public body, institution of the Autonomous Republic of Crimea, their officers, except for cases concerning their decisions, actions or inactivity in matters about administrative misconduct and cases cognizant to local courts as administrative courts.

Thus, the KAC of Ukraine stipulates that the refusal to try a case can take place on two conditions:

- 1) if it relates to administrative misconduct;
- 2) if this case is cognizant to local common court.

Part 1 of art. 18 of KAC stipulates local common courts as administrative courts take cognizance of:

- 1) administrative cases in which one of the parties is a body or officer of local self-government, officer of local self-government body, except for those within the cognizance of circuit administrative courts;
- 2) all administrative cases concerning decisions, actions or inactivity of subjects of powers of authority in cases about calling to administrative account;

- 3) all administrative cases in litigations of physical persons and subjects of powers of authority concerning calculation, fixing, recalculation, payment, granting, receipt of pensions, social payments to disabled citizens, compulsory state social insurance payments and other social payments, surcharge, social services, assistance, protection, and privileges.

Under art.6 of the Law of Ukraine “On Government Penal Agency of Ukraine”, the penal colonies are structural elements of the Government Penal Agency of Ukraine carrying out of law-enforcement and human rights functions. Art. 1 of the said Law empowers the Government Penal Agency of Ukraine to apply single public policy in the field of execution of punishments.

The work in the Government Penal Agency of Ukraine is a special government service (art.14 of the Law “On Government Penal Agency of Ukraine”). Thus, the administration of penal colonies is an executive body. The actions and inactivity mentioned in convicts’ appeals did not relate to calling to administrative account as well as fixing of different types of social assistance.

That is, in our opinion, these and similar cases should be in jurisdiction not of local, but administrative court. Maybe, our arguments may seem debatable. But we believe that the idea about existence of such problem of relief at law of convicts in the area of violation of their rights is self-evident, as only in this way we can guarantee strict observance of the Constitution of Ukraine.

Ukraine will never become a law-governed state, if a certain circle of citizens’ rights are not guaranteed by effective protection with simultaneous free access to justice.

The discussed possibility of ambiguous perception and interpretation by courts of statutory and legal provisions should be taken into account during judicial reform, intended, according to specialists, to “cut dilatory procedures at court, corruption in judicial system, and introduce a new judicial system that brings legislation over to European standards without revolutionary changes .”

7. OVERVIEW OF THE EUROPEAN COURT DECISION ON DAVYDOV ET AL. VS. UKRAINE

On June 1, 2010 the European human rights court (hereafter referred to as Court) made a very important decision for the Ukrainian penal system in the case of Davydov et al. vs. Ukraine (statements № 17674/02 and 39081/2) admitting Ukraine’ s violation of stipulations of Convention protection of human rights and fundamental freedoms (hereafter referred to as Convention). The decision relates to three complainants who at the time were doing their terms in EEP № 58 (so-called Zamkova colony) in Iziaslav City, Khmelnytsk Oblast, Serhiy Davydov, Vitaliy Ilchenko and Serhiy Homeniuk, b. 1963, 1975 and 1967 accordingly. According to the complainants, twice during their term — on May 30, 2001 and on January 28, 2002 — they were cruelly beaten by Department’s special unit privates in the process of drills in the colony. Complainants maintained that they were not alerted about drills, they also were not asked about their consent to participate; they were pushed, thrown, beaten, stepped-on, compelled to undress and humiliated in the process of operation; they got no medical treatment for inflicted traumas, and their complaints were not investigated adequately. Then the complainants maintained that their correspondence to the European court was checked; that some of them were punished with confinement in a solitary cell for their complaints to Court, the complainants maintained that they could not effectively complain about all these events. They also complained about bad food and upkeep.

Taking into account that the government of Ukraine did not acknowledge the circumstances presented in the materials of the case and denied that the prisoners got bodily harms during drills, in June 2007 the Court conducted its own on-site investigation of the case circumstances, and in the room of Khmelnytsk Oblast Appeal Court three judges heard witnesses, including three complainants. The court also considered documents presented by parties concerning drills, including the plan of drills, jailer’s instructions, and premises.

Having considered the behavior of the Government relative to assistance to Court in establishment of facts in the case the Court concluded that the government of Ukraine had failed to

carry out its commitments by art. 38, §1(a) of the Convention. Being pedantic in its subsidiary role concerning establishment of facts, the Court, nevertheless estimated obtained proofs taking into account that the complaints contained serious facts about brutal treatment. The court came to the conclusion that the drills were not conducted in accordance with the clear-cut rules. The complainants got injuries, they were offended during drills, but damages were not fixed during the first training, and the medical records made after the second training were lost. The operative rule permitted the jailers not to fix damage and not to respond to medical complaints. The complainants intimidated and forced by the administration of the colony to renounce complaints in Court got no medical assistance. The department and office of public prosecutor conducted investigation of complaints submitted by the representatives of the complainants. The court came to the conclusion that in the context of drills on May 30 2001 and January 28, 2002 the stipulations of article 3 of the Convention were violated on four counts.

First, the complainants were treated brutally; they felt fear and humiliation during drills conducted both without the prisoners' consent and without legal grounds. The court underlined that bodies of power had to drill special unit personnel in such a way that nobody would be subject to brutal treatment as a result of these actions. It also noted that accounting for complete ban of brutal treatment the drills of special unit personnel should be conducted so that prevent any possibility of violation of this rule by the agents of the state.

Second, there was no effective investigation of the complaints. The investigations conducted had substantial defects; in particular, the Court had not received detailed records of investigation. The court concluded that the bodies of power did not try to make important steps for quick and independent investigation that would result in substantial results.

Third, it was not established that complainants ever underwent medical inspection in connection with their complaints; they got no medical treatment in connection with bodily harms inflicted during drills; no medical records of complainants were kept. Finally, the cells of complainants were constantly overcrowded that was a structural problem and by itself violated the stipulations of Convention.

The court referred to its practice, in which it acknowledged that in Ukraine there were no instruments of effective investigation of complaints about brutal treatment, absence of medical assistance and conditions of imprisonment. It came concluded that the article 13 of the Convention was violated. The court concluded that the letters of complainants were illegally checked and censored in violation of article 8, §1 of Convention.

The Court also admitted that in relation to complainants Ukraine violated article 34 (the right to individual complaint), because the complainants were pressured to make them quit complaining to Court.

Thereby the Court decided that the Government failed to fulfill its obligation by article 38, §1 (a) of Convention, violated article 3 of Convention in its material aspect, because the first complainant (Mr. Davydov) was brutally treated during drills on May 30, 2001 and on January 29 2002, got no medical assistance for bodily harms inflicted during drills and lived in bad conditions in the Zamkova colony, and also turns down the Government's denial about exhaustion of national instruments of legal protection; that article 3 of Convention was violated in its material aspect, because the second complainant (Mr. Ilchenko) was brutally treated during drills on May 30, 2001 and on January 29 2002, got no medical assistance for bodily harms inflicted during drills and lived in bad conditions in the Zamkova colony, and also turns down the Government's denial about exhaustion of national instruments of legal protection; that article 3 of Convention was violated in its material aspect, because the third complainant (Mr. Homeniuk) was brutally treated during drills on May 30, 2001 and on January 29 2002, got no medical assistance for bodily harms inflicted during drills and lived in bad conditions in the Zamkova colony, and also turns down the Government's denial about exhaustion of national instruments of legal protection; that article 3 of Convention was violated in its procedural aspect, because the complaints of the first, second and third complainants about their brutal treatment during drills were not properly considered by Ukrainian government, and also turns down the Government's denial about exhaustion of national instruments of legal protection; that ar-

ticle 13 of Convention was violated in combination with article 3 of Convention for lack of effective and accessible instruments of legal protection in national legislation for lodging complaints against brutal treatment and bodily harms caused during drills, absence of medical treatment in connection with these damages, and also bad terms of imprisonment; that article 8, §1 of Convention was violated because interference with the correspondence of the first, second and third complainants was illegal, and that it was not necessary to examine separately complaints according to article 13 of Convention in combination with article 8 related to the fact that complainants had no effective and accessible instruments of legal protection for submission of complaints about interference with their correspondence; that the right of the first, second and third complainants to submit individual complaints according to article 34 Convention was violated.

As far as we know, until now there has been no thorough investigation of the circumstances mentioned in the decision, no officer directly participating in brutal treatment of convicts was brought to book. We also remind of the likely mass beating of prisoners in Iziaslav colony #31 in January 2007. It is noteworthy that many officers mentioned in the decision of European Court in the case Davydov et al. vs. Ukraine were accessories to mass beating of prisoners in 2007. After these events of Shepetivka by the district office of public prosecutor a decision about a refuse in laying an action from February 7, 2007 was taken away as a result of verification that has the same defects that were set by the European court in the above case.

It would be good if at the state level the measures of public prosecutor's response will be taken as a result of the decision of European court in the case Davydov et al. vs. Ukraine intended to bring to book of accessories to the actions recognized as violations of article 3 of Convention and are crimes under legislation of Ukraine, in particular, in relation to violation or proceedings or renewal of investigation:

- circumstances of mass beating with the purpose of establishing responsibility of persons that directly inflicted bodily harms or gave corresponding commands;
- circumstances making medical assistance to the injured prisoners unavailable.

8. CONCLUSIONS

Despite the replacement of management and renaming of department, the situation with the observance of prisoner's rights has not improved and is worsening dynamically, because the public penal policy remains unchanged. The state must understand that increase of the number of prisoners, replacement or reduction of skilled personnel, rise in wages of personnel and so on without reform of penal paradigm will not result in real changes of the system. While Penitentiary Service remains the repression-oriented functional instrument of penal policy of Middle Ages, it cannot be reformed according to the modern model of Ukrainian prison by European standards. The state must realize that the penal system tending to dishonor, debase, intimidate, regularly violate the rights and freedoms of prisoners only leads to forming structures of people which are convinced that committing crime is the norm of behavior, hostile toward the state structures and society as a whole, who have neither priorities nor social consciousness. One needs to understand that the aim of execution of punishment is not only an isolation of criminals but also public policy intended to reform the consciousness of convict in his relation to committing crime, that persons deprived of rights are the product of society and that same society must take interest in the quality of this product which returns to society from the institutions of confinement. The state must give prisoners a chance choose their standing, opinion and priorities of behavior in the form of public remarks, free appeals to public institutions and organizations, including appeals against actions and inactivity of managers of penal institutions in court, make this practice of legal relationships simple, clear and accessible for prisoners.

There is a need in national preventive mechanism to prevent tortures by which the specially trained representatives of civil society will have a mandate of free access to any place of confine-

ment, and the conclusions about violation of rights and freedoms of prisoners should have adequate response of the state.

9. RECOMMENDATIONS

1. Complete the process of transferring the Department to the Ministry of Justice as called for in PACE Resolution № 1466 (2005).
2. Carry out a comprehensive analysis of all current penal legislation and practice to determine whether they comply with international standards.
3. Rework the Concept Strategy for reform of the penal system in accordance with the Concept Strategy for reform of the criminal justice system, involving in the reworking and discussion wide circles of specialists, and ensure the holding of independent expert assessments of the Concept Strategy and its public discussion.
4. Cancel provisions of current normative legal acts of the Department which violate human rights.
5. On the basis of a new Concept Strategy for reform of the penal system, draw up a draft law on amendments and additions to the Penal Code in line with international standards; a draft law on amendments and additions to the Law “On the State Penal Service”; a draft law “On the disciplinary charter of the State Penal Service of Ukraine; draft Cabinet of Ministers Resolutions “On the procedure for serving in the State Penal Service” and “On the procedure for making a one-off payment in the event of death or crippling injury of an employment of the State Penal Service, and compensation for damages to his property when carrying out his official duties”.
6. Review the tasks and legal basis for the activities of special units within the system and do not use them for carrying out searches and other actions within penal institutions.
7. Draw up and implement procedure for effective and swift response to reforms of possible human rights violations in penal institutions, in cooperation with leading human rights organizations.
8. Prepare a constitutional appeal in order to determine the jurisdiction of the trial considering complaints of prisoners on actions (inaction) of the administration of penal institutions.
9. Draw up and implement mechanisms and procedure for visits to penal institutions in accordance with the Optional Protocol to the UN Convention against Torture.
10. Promote the creation of other mechanisms of public control over the work of penal institutions.
11. Introduce a real and working system for submitting complaints; put an end to the practice of punishing prisoners for attempts to appeal against the behavior of the penal administration.
12. Prepare an exhaustive list of actions which will incur disciplinary penalties.
13. Scrupulously check all possible cases of corrupt activities by employees of the system. Publicly express the position of the Department with regard to all cases found to have substance
14. Introduce research programs and projects, including projects of civic human rights organizations on observance of prisoners’ rights and the penal system as a whole.
15. Improve the level to which the public are informed about the activities of penal bodies and institutions, about the situation and problems of the Department. Create a press service for the Department in each region.
16. Transfer medical services to the Ministry of Health.

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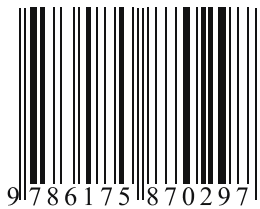
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