

HUMAN RIGHTS IN UKRAINE — 2011

HUMAN RIGHTS ORGANISATIONS REPORT

UKRAINIAN HELSINKI HUMAN RIGHTS UNION

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This book considers the human rights situation in Ukraine during 2011, it is based on studies by various non-governmental human rights organizations and specialists in this area. Each unit concentrates on identifying and analysing violations of specific rights in this period, 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.

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Arkadiy Bushchenko, Yevhen Zakharov

**CIVIL ASSESSMENT OF GOVERNMENT POLICY
IN THE AREA OF HUMAN RIGHTS**

HUMAN RIGHTS IN UKRAINE – 2011: MORE AND MORE VIOLATIONS¹

If between 2005 and 2009 we reported that government policy on human rights was ineffective, unsystematic and chaotic, today we are forced to state that during the last two years there has been no such government policy at all, and human rights are not a priority for the leaders of the country. We have seen virtually no positive action by the authorities and administration aimed at enabling citizens to exercise their rights, while there are more and more infringements of human rights and fundamental freedoms.

This overview briefly examines only some of the tendencies which emerged in 2011 and seem most dangerous for human rights – the drop in the standard of living of a major part of the population; political persecution of the opposition and civic movements with the use of the courts and law enforcement bodies; disregard for judicial independence and interference in court proceedings; and brutality of criminal law policy.

INCREASED POVERTY AND SOCIAL INEQUALITY

The situation with the government's safeguarding of social and economic rights is catastrophic. The 36 billion UAH payment deficit as of the end of 2011 indicates the government's inability to fulfil its economic commitments. And although the government declares a 2.3% fall in poverty in 2011 through a 25% increase in the subsistence minimum, an increase of over 12% in the average pension and 10% increase in the real wage, these are deceptive statistics. They are based on an increase in GNP per head of population, but do not take into account the average Ukrainian's buying capacity, while the subsistence minimum does not envisage many necessary expenses, for example, the cost to the average Ukrainian of sending a child to kindergarten, of education, medical services etc. The subsistence minimum, which is the criterion for establishing the level of remuneration for work and social payments, is still established on the basis of a selection of food items, goods and services approved 11 years ago in a resolution from 14.04.2000 (No. 656). During the period which has elapsed since then the selection has not once been reviewed whereas according to Article 3 §1 of the Law on the Subsistence Minimum, it should be reviewed at least every five years. Furthermore, against a background of increasing consumer prices in Ukraine over recent years, the subsistence minimum is excessively low. This in turn makes the size of pensions, wages and assistance for the poorer groups in society too low and reduces the population's real income.²

Assessments from trade unions, sociological research from the Ukrainian Social Research Centre; the International Sociology Institute; the Razumkov Centre; the Democratic Initiatives

¹ Prepared by Yevhen Zakharov, director of KHPG and Head of the Board of UHHRU.

² The Accounting Chamber: Ukraine has not been fighting poverty for 10 years now <http://www.epravda.com.ua/news/2011/10/19/302410/>

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Centre and others research establishments, on the contrary, indicate a rise in poverty. At present one quarter of Ukraine's population are considered poor.³ 85% of Ukrainians, in order to survive, were forced to economize on food, holidays, recreation and clothing. The average pay around the country is 2.5 thousand UAH which indicates an increase in the divide between rich and poor and assault on small and middle-level business, and a weakening of the middle class which should form the base and dynamic force of economic development.

The issue of poverty also concerns the public sector. Those classified as poor include the educated, qualified and full-time employed groups in society (people working in public sector institutions and organizations, education, cultural, scientific, medical, social workers, civil servants, engineers etc). Low salaries and pensions combined with rapidly increasing prices and tariffs make it impossible for them to provide the basic necessities for their families⁴

Yet even such a low, sometimes less than minimum wage is paid with delays, both to non-State workers and to people in the public sphere. For example, as of 1 October 2011 wage arrears came to 1,180 UAH.⁵ There is a steady trend towards increasing wage arrears.

In these conditions the government has adopted a harsh policy on suspending or reducing social payments for former Chornobyl clean-up workers, Afghanistan War veterans, children and others, and in response to protests has effectively resorted to political persecution. Despite the Constitutional Court judgement in 2007 (in the case of citizens' social guarantees⁶) which stated that rights cannot be suspended as opposed to privileges, the government demonstratively suspended implementation of social guarantees in the 2011 budget law. Furthermore Item 4 of the Final Provisions of 2011 Law on the State Budget gives the Cabinet of Ministers the right to establish the procedure and amounts of social payments based on available financial possibilities. The Cabinet of Ministers immediately arranged that pensions should be calculated without taking into account court rulings. This elicited mass protests from former Chornobyl clean-up workers, Afghanistan War veterans, "children of the War" and other groups in society throughout the country, and is creating the threat of an intensification of confrontation between the protesting groups and the law enforcement agencies. One person has already died in Donetsk as a result of this confrontation — 74-year-old retired miner Gennady Konoplyov.

The government says that there is no money in the budget to cover social payments at such a level, and an analogous norm for management of social payments by the Cabinet of Ministers has been added to the 2012 budget. Yet such actions by the government look particularly indecent given the incredible amounts spent on maintaining the President, parliament, Cabinet of Ministers, as well as other parts of the State apparatus which overall exceeds the budget allocations for social payments in 2011 by 3 billion UAH. Procurement of expensive cars, pearl baths, gold toilets, travel around the country on chartered flights, etc — all of this strengthens public opinion that those in power are corrupt, that there is money in the public coffers, only it won't be given, but will be channelled to meet the needs of high-ranking officials, not citizens. We would note that there are almost no attempts to curb professionally-linked concessions with these in the main remaining.

The government's policy on social payments was backed by the Constitutional Court which in its judgement of 26 December 2011 found Item 4 §4 of the Final Provisions to the 2011 Law on the State Budget constitutional. This CCU judgement effectively prevents Ukrainians from upholding their social guarantees in the amounts set down in the relevant laws through the courts. It would be interesting to know whether the Constitutional Court judges would agree that the Ukrainian state cannot be called law-based or social.

³ The poverty line in Ukraine is 1025 UAH <http://health.unian.net/ukr/detail/225542>.

⁴ The Committee on Social Policy and Employment has found the work of the Cabinet of Ministers in ensuring implementation of the President's Decree "On urgent measures to overcome poverty" unsatisfactory http://portal.rada.gov.ua/rada/control/uk/publish/article/news_left?art_id=259301&cat_id=37486

⁵ Wage arrears increase by 2.2% http://news.dt.ua/ECONOMICS/zaborgovanist_iz_zarplat_zbilshilasya_na_2,2-90232.html

⁶ <http://www.ccu.gov.ua/pls/wccu/P000?lang=0>.

The Constitutional Court based its judgement on the principle of proportionality between the need for social protection and the financial capacity of the State. Of course the amounts of payments on the basis of social factors to over 13 million people, and professionally linked payments to 3.2 million people are an impossible burden for the budget. Yet to pass such a judgement it was necessary to first get rid of the relict of socialism in the Constitution of declarative promises of social guarantees for all, to introduce a principle of proportionality into it, and then one could seriously consider this judgement. The main issue in this had been effectively discarded that being differentiation of benefits and privileges and social and economic rights, while the narrowing of the content and scope of rights is prohibited by Article 22 of the Constitution. For example, the payments to former Chernobyl clean-up workers are in implementation of their right to social protection. When young soldiers and servicemen were sent in 1986-1987 to clean up the aftermath of the Chernobyl Nuclear Disaster, nobody asked for their consent, while they returned with serious health problems. The state must under all circumstances provide them assistance as compensation for their damaged health, and, often, shattered lives. Payments to rehabilitated victims of political repression are not concessions, but compensation which the state is obliged to pay for the years of imprisonment in terrible conditions on the basis of unlawful sentences. Such payments cannot be cancelled or reduced “on the basis of the government’s financial capacity”.

In this context one must mention the discriminatory pension reform passed in 2011 which resulted in a reduction in current pensions.

POLITICAL PERSECUTION OF THE OPPOSITION AND CIVIC MOVEMENTS

The 26 December Constitutional Court judgement supposedly put an end to the legal argument. However the flagrant injustice of a decrease in the scope of social rights in spite of current laws for former Chernobyl clean-up workers and some other layers of society determines and will continue to arouse their wide-scale protests. Instead of reconsidering its policy, avoiding methods of force against the protesters and moving towards dialogue, the government is trying to intimidate protesters, using the law enforcement bodies — the MIA, SBU [Security Service], and Prosecutor’s Office. This tendency — of using the law enforcement bodies as instruments for political repression of political opponents and civic movements — is highly dangerous for human rights since it can set a wheel of repression in motion which will later be very hard to stop. And then political repression against imagined enemies can turn into repression against everybody.

We would cite one example with those same former Chernobyl clean-up workers.

Dissatisfied with the behaviour of the President of the nationwide civic organization “Chernobyl Union of Ukraine”, Yury Andreyev, who was not, in their opinion, conscientiously representing their interests⁷, some former Chernobyl clean-up workers wanted to vote him out at the reporting and election conference on 16 December outside Kyiv. However, in terms of the number of Special Force Berkut officers, the gathering looked more like military exercises. The Berkut officers let those deemed needed into the conference, prevented those who weren’t, and when Anatoly Mokry, a deputy from Kremenchug tried to protest from the tribune against such a manner of running of the conference, they effectively threw him out of the conference hall, telling him that he had been stripped of his status as conference delegate⁸.

Elected delegates of the conference from the Kharkiv former Chernobyl clean-up workers, Volodymyr Proskurin and Petro Prokopenko could not get to the conference at all. Proskurin was summoned as a witness in a criminal case over alleged forgery of documents confirming Chernobyl clean-up worker status. At 6.00 on 16 December he was detained near his flat and taken to the investigation department where he waited for the 11.00 appointment and was then questioned for 8 hours. Petro Prokopenko had

⁷ <http://khpg.org/index.php?id=1321974814>

⁸ <http://www.pravda.com.ua/rus/news/2011/12/17/6845372>

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been called to the investigators on 18 December. He was nonetheless detained outside Kyiv on 16 December in the morning as he was about to enter the conference hall and taken by car to Kharkiv and was in all detained for around 9 hours.

Such unprecedentedly flagrant interference by Internal Affairs officers in the internal matters of a civic organization is undoubtedly political persecution. It is typical that the criminal investigation over forgery of documents was initiated by the MIA regional investigation department by the Minister of Internal Affairs, Zakharchenko. Proskurin had already been detained and he was saved only by the fact that National Deputy Mykhailo Volynets had by chance received on that same day from the MIA a document long asked for certifying that as a 21-year-old policeman Volodymyr Proskurin had in 1986 gone to Chornobyl and Prypyat where he took part in the clean-up operation. Volynets flew to Kharkiv with the document.

Volodymyr Proskurin is registering a new nationwide organization “Union of Chornobyl Veterans”. Perhaps strong leaders who demand unyielding enforcement of the Law on the Status and Social Protection of Citizens who suffered as the result of the Chornobyl Disaster and consistently uphold the interests of former Chornobyl clean-up workers are clearly inconvenient to those in power. They therefore unleashed an unprecedented campaign to discredit them, public statements about “fake” Chornobyl clean-up workers who supposedly paid for court rulings, get unwarrantedly high pensions, etc. On top of that they treat former Chornobyl clean-up workers like criminals, with surveillance, unlawful detentions, attempts under any condition to initiate criminal proceedings. From 3 January for several evenings Proskurin was observed by two cars with police officers near his apartment block. He believes that they want to detain him and force him to undergo a medical examination in order to take away his second group disability status which he received indefinitely in 2010, and that such actions are planned also against other leaders of the Chornobyl clean-up workers movement.

Such flagrant interference in the matters of a civic association and humiliating contempt for ones own citizens had not been seen in all the 20 years of independence. Yet the former Chornobyl clean-up workers are not the only social group that has been persecuted by the authorities with the help of the law enforcement bodies. In general 2011 saw intensified political harassment of members of civic movements and organizations within civil society. Based on our observations around 60 civic activists, journalists and human rights activists, as well as 11 civic organizations suffered harassment, with such cases seen in 17 regions of the country. Criminal investigations were initiated against 30 people, 3 cases involving administrative proceedings and 2 civil cases were launched. A decision to undertake forced measures of a medical nature was taken against one person. Around 25 people had their liberty restricted (through detention, remand in custody in a temporary holding facility or SIZO [pre-trial remand unit]) for varying lengths of time. 16 activists were subjected to physical violence. Two people emigrated. All of them encountered violations of legislation or disproportionate interference from the state.

The following criminal investigations are politically motivated: those initiated against members of the Tax Code protests on Maidan Nezalezhnosti [Independence Square]; members of the party VO Svoboda; the nationalist organization Tryzub who daubed paint over a monument to Felix Dzerzhynsky and beheaded the bust of Joseph Stalin; against people for scrambling eggs on the Eternal Flame in Glory Park in Kyiv. There were undoubtedly political motives in the cutting from air of three television channels: ATN, “Fora” and ATVK in Kharkiv which were critical of the local authorities and Mayor. There were widespread violations of freedom of peaceful assembly. Besides unwarranted bans on such gatherings by courts and even local authorities, there were also absolutely anecdotal cases, for example, in Simferopol. Serhiy Veselovsky was charged with administrative liability for “organization of an unauthorized anti-government rally on Lenin Square”. This “rally” consisted of a silent sit-down by several young people on the steps of the Crimean Parliament building with their back to the main entrance for 15 minutes after the end of protests against the felling of trees on Gorky St in a totally different place.

There were also actions by various authorities aimed at deterring young people from civic activity, at cooling them down so to speak. There were also examples of political persecution of young people. For example, police officers in August 2011 turned up at the Youth Nationalist

Congress youth camp in the Sumy region. They copied out the passport and registration details of all participants (around 50 people) in training seminars on tourism and civic activism and videoed them. The “prophylactic conversations” which were held in 2010 in various regions by the SBU and police with activists from the Regional Initiatives Foundation, the Democratic Alliance, the independent student union “Direct Action”, and the women’s organization Femen, did not stop. In various forms from advice to threats the young people were advised to not take part in protests, were asked about the leadership of the organizations, the source of their funding, etc.

There was also considerable pressure from the Ministry of Education, Science, Youth and Sport and the administrations of higher educational institutes on particular students and bodies of student self-government which don’t support the Ministry’s policy, for example, by protesting against the new draft Law on Higher Education. The situation became widespread where the Ministry phoned institutes demanding that they carry out an instructional conversation with students and the heads of such student self-government bodies that publicly express their opposition to the draft law or who have been seen at protest actions.

Political persecution is a very serious human rights violation and has a significant impact on political freedom which vanishes rapidly, with the repression aimed at intimidating the public. However it has the opposite effect since they arouse even more protest. The regime gets more worried and takes preventive measures like passing jurisdiction for Article 294 of the Criminal Code (mass disturbances) from the MIA to the SBU.

One can also consider the new Law on the Election of National Deputies, passed on 17 November 2011 by a constitutional majority as such a preventive measure aimed at the ruling majority’s holding onto power. Its adoption was determined by objective need and addressed solely the political needs of those in power. A proportional — majority system, raising the election threshold for a party entering parliament to 5%, and a ban on participation by blocs of parties in the elections remained in the version proposed by those in power. Despite their promises they did not hold widespread public discussion of changes to electoral legislation and the results of those public discussions which were run by the public were ignored.

We would also note that the elections for the Verkhovna Rada should have been held in the last week of March in the fourth year of when they actually carried out their functions. That is, the next parliamentary elections should have taken place on 27 March 2011. If one analyzes Article 77 §1 and Article 103 §5 of the Constitution, it is clear that the President and MPs may not hold office longer than the designated terms. Yet the parliamentary elections were put back to autumn 2012. This alone is sufficient to conclude that the government in Ukraine has been illegitimate for almost a year.

PRESSURE ON THE JUDICIARY AND INTERFERENCE IN COURT PROCEEDINGS

A strong, independent and just judiciary is the main prerequisite for human rights. Yet who is not laying siege to the justice system’s authority! The actions of the Cabinet of Ministers in banning the Pension Fund from allocating money in enforcement of court rulings on social payments clearly demonstrate the lack of respect for the justice system and supercilious attitude by the executive branch of power to the judiciary. In 2010 and 2011 disregard intensified for judicial independence and rule of law as a whole. Selective criminal prosecutions were more and more dominant, with the courts coming more and more under the control of the Prosecutor’s office, executive and bodies of local self-government. In cases of a political nature, in anti-corruption cases and many other types of cases the principle of adversarial proceedings can be forgotten about, and the courts totally lost their independence being turned into obedient implementers of others’ wishes. The court trials of former government officials are a parody of justice. For example, the restraint measure against Yulia Tymoshenko and Yury Lutsenko was changed from a signed undertaking not to abscond to remand in custody without any lawful grounds. The holding of a court hearing to determine restraint measures against Yulia Tymoshenko over the United Energy Systems of Ukraine prosecution in the medical

unit of the SIZO [remand unit] is a mockery of judicial procedure, and of the accused who is confined to her bed. In general everything in the criminal prosecution of the former Prime Minister is in keeping not with the law but with the wishes of those in high places who interfere, ignoring all rules and established practice, unceasingly trying to humiliate the imprisoned and ill woman.

So that judges cannot show resistance to such pressure, a Damocles sword has been suspended over them in the form of threat of dismissal for infringement of their oath. This threat can be carried out at any moment through a submission to the High Council of Justice. According to the Law on the High Council of Justice, its members are authorized, in considering such submissions, to even interfere in court cases which have not ended. In a judgement from 11 March 2011, No. 2/2001, the Constitutional Court prohibited requests to see the material of court cases where proceedings have not ended because this could lead to interference in the course of justice⁹, and the Verkhovna Rada was supposed to change the law taking this Constitutional Court judgement into account. However the amendments to this law passed on 4 October and signed by the President on 25 November 2011¹⁰, on the contrary, only increased the possibilities for interference by the High Council of Justice as a whole, and its members in the consideration of court cases. For example, Article 40 §1 of this Law states:

“Verification of information about disciplinary misdemeanours is carried out on the instruction of the High Council of Justice or the Head of the High Council of Justice to one of the members of the High Council of Justice through receiving written explanation from the judge and other individuals; demanding to see the court cases (copies) the examination of which has ended, and viewing court cases the examination of which has not ended; receiving other information from state authorities and bodies of local self-government, their officials, heads of enterprises, institutions, organizations regardless of their form of property and subordination, of citizens and their associations”.

Article 25 §4 of the Law envisages that the High Council of Justice or its members can demand copies of court case material which has been returned for a new examination, or which has been handed over to another judge, i.e. in those cases where the examination has not been fully concluded and the court ruling has not come into force.

In the opinion of the Verkhovna Rada Central Legal Department such provisions of the law are not in keeping with the Constitutional Court judgements from 19 May 1999, No. 4/99; from 11 April 2000, No. 4/2000; from 20 March 2002, No. 4/2002 and from 11 March 2011, No. 2/2011 which state that the Constitution and laws of Ukraine guarantee the independence and inviolability of judges, as well as prohibiting influence on judges in any form (Article 126 of the Constitution). Yet the parliamentary majority which is under the control of the regime did not pay any attention to this and adopted the amendments to the Law in breach of the Constitution and Constitutional Court judgements.

Practice in using submissions to the High Council of Justice confirms the wish to control judges. Even if it does not dismiss judges, submissions and their review remind judges that they need to be obedient. In 2011 there were submissions to the High Council of Justice with allegations of infringement by judges of their oath for handing down rulings which were not to the Prosecutor's liking. For example, on 7 June 2011 the Deputy Prosecutor General Mykhailo Havrylyuk, who is at the same time a member of the High Council of Justice, wrote to the High Council of Justice suggesting that it dismiss three judges of the Kyiv Court of Appeal — Ihor Moroz, Valery. Pashkevych and Ludmila Bartashchuk, alleging breach of their oath. In fact, Mr Havrylyuk wanted to punish the judges for their observance of the Constitution and European Convention on Human Rights. The judges had passed a ruling to free the accused from custody in view of the lack of grounds for extending remand in custody. This ruling is fully in line with Article 29 of Ukraine's Constitution and with Article 5 of the European Convention which establishes the right to liberty as an inalienable human right meaning that nobody has to prove that he is justified in being at liberty. This is also confirmed by the case law of the European Court of Human Rights which has on a number of occasions reiterated that there must be a presumption in favour of release, and that under a verdict is issued, a person must

⁹ <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v002p710-11>

¹⁰ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=40136

be deemed innocent, and that the person should be released as soon as remand in custody becomes unwarranted. The Deputy Prosecutor General is effectively blaming the panel of judges for releasing the accused since the prosecution failed to provide the court with specific facts which could justify continued detention. In court the Prosecutor did not provide any specific fact in favour of such a ruling. Yet the attempt by the Prosecutor's office to exert pressure on the judges merely because they did not support the Prosecutor's position is absolutely unacceptable.

The Prosecutor's Office which is allocated enormous funding for "defence of human rights" should direct its energies towards eradicating those violations, including in the work of the courts, which have already been identified by the European Court of Human Rights, and not try to punish judges for endeavouring to break the pernicious practice of obliging the Prosecutor's Office and for making demands on State bodies representing the prosecution.

Another highly publicized example was the interference by the Prosecutor General's Office in the activities of the Supreme Court. On 7 November 2011 Mykhailo Havrylyuk gave a briefing¹¹ at which he accused Supreme Court judges of illegally changing the sentences of 15 dangerous criminals from life imprisonment to 15 years. He said that the initiative was taken by some National Deputies [MPs] who provided information about the alleged breach of oath by the judges. "It is unclear on what grounds the Supreme Court Criminal Chamber, as exceptional proceedings, reviewed all these sentences with flagrant violation of the requirements of criminal legislation and changed the sentences. After examination by the High Council of Justice all the names of the judges will be revealed".

He also stated that some of the judges suspected of unlawful behaviour had already resigned of their own accord. However the problem of changing the death penalty to life imprisonment or 15 years is a difficult one and there have been constant discussions since 2000 on the subject, with the view of lawyers being divided. To assert now that the Supreme Court judges who reconsidered the death sentences and changed them to 15 years imprisonment in this way infringed their oath is, in my opinion, incorrect.

There have also been submissions alleging breach of oath by judges who handed down rules in cases with a pronounced political nature. For example, on 3 August 2011 a submission was received by the High Council of Justice from the President of the Kyiv Court of Appeal, Anton Chernushenko alleging breach of legislation by judges of that court Valentina Lyaskovska, Anatoly Kuzmin and Oleksandr Zhuravel during consideration of whether to change the restraint measure about Anatoly Makarenko and Taras Shepitko. Those judges had, on 5 July, released Makarenko and Shepitko from custody justifying this as due to positive character references, applications from respected people for their release, Makarenko's ill health and the fact that Shepitko has children under 16. The court prohibited them from leaving the country.¹²

While such an instrument of pressure on judges is retained, it is not possible to speak seriously of court protection for human rights.

We should note the amendments passed in 2011 to the Law on Access to Court Rulings which seriously reduce the Register of Court Rulings. From now on, in accordance with Article 3 §3: "*The list of court rulings of general jurisdiction courts which are to be added to the Register is approved by the Council of Judges, after agreement with the State Judicial Administration*"

BRUTALITY OF CRIMINAL LAW POLICY

The situation with torture and ill-treatment became more acute in 2011 as against the previous year. . Despite a number of large-scale protests, brutal treatment of detainees is continuing, regardless of the MIA's declared zero tolerance position with regard to violations of the law by police

¹¹ High Council of Justice "investigates" Supreme Court judges

¹² khpg.org/index.php?id=1309903839

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officers. According to sociological research at national level (including a survey of 3000 respondents in Kyiv, Lviv, Kharkiv, Poltava and the Crimea, carried out as part of a Kharkiv Human Rights Group project with the support of the European Commission, the estimated number of victims of unlawful violence at the hands of the police came to more than 790 thousand in 2010 (this means that there was an act of unlawful violence by the police every 40 seconds) there was an act of unlawful violence by the police. In 2011 the figure had reached 980 thousand. In 2010 51 people died in police institutions (against 23 in 2009), while by the end of June 2011 news had become public of 27 deaths.

Even the Prosecutor General Viktor Pshonka at an extended meeting on 21 June on the results of Prosecutor Office work during the first 6 months of 2011 stated: “The problem of human rights in criminal proceedings is particularly acute for Ukraine. There are not isolated cases of torture at the detective inquiry and criminal investigation stages”.

The assessments cited here of the number of victims is in stark contrast to the number of cases of unlawful violence by law enforcement officers which reached the public sphere: victims are scared to complain. We see only the tip of the iceberg. Torture and ill-treatment most often go unpunished or, what is worse, are seen as the norm. This leads to an increase in lawlessness and impunity in the law enforcement bodies on the one hand, and in everybody having an increased feeling of being unprotected on the other.

The number of people imprisoned is on the increase, with the issue of their being provided with proper medical assistance remaining acute. Mortality in institutions under the State Penitentiary Service rose by 45% during the first half of 2011 (601 deaths against 808 for the whole of 2010); the number of suicides by 22%¹³ The issue of overcrowding in some SIZO again became acute with prisoners in some cells having to take turns to sleep on the bed. There was no implementation of the requirements of the European Court of Human Rights in the Kharchenko v. Ukraine case regarding changes to legislation on pre-trial detention during the investigation, when reading the file material and during the trial. This is despite the fact that the courts sent approximately one in eleven criminal cases back for further investigation, there are frequent cases where the accused can spend years in a SIZO, although innocent since no verdict has been handed down in their case, and the judge does not dare to acquit them or change the restraint measure. The worst record was 12 years! The already pitiful number of acquittals has over the last two years fallen even further, with the Prosecutor’s office also seeking to have these revoked at appeal stage. These problems should have been resolved by a new Criminal Procedure Code which they promised to adopt in 2011 however the Code was not tabled in parliament.

2011 saw the adoption of a number of laws which violate human rights, for example the Law on the Legal Status of Foreigners and Stateless Persons and others. All changes without exception are concentrated on broadening the powers of state bodies in exercising control over foreign nationals and functions of coercion and punishment.

At the same time as amendments to legislation aimed at strengthening legal pressure on foreign nationals, in 2011 an additional State body was finally formed for carrying out such immigration policy — the State Migration Service. Unfortunately, instead of a civilian and transparent body independent of the MIA, another gendarme-like body for supervision of foreign nationals has been created, as a kind of daughter firm of the MIA.

THE PUBLIC’S REACTION

2011 was characterized by an increase in public protests by various groups in society. Who didn’t protest against the actions of the authorities! There were protests by workers, teachers, students, environmental activists, members of various political parties, people on benefits, farmers,

¹³ <http://ukrprison.org.ua/index.php?id=1314032401>

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vets ... According to MIA statistics, during 2011 there were 160 thousand protests¹⁴. How effective were they? Examination of the authorities' reaction gives grounds for concluding that they may at best make partial concessions only to later push what they want. One saw no willingness to engage in honest dialogue with the public. One can therefore expect protests against the policy of those in power to increase. According to a public opinion survey by the Razumkov Centre ¹⁵, the number of those who believe that where there is a significant deterioration in living conditions, you need to go out into the street and protest (52%) was in December 2011 significantly higher than the number who believe that it's better to endure financial difficulties so as to retain order in the country (23.3%)

We are once again forced to recall the historical experience of the twentieth century that a political regime which violates human rights is more and more doomed to failure. The human rights situation will improve only when there are radical changes in attitude of those in power to their main constitutional duty, that being the affirmation and protection of human rights. What remains in question is whether the country's leaders are capable of understanding this at least for the sake of their own selfish interests and a sense of self-preservation.

¹⁴ <http://tvi.ua/ua/watch/author/?prog=698>

¹⁵ http://www.razumkov.org.ua/ukr/news.php?news_id=386

POLITICAL PERSECUTIONS¹

In 2011, as a result of the resistance of Ukrainian society and devastating criticism of the Council of Europe, European Union, and leaders of many Western countries the criminal prosecution for political reasons was held up. There were nearly no new politically conditioned criminal cases, all political prisoners, besides several former government officials, were released from custody. However, no criminal investigation was terminated due to nonoccurrence of events and / or a crime; the court judgments in these cases give the impression of unfair and unlawful, while the extrajudicial persecution of community activists and participants of the protest movements went on. There were much more violations of freedom of peaceful assemblies and freedom of associations in 2011 than in 2010. In 2010, they renewed administrative detention and conviction for peaceful protests that had not been observed since 2004, such incidents were frequent and in 2011. The Security Service of Ukraine became more active in the criminal cases against politicians and politically conditioned actions against civil society activists.

Changing measure of restraint for Yuliya Tymoshenko and Yuriy Lutsenko from recognizance not to punitive detention had no legal basis. It is likely that the European Court will recognize the violation of Article 5 of the European Convention (right to freedom) with respect to both politicians. The trials in both cases were accompanied by significant violations of the right to a fair trial and showed disregard for the rule of law.

Seven years of imprisonment for Yuliya Tymoshenko for actions related to contracts for the supply of Russian gas, confirm the political motives of the criminal prosecution. This sentence resulted in tearing Ukraine away from European integration processes and destruction of foundations of criminal law and procedure. It showed complete dependence of the court on the direct intervention of executive power and influential political forces, dependence on political considerations in general, on irrepressible desire to find and punish someone for aberrations of life, for political and economic improprieties. It turned out that the Ukrainian justice is unable to resist the rampant spread of criminal law in areas that principally cannot be solved in the penal domain.

The sentence of Pechersk Court does not give answers to very substantial arguments made by the defense during the proceedings, and thereby violates the right of Yuliya Tymoshenko to informed decision under Article 6 of the European Convention on Human Rights. In particular, these are the following questions.

Did the accusation formulate with sufficient precision what rules in force at the time of the event forbade the Prime Minister of Ukraine to give instructions of which she was accused? Were these rules formulated with such precision that they could be breached and raise awareness of the wrongfulness of such actions?

Did the prosecution fetch enough evidence that if Tymoshenko had not performed the incriminated actions, the price of gas would have remained at the level of 2008? Did the prosecution provide evidence that other factors could have led to higher prices?

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Did the prosecution provide sufficient evidence that the circumstances known under generalized name “the gas crisis of 2009” could not be treated as “justified risk conditions” in the meaning of Article 42 of the Criminal Code?

Can the rendering of somebody’s words be recognized as the evidence for the prosecution, i.e., that is the rendering of the words of the person who was not questioned during the trial, and whether the court of first instance was right relying on such evidence? Can the testimony of a person, whom defense was unable to examine during the trial, be considered an adequate evidence?

Can the thought, evaluation, or assumption of a witness who is not acting as an expert in the process be considered as evidence for the prosecution, and whether it was right that the court of first instance relied on such evidence?

Can the sentence be legal if the court failed to explore substantial evidence that may indicate in favor of the defendant?

Without juridical answers to these and other legal issues the sentencing of Yuliya Tymoshenko will remain an event of political life ruining criminal justice system, the rule of law in the state and legal certainty, affecting the entire system of governance and public life. The existence of such sentence will create an atmosphere in which any manager will not be certain about the consequences of her/his actions which not always unmistakable and sometimes lead to unexpected or unfavorable results.

At the level of state governance it will lead to paralysis of management because of the unwillingness of anyone to take responsibility; it will transform the state apparatus into the pack, where only the sympathy of the leader can protect a member of a pack against responsibility. This gives the government unprecedented opportunities for selective persecution, because it leaves only one criterion separating the legitimate from criminal behavior: sympathy of the government to certain actions and decisions.

In our opinion, the Cassation Court, which has to consider this matter, should pay attention to the need to provide a reasonable answer to the above questions and carefully verify the application of the norms of procedural law by the Pechersky Court.

The criminal cases involving Yuriy Lutsenko completely collapsed in court. Only one of numerous witnesses confirmed his testimony given during the preliminary investigation, while the in-court testimonies of the lion’s share of witnesses indicate the innocence of ex-minister. Besides, the charges look rather ridiculous. The actions in which Lutsenko has been incriminated are not criminally punishable and cannot generally be subject to criminal prosecution. The sentence to Yuriy Lutsenko is simply a mockery of justice.

We may venture to predict that in the future, if all Ukrainian courts leave sentences of Tymoshenko and Lutsenko in place, the European Court will find a violation of the right to a fair trial (Article 6), that there was been punishment without guilt (Article 7), and that the motives of prosecution were political (Article 18). But confirmation of this statement may occur only in a few years.

The chronicle of cases of victims of political repressions² and review of political persecution of the activists of civil society³ give a general idea of the scale and nature of political persecutions. The government actions against politicians were widely covered in the media and the Internet; however, the media published much less about conflicts with the authorities of civil society activists, journalists, human rights activists, members of NGOs, members of trade unions, youth and student movements.

According to our observations, about 60 members of the public and 11 members of NGOs from 17 regions of the country were subjected to various forms of political persecution in 2010–2011. Criminal charges were brought against 30 people, in 3 cases administrative offences were fixed, in two instances civil cases were initiated. One person was sentenced to compulsory medical treatment. 27 people were submitted to limitation of liberty (arrest, detention or imprisonment) for various

² Yevhen Zakharov, Borys Zakharov. Political persecutions in contemporary Ukraine. See: [Http://khpg.org/index.php?id=1321885956](http://khpg.org/index.php?id=1321885956)

³ Olexandr Matviychuk. Harassment of civil society in Ukraine in 2011. See: <http://khpg.org/index.php?id=1321886708>

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periods, 16 people suffered physical violence, and two persons emigrated. All of them faced violations of law or disproportionate state intervention.

The cases of political harassment of the representatives of civil society may be divided into four groups by political reasons of the state that lay at the heart of such persecutions. These are the reasons as follows:

- 1) “ideological”;
- 2) preservation of power by restricting human rights;
- 3) persecution for public activity;
- 4) quelling of the protest potential of the society.

The first group includes cases of civil activists, public figures and national patriotic organizations. These include the already mentioned in the annual reports of 2009-2010 cases of cutting the head of the bust of Stalin, splashing with paint of Dzerzhinsky’s monument, egg frying on the Eternal Flame, recent legal proceedings instigated for splashing paint at billboards depicting President. All valid judgments did not prescribe deprivation of freedom. However, the qualification of crimes is highly questionable in all these cases.

The obvious ideological reasons underlie the case of Lviv historian Ruslan Zabily about “preparing for disclosure of state secrets” and removal of more than fifty-year-old archival materials. The case was classified “top secret”, and Ruslan Zabily is a witness. The interrogations are conducted with quarterly intervals. But all this cannot change the fact that the Soviet documents classified “secret” and “top secret” taken from Zabily cannot be a state secret according to the Law of Ukraine “On State Secrets.”

The second group includes cases when, while defending the existing authorities, they limit fundamental liberties, first of all freedom of convictions, freedom of assembly and freedom of associations (in which cases we deal with violations of Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms). Numerous examples of such violations were listed in the relevant sections of this Report.

The third group includes cases of persecution for social activities of individuals and public organizations. There were very many such cases against human rights activists and social activists (Volodymyr Proskurin, Petro Prokopenko, Andriy Fiedosov, Dementiy Bely, Dmytro Groisman, Andriy Bondarenko and others) and certain organizations, such as NGOs “Class” from Alchevsk, “Center for Legal Protection of Odesa Residents” and others.

The fourth group comprise many cases when authorities are trying to intimidate protesters (entrepreneurs, Chernobyl veterans, Afghans, various youth groups) and bring an end to the protests. If the actions of authorities against the “adult” protest electorate are well covered and well-known, the suppression of youth protests needs further studies and description. This is due to a number of subjective factors, including the reluctance of students to publish and formally verify facts that occurred, because of their exposure to the university administration.

In conclusion, we should note that further developments in this area depend on several factors. While political repressions have been suspended, their threat remains. At any time the repressions of dissenters may return, if the “hawks” in the management of the state consider it advantageous to them, especially since many Ukrainians are scared already. And awareness of the need to correct mistakes and return to the dialogue with society is not observed. On the contrary, the power politics remains a dominating tendency. However, it seems that some authorities have already realized: the political persecutions result in increased external pressure on the state from the West and fail to reach its goal to stop protests against the current state policy and practice.

CONSTITUTIONAL PROCESS IN UKRAINE: 2011 – EARLY 2012. CURRENT TRENDS AND SUMMARY¹

The constitutional process in Ukraine in 2011 had signs of peaceful evolutionary process; however, strategically it fell under the influence of the idea of the Constitutional Assembly of Ukraine, which would lead to significant renewal of the Fundamental Law of Ukraine; it had been articulated by the first President of Ukraine Leonid Kravchuk early in 2010. In 2011, the initiative of L. Kravchuk was backed up by current President of Ukraine Viktor Yanukovich, which signed the Decree “The question of formation and organization of the Constitutional Assembly” on January 25, 2012, No. 31/2012.

This move of the President was met with mixed feelings of the public and experts, because 100 members of the Constitutional Assembly working on a voluntary basis are not likely to draft a new Constitution of Ukraine from the technical and juridical point of view. The political opposition suspected the authorities of an attempt to use the Assembly and legitimize the constitutional reform only in the formal sense, and therefore refused to join the “professional-civil” forum. However, in our opinion, the steps of Kyiv officialdom aiming at renewal of the Constitution should not be underestimated, as they are justified by the evidence of the critical attitude of the Ukrainian state and society to the current Fundamental Law.

As early as in 1996, current Chairman of the Central Election Commission (CEC) of Ukraine and the constitutional law professor V. Shapoval said, the Ukrainian Constitution of 1996 was developed and adopted as the fundamental law of the state rather than of the civil society (as it should be). Therefore, from the very outset its regulatory potential was limited in time and space. The Constitution of Ukraine proved to be appropriate as a Fundamental law for the transit period. However, during 16 years of intensive use, it has almost exhausted its inherent positive regulatory properties. The 1996 Constitution was designed for post-totalitarian state and society; however, it is proved to be functionally deficient under conditions of broader political freedom, economic market and increasing activity of civil society.

No wonder, the structural weaknesses of the Constitution became evident in the domain of law enforcement, which may be exemplified with “resonance” judgments of the Constitutional Court of Ukraine on the interpretation of articles and provisions of the Fundamental Law in 2011 and early 2012. In order to explain this thesis, we have chosen typical decisions of the Constitutional Court of Ukraine of October 20, 2011; December 26, 2011; January 20, 2012; and January 25, 2012. The political and legal commentaries will tally up the expert opinion on strategy for the constitutional process in Ukraine.

¹ Prepared by Vsevolod Rechytsky, Constitutional Expert of the Kharkiv Human Rights Group.

**THE POLITICAL AND LEGAL COMMENTARY ON THE CONSTITUTIONAL COURT JUDGMENT
IN RESPONSE TO THE CONSTITUTIONAL SUBMISSION FROM THE SECURITY SERVICE OF UKRAINE
CONCERNING AN OFFICIAL INTERPRETATION OF THE PROVISIONS OF PART THREE OF ARTICLE 62
OF THE CONSTITUTION OF UKRAINE FROM OCTOBER 20, 2012**

The reason for the submission of the Security Service of Ukraine, as noted by the Constitutional Court (hereinafter *the Court*), was the need to obtain an official interpretation of Article 62 of the Constitution of Ukraine (1996) stating that “the prosecution cannot be based on the evidences obtained illegally.”

The legal entity entitled to constitutional submission substantiated the practical need for an official interpretation of this provision by ambiguous court practice in evaluating the admissibility of evidence in criminal cases. In his opinion, the evidences submitted by any person pursuant to Article 66 of the Criminal Procedure Code do not meet admissibility requirements, if they are obtained with the help of violations related to the unlawful limitation of fundamental rights and freedoms, as well as violations resulting from activity having formal signs of investigation and search operations carried out by persons who were not officially authorized to perform them. According to the legal entity entitled to constitutional submission, the agencies of inquiry, pre-trial investigation and judicial agencies and their officers have no right to admit factual data as evidence in a criminal case, if they are received illegally in the light of the provisions of Article 62 of the Constitution of Ukraine.

Having reviewed the petition, the Constitutional Court of Ukraine has concluded that the collection, verification and evaluation of evidence are possible only in the manner prescribed by law in detail. According to Article 65 of the Criminal Procedure Code, the evidence in a criminal case are factual data, on the basis of which, in accordance with the established procedure, the examining body, investigator and court determine the presence or absence of a socially dangerous act, culpability of the person, who committed the act, and other circumstances relevant to solving the case. These data are established with the help of the testimony of a witness, victim, suspect, accused, expert conclusion, material evidence, protocols of investigative and judicial actions, protocols with relevant annexes compiled by the authorities as a result of search operations and other documents. This list of subjects that can submit evidence is defined in special legislation.

Furthermore, as the Court noted, only the evidence that was obtained in accordance with criminal procedure can be recognized and used as admissible evidence in a criminal case. Therefore, the verification of evidence on their admissibility should be considered a guarantee of rights and freedoms of citizens in the criminal process and a means to facilitate the adoption of legal and equitable judgment in the case. The analysis of the provisions of Article 62 of the Constitution of Ukraine about the fact that “an accusation shall not be based on illegally obtained evidence” substantiated the conclusion of the court that the imputation of a crime cannot be justified by illegally obtained factual data, namely: 1) in violation of constitutional rights and freedoms of citizens, 2) in violation of the legal rules of procedure, means and sources of factual data compiled by a person without specific authorization for investigation and search operations.

The Court emphasized that the investigation and search operations may be conducted only by legally defined public authorities and their officers which are supposed to act only on the basis of and within the credentials and in the manner envisaged by the Constitution and legislation of Ukraine (part two of Article 19 of the Fundamental Law of Ukraine). That is the investigation and search operations or the use of means to obtain factual data shall be exclusively subject to the rights and freedoms of citizens in legally prescribed circumstances and according to the procedure and only by persons or units which are specifically authorized to perform investigation and search operations. The violation by the persons authorized to carry out investigation and search operations of the laws of Ukraine while obtaining factual data should be considered as grounds for declaring the evidence collected in such manner inadmissible. We can but agree with the latter statement.

On the other hand, the Constitutional Court noted that the factual data on the commitment of a crime or preparation for it can be obtained not only as a result of investigation and search operations conducted by specifically authorized persons, but also accidentally or purposefully fixed by physical entities who made private photos, films, video and audio recordings. Moreover, the Court accentuated that while assessing as evidence in a criminal case the factual data containing information about a crime or preparation for it one should take into consideration initiatory or situational (random) nature of actions of private individuals or legal entities, as well as task of fixation by them of these data.

As a result, the Court arrived at a principal conclusion that any things or documents (factual data) submitted by physical or legal entity do not meet the requirements of admissibility of evidence if they were obtained in violation of human rights and fundamental freedoms of a person and citizen, or if they were received as a result of targeted investigation and search operations, to which these persons were not officially entitled. That is the Constitutional Court expressed its belief that the provisions of Article 62 of the Constitution of Ukraine that “an accusation shall not be based on illegally obtained evidence” should be understood to mean that the imputation of a crime cannot be based on factual data obtained: 1) as a result of investigation and search operations of authorized persons, but in violation of constitutional guarantees of rights and freedoms of citizens; 2) with the breach of the procedure of their collection established by law; 3) as a result of targeted investigation and search operations by private (unauthorized for such actions) individuals.

The judicial disposition of the Court, pursuant to Articles 147, 150, 153 of the Constitution of Ukraine, Articles 51, 63, 65, 67, 69, 95 of the Law of Ukraine “On the Constitutional Court of Ukraine” maintains that obtaining evidence in criminal proceedings as a result of investigation and search operations cannot be carried out illegally and incrimination cannot be based on factual data obtained as a result of investigation and search operations by authorized persons without compliance with constitutional provisions or in violation of procedure established by law. Moreover, one cannot consider as evidence in criminal proceedings the factual data obtained with the help of targeted collection and fixation using measures prescribed by the Law of Ukraine “On investigation and search operations” by a person not entitled to carry out such activity.

The human rights community regards the last words of the judgment as a direct allusion to the security service Major M. Melnychenko, because his actions correspond to the concept of amateur investigation and search operations (secret taping of talks, unauthorized installation of recording equipment in the office of the President of Ukraine, etc.) carried out by technically competent person, thought not specifically authorized.

As a result, the Constitutional Court created a legal mechanism to combat all — real and only potentially possible — *Melnychenkos*. It greatly facilitated the counselor’s job in the case of untouchable top-brass accused. However, maybe in this case, the Court, maintaining law and order, stood up for rather abstract principle, than the real interests of civil society. Let us imagine a situation: a decent man sitting in the park sees a woman leaving a stroller with a baby at the entrance to the bank, institution or office. Then this same man sees that a man comes to the stroller and tries to grab a baby and put it into the trunk of his car... If now our observer starts videorecording the scene (cell-phone, etc.), he (as determined by the Constitutional Court) will carry out unauthorized targeted investigation and search operations. Therefore, his record will not be attached as evidence in the case...

That is the court carried to the point of absurdity the ideal, “clinically pure” and therefore unrealistic model of amateur fighting crime in Ukraine: the minute a person sees or hears that some VIP commits an offense, s/he should stop overhearing (look in that direction) the offender, call the prosecutor’s office, the Security Service or militia, identify her/himself, give her/his address, and explain the essence of the case... Then the situational (for the Court believes that targeting only harms) fighter-volunteer combating crime has to peacefully wait for the summons from the district department of the MIA, prosecutor’s office, or court. Well, it is a kind of a useful solution for the country in which hundreds of thousands of people were exterminated by the representatives of the government without any investigation and trial.

From the procedural point of view the Constitutional Court decision is approximately as follows: one should persecute the crime in such strict accordance with the law, that it makes this rule a “crime.” Not coincidentally, philosopher H. Spenser considered criminal any law which surpassed moral requirements of the average individual. From a political point of view this decision of the Court is complementary to Kuchma. In an ethical sense, it is infantile, black and white, utopian and poorly coordinated with the requirements of common sense...

**THE POLITICAL AND LEGAL COMMENTARY ON THE CONSTITUTIONAL COURT OF UKRAINE
JUDGEMENT IN RESPONSE TO A CONSTITUTIONAL SUBMISSION
FROM THE ZHASHKIV DISTRICT COUNCIL (CHERKASY OBLAST)
ASKING FOR AN OFFICIAL INTERPRETATION OF ARTICLE 32 §1, ARTICLE 34 §2
OF THE CONSTITUTION OF 20 JANUARY 2012**

It should be noted that from the legal point of view the judgement in question is relatively simple. The Constitutional Court resorted to the simple method of “political syllogism”. It first considered how protected private information about the average Ukrainian citizen is according to Ukrainian (constitutional) legislation. Then it drew the conclusion that public officials and people working in the central authorities and bodies of local self-government are a kind of the same, of ordinary Ukrainian citizens. From then on it was quite simple: *if public officials are the same as those who are not public officials, then they need to have the same level of protection of their private life from outside interference as do ordinary Ukrainian citizens.* From the outside, all smooth sailing ahead.

Why can this syllogism be considered “political”? Because it is admissible precisely in the political sense. It is a demonstration of Ukrainian political disingenuousness. In the legal sense such a “syllogism” is clearly unacceptable. Public officials and civil servants are protected from external intrusion with respect to information to a different extent from ordinary Ukrainian citizens. That is the case but elsewhere ... in Europe, in the West. In Ukraine however they are ... “simply people” At least this is the view to which the esteemed Constitutional Court directs us.

In its Judgement, the Court writes: *“A systematic analysis of the provisions of Article 24 §§1, 2 and Article 32 §1 gives grounds for considering that enjoyment of the right to inviolability of personal and family life is guaranteed to each person regardless of their gender, political, financial, social, language or other characteristics, as well as the status of a public person, including a civil servant, State or civic figure, who plays a certain role in the political, economic, social, cultural or other sphere of State or public life”* (my highlighting — VR) In fact, however, Article 24 §2 of the Constitution says nothing of the sort. We quote it in full: *“There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics”*

Ukraine’s Constitutional Court has thus resorted to an unacceptably *broad* interpretation of the principle that discrimination shall be prohibited well-known in European legislation. A typical Slavonic trick as the Marquis de Custine would have said.

In fact, in giving an official interpretation of Article 32 §1, Article 34 §§2, 3 of the Constitution regarding what should be understood as information about the personal and family life of public officials and civil servants (whether such information is confidential information about a person), whether the collection, storage, use and dissemination of information about a public person constitutes intrusion in their personal and family life (which is prohibited except in cases envisaged by the Constitution), the following needed to be taken into consideration.

1. An interpretation of the above-mentioned constitutional articles should first and foremost be based on the general designation of the Constitution as the source which safeguards the principle of the rule of law in Ukraine. This entails an understanding that a Constitution in its legal form consolidates a liberal-democratic political regime which — in the majority of cases — leads to an

enhanced level of social dynamic. Modern legal thinking views the Constitution as a functionally special law providing the legal framework for ensuring the interests of *civil society* as a whole.

2. A modern Constitution envisages the safeguarding of individual freedom, the election of leaders and the right of the people to control the course of State and public matters. In its extended view this means the awareness of all those engaged in application of the law that those wielding political power should act in strict *compliance with universal organic principles, and that citizens should consciously elect* those in charge at State and local self-government level so that they carry out what the people consider correct, and not what they themselves want.

3. One of the main ideas on which constitutionalism is based is that the authorities should act only within the limits defined and permitted them by free citizens. For this reason the *Constitution is accepted as being the main legal document not so much of the State, as much as of civil society, the free public as such*. In conditions of constitutionalism it is not the State that should teach citizens about proper behaviour, but citizens should indicate to the authorities what would be a beneficial direction for their activities. Otherwise citizens would risk getting, under the guise of a Constitution, merely a means for reducing the standards of their civil-political and personal freedom.

4. A modern Constitution is concerned that the State in its activities should not excessively restrict citizens even where this concerns issues of national security. After all in conditions of democracy and the rule of law a potential factor for the flourishing of civil society and its members is the guarantee of their political liberty and freedom of information. These are regarded as natural and inalienable as understood by John Locke. Thus *new constitutional standards automatically envisage protection of freedom in receiving and disseminating information, freedom of thought and expression*.

5. *Effectively all constitutional norms should be assessed from the vantage point of fundamental, strategic rules for the existence of a free society*. For example, the star of political philosophy in the XX century, John Rawls saw a constitution as being a collection of rules for fair procedure, a form of incorporation of liberties with the help of which citizens have the opportunity to fully carry out their life's purpose. Here *the most important of the constitutional tasks he considered to be the consolidation and safeguarding of intellectual freedom as the precondition for society's political maturity, a factor in its self-awareness*.

6. Nowadays virtually all constitutionalists recognize the main purpose of a constitution as being to restrict State power with this entailing the establishment of transparent and clear principles for any activities by the authorities. Thus constitutionalism is the direct rejection of repressive elements in the relations between civil society and the authorities. Freedom of thought, expression, freedom to receive and disseminate information logically fall into the realm of law free of political or administrative control. Clearly the free seeking and dissemination of information is the guarantee of freedom of thought, conscience, expression, of the press and the media as a whole.

7. The free dissemination of information envisages freedom to search for information and freedom to use it. Clearly *there are certain restrictions regarding the legal status of engaged in information activities and their objects of interest*. For example, confidential and secret information fall under legal protection. That these categories of information have a special legal regime envisaged by current legislation is self-evident.

8. The problem however is that confidential information is only a part of information on restricted access, and *information on restricted access can be disseminated if it is of public need, that is, it is the subject of public interest and the right of the public to know the information outweighs the potential damage from its dissemination* (Article 29 §1 of the Law on Information).

9. Furthermore, *information about infringements of human rights and civil liberties, about the unlawful actions of the authorities or bodies of local self-government, as well as their public officials and civil servants, cannot be classified as information on restricted access* (Article 21 §§4, 5 of the Law on Information). *If we bear in mind that unlawful actions by public officials and civil servants can also be carried out in the sphere of private and family life, it follows that the sphere of privacy of public officials and civil servants of the authorities and bodies of local self-government is not absolutely protected from external intrusion It is self-evident, for example, that Ukrainian voters have the right to know about the criminal, sexual mania or tyrannical tendencies of those they may elect*.

10. In addition, *income declarations of the following people and members of their family are also not classified as information on restricted access: those standing for office or holding electoral office in bodies of power; those holding a first or second category post as civil servant or official of a body of local self-government* (Article 6 §6 of the Law on Access to Public Information).

11. It should also be noted that in the sphere of jurisdiction of the European Court of Human Rights the principle has long been in force that *the scope of information which can be restricted about a public official is considerably narrower than that for a private individual* (Lingens v. Austria, 1986). In that case the European Court stated that *public figures should show considerably more tolerance of interest regarding various aspects of their life from journalists and the public as a whole*.

Nor is this approach specific to Europe. Article 32 of the South African Constitution (1996) states that *each person has the right to any information held by the State, as well as to any information which is held by any other person if that information is needed for the exercising or protection of any subjective civil rights* (Article 32 §1.a, b). Thus *one of the most important rights envisaged by the current Constitution of South Africa is the right of free access to any information deriving from the State or individuals and needed for the protection or exercising of civil rights and liberties*.

If we bear in mind the fact that civil rights embrace the personal and political rights, the broad scope for the regulatory potential of the given article becomes clear. In order to exercise their electoral rights, each citizen aware of their purpose has the right and must know as much as possible about significant circumstances in the life of a person standing for office as deputy, mayor, judge, President, etc.

In general the principle of transparency, openness regarding life circumstances (including private) of public officials is universally recognized. For example, Article 39 §6 of Brazil's Constitution (1988) states that *executive, legislative and judicial branches of power must publish on an annual basis the size of their pecuniary expenditure and remuneration for all public positions and posts*.

It is well-known also that the *size of pay and other remuneration of judges of the US Supreme Court* (unlike the size of pay of judges of Ukraine's Supreme and Constitutional Court), *senators, members of the US Congress House of Representatives, as well as the President of the United States are on open access and regularly updated on official State websites*.

12. In its Judgement in the Case of Weber v. Switzerland (1990), the European Court of Human Rights also noted that *there is no need to avoid disclosure of private information if this has taken on a public nature and has thus ceased to be confidential*. Then in the Judgement in the Case of Leander v. Sweden (1987), the European Court observed that *the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others* (for example, journalists, etc — VR) *wish or may be willing to impart to him*

13. As for American experience, in the Judgement of the US Supreme Court in the Case of Hustler Magazine v. Falwell (1988) the court ruled that *excessive and exaggerated press attention to the lives of public figures cannot force the basis of law suits for moral compensation except where such information contained overtly false statements about facts, and where it was published with direct "bad intent"*. In general there are considerable restrictions on defence of the private life of public figures in America.

In 1972 the US Supreme Court ruled that *if those on the hunt for news stories are not protected from court proceedings, journalism swiftly turns into a meaningless exercise*. For example, modern American laws do not waive journalists' liability for intrusion on the private property of a public figure, however it is considered that punishment for actions of such a kind should in no way undermine the availing atmosphere in the country of freedom of speech and press freedom.

14. With regard to Ukraine, it is worth noting that Ukraine is a post-totalitarian State, and therefore especially vulnerable to regression, to any quasi-censorship restrictions regarding freedom of information, opinion and expression.

One can also not ignore the fact that the election of people holding power by the population takes place on the principle of personal sympathies or antipathy with regard to the candidates. If that is so, then it is manifestly the right of the public to have considerably more information about public figures than is envisaged by traditional considerations of protection of their privacy of information.

In general, in their Judgement, the Constitutional Court did not so much serve the official regime, as throw yet another dry twig in the vehement discussion regarding its unethical and undemocratic nature. There has long been a critical mass of cultured and educated people in Ukraine who can recognize and identify legal manipulation and distinguish the letter of the law (Ukrainian and European) from its legal content. One can imagine that the only public conclusion from such a precedent will be a further fall in the rating of those in power (already virtually electoral rating). This is a dubious service given the date for the parliamentary elections... Furthermore, the crucial question yet again arises of whose priorities the Constitutional Court is defending. The classic answer (from the point of view of the doctrine of organic constitutionalism) is that it stands for the defence of *civil society*. The real and pragmatic answer is that it is defending the interests of *the ruling elite, the political establishment*.

**THE POLITICAL AND LEGAL COMMENTARY ON THE CONSTITUTIONAL COURT OF UKRAINE
JUDGEMENT IN THE CASE OF CONSTITUTIONAL PETITION OF 49 PEOPLE’S DEPUTIES OF UKRAINE,
53 PEOPLE’S DEPUTIES OF UKRAINE AND 56 PEOPLE’S DEPUTIES OF UKRAINE CONCERNING
THE CONFORMITY OF THE CONSTITUTION OF UKRAINE (CONSTITUTIONALITY) OF PARAGRAPH 4
OF PART VII “FINAL REGULATIONS” WITH THE LAW OF UKRAINE
“ON THE STATE BUDGET OF UKRAINE FOR 2011”
DATED DECEMBER 26, 2011**

The subject of submission in this case consisted in the belief of people’s deputies of Ukraine that the limitation imposed by paragraph 4 of Section VII “Final Provisions” of the Law of Ukraine “On State Budget of Ukraine for 2011” on the realization of Articles 39, 50, 51, 52, 54 of the Law of Ukraine “On the status and social protection of citizens affected by the Chernobyl Disaster”, Article 6 of the Law of Ukraine “On Social Protection of Children of War”, articles 14, 22, 37 and part 3 of Article 43 of the Law of Ukraine “On Pension Provision of persons released from military service, and some others” is unconstitutional. Indeed, according to the “final provisions”, the procedure and volume of the above regulation should be determined by the Cabinet of Ministers of Ukraine on the basis of financial resources of budget of the Pension Fund of Ukraine for 2011.

The people’s deputies think that the Verkhovna Rada of Ukraine empowered the Cabinet of Ministers of Ukraine to determine the procedure and size of payment of social benefits under the said laws and change the size of benefits depending on the available financial resources of the Pension Fund of Ukraine for 2011 curtailing constitutional rights of citizens to social protection.

In its disposition of the case the Constitutional Court of Ukraine concluded that “the social and economic rights stipulated by law are not absolute.” Therefore, the mechanism of realization of these rights may be changed by the state because of the inability to finance it with the help of proportional redistribution of means to maintain the balance of interests throughout the society. Moreover, these measures “may be needed to prevent or eliminate real threats to economic security of Ukraine”, which is the most important function of the state.

The Constitutional Court stated that “the principle of balanced budget” is crucial along with the principles of justice and proportionality (dimensionality) in the activities of public authorities, particularly in the preparation, adoption and implementation of the State budget for the current year. Therefore, paragraph 4, section VII, of the “Final Provisions” sets an acceptable mechanism, from the constitutional standpoint, of realization of the laws of Ukraine “About the status and social protection of citizens affected by the Chernobyl Disaster,” “On Social Protection of Children of War,” “ On pensions for persons released from military service, and some others. “

At the household level, this means that the size of social benefits in Ukraine determined by laws should be within the real possibilities of the State Budget of Ukraine for the current year. The higher revenues will mean more benefits; less income will mean lower payments. From the economic

standpoint it looks quite grounded and consistent with the laws. And there is logic in it. However, in legal terms there remain insoluble contradictions.

The thing is that the socio-economic rights in the current Constitution of Ukraine have been formatted not according to the model of International Covenant on Economic, Social and Cultural Rights (1966), where they act as rights-principles, rights-guidelines or rights-programs, but according to the model of socio-economic rights of the typical Stalinist socialist constitution.

As stated in Article 2 of the International Covenant on Economic, Social and Cultural Rights (1966), “each State participating in the present Covenant undertakes to individually and through international assistance and cooperation, especially economic and technical, to employ to the maximum its available resources to gradually ensure full realization of rights envisaged in the Covenant by all appropriate means, including the legislative measures.” Obviously, if the Constitution of Ukraine in 1996 had contained such formulations, the ruling of the Constitutional Court from December 20, 2011 would have perfectly interpreted their content.

However, in reality the social and economic rights in the Constitution of Ukraine were formulated peremptorily and imperatively. They did not correspond with the available financial and material resources of the state and should be carried out in full directly on the basis of constitutional provisions that had the highest legal force and were inalienable, inviolable and allowed the direct legal defense (Article 8, 9, 21 of the Constitution of Ukraine, 1996). That is the Constitutional Court of Ukraine has once again become hostage to political utopia that has no prospects of survival, but still remains in the status of the Fundamental Law of the great European nation. Until this situation is not radically changed, the constitutional antinomies will remain automatically programmed in Ukraine.

Interestingly, the specific wordings of the Constitutional Court are subconsciously provocative, galling, and inconvenient for the Ukrainian state apparatus. For example, the Decision refers to the principle of “proportional redistribution of funds to maintain the balance of public interest.” After reading it, one would like to ask the authors of the current State Budget of Ukraine: why our budget salary bracket makes 1:40 while in USA it is 1:5, and in Western Europe 1: 4? Why in Ukraine, where the principle of “proportional redistribution” allegedly dominates, an MP receives a salary, which is 6-8 times the salary of the surgeon of the highest category, while in Germany the wages of parliamentarian are one and a half times less than the wages of the same surgeon?

It is not clear also why, according to the principles of proportionality, the salary of Ukrainian MP or minister is 5-6 times bigger than the salary of university professors and why employees of the Supreme Court of the Constitutional and the Prosecutor General of Ukraine get luxury apartments for free, although, based on Article 47 of Constitution of Ukraine, free housing in the country should be provided only for the “citizens who need social protection”? However, the theme of socio-economic rights and related social benefits was soon continued in the Decision of the Constitutional Court of January 25, 2012.

THE POLITICAL AND LEGAL COMMENTARY ON THE CONSTITUTIONAL COURT OF UKRAINE JUDGEMENT ON THE CONSTITUTIONAL SUBMISSION OF THE PENSION FUND OF UKRAINE CONCERNING OFFICIAL INTERPRETATION OF ARTICLE 1 OF THE FIRST, SECOND, THIRD PARAGRAPHS OF ARTICLE 95, PARAGRAPH TWO OF ARTICLE 96, PARAGRAPHS 2, 3, 6 OF ARTICLE 116, PARAGRAPH 2 OF ARTICLE 124, PARAGRAPH 1 OF ARTICLE 129 OF THE CONSTITUTION OF UKRAINE, PARAGRAPH 2 OF ARTICLE 9 OF THE CODE OF ADMINISTRATIVE PROCEDURE OF UKRAINE IN THEIR SYSTEM RELATIONSHIP WITH CERTAIN PROVISIONS OF THE CONSTITUTION OF UKRAINE DATED JANUARY 25, 2012.

The Ukrainian community knows this decision very well, and its juridical essence boils down to the following. As the Constitutional Court acknowledged, “the Cabinet of Ministers of Ukraine regulates the procedure and size of social benefits and assistance to be funded from the State Budget

of Ukraine.” Moreover, “while resolving cases of social protection, the courts are guided by the principle of legality,” which provides “application of laws of Ukraine by Ukrainian courts and regulations of relevant public authorities adopted on the basis, within powers and in a way stipulated by the Constitution and laws of Ukraine, including regulations of the Cabinet of Ministers of Ukraine issued within its jurisdiction.” As the Court noted, the activities of the Cabinet of Ministers should proceed from the principles of “financial capabilities of the state, which is expected to justly and impartially allocate social wealth among citizens and territorial communities and strive to balance the budget of Ukraine.”

In practice this means that the state ensuring of social security should be implemented within the planned budget expenditures, and in the case where the legislation of Ukraine provides larger social expenditures (benefits) than the current state budget can afford, the real size of benefits is determined not by legislation or judicial decision based on it, but by the real possibilities of the State Budget, or, in simpler words, by the plan of financial expenditures and revenues of the Ukrainian state.

On the face of it, this decision is based on the principles of common sense, because everyone knows that “we’d rather live within our means”, “do not live on credit,” etc., but the realistic approach triggered a series of “dissenting opinions” in the Constitutional Court of Ukraine. In particular, the Decision of the Court was accompanied by “individual opinions” of judges V. Shyshkin, D. Lylak, P. Stetsyuk, and M. Markush.

Thus, Judge V. Shyshkin criticized the narrowness of the judgment’s “philosophy”, its “endless theorization”, incorrect use of foreign precedents by the Court (of the practice of European Court of Human Rights) etc.

D. Lylak notes the incompleteness of the answers of Constitutional Court to the questions, erroneous opinion of the Court that the failure of financial backing of social-economic rights and the need to avoid “threats to economic security of Ukraine” must lead to “changes in the mechanism of accrual of social benefits and assistance.” Judge D. Lylak believes that the right of citizens to social protection may be limited only during war or emergency.

Judge P. Stetsyuk believes that, in fact, with this interpretation the Constitutional Court “attempted to equate the Cabinet of Ministers of Ukraine with the status of the legislative body obliging the courts of general jurisdiction considering social cases to directly apply the provisions of regulations of the Government of Ukraine paying no attention to the laws as such.”

According to Judge M. Markush, the Constitutional Court made a mistake recognizing by its decision the possibility of “adjustment of social laws through by-laws bringing ... the size of [social] benefits down,” which is actually “the abolition or restriction of social rights and guarantees, and, therefore, a violation of the procedure of amending the laws stipulated by the Constitution of Ukraine.” Generalizing the situation Judge M. Markush maintains that “in accordance with Articles 1 and 3 of the Constitution of Ukraine, the state cannot arbitrarily abandon the assumed financial obligations under the law.”

After reading the above, one may notice that the judges, authors of “individual opinions”, did so within their status opportunities. Their criticism is professional, well-reasoned and detailed, but also it is a kind of criticism typical of judges under oath. That is, unlike the academic community, the judges of the Constitutional Court in their professional capacity may perceive the current Constitution of Ukraine only in positive terms. For them it is not just a literary document, but the legal ideal and the source of justice, embodiment of reason and the best aspirations of the Ukrainian people.

So it should be, because if the judge does not believe in the law on which he decides, his judicial opinion is worthless. For public the words of court are the words of law... On the other hand, there are no ideal laws and constitutions. Any law is only a work of human imagination and thought, a summary of the experience, an embodiment of human aspirations for the future.

If you look at it from this perspective, you can notice the controversial nature of the Constitution of Ukraine reflected in the field of socio-economic rights. The Constitution of Ukraine has a typical set of socio-economic (“positive”, scientifically speaking) rights and freedoms, implemen-

tation of which is designed not for the free market, capitalism and freedom, but for the planned economy, state ownership and distributive economic system. The constitutional judges cannot say it frankly by virtue of their official position, but the Ukrainian society cannot get on with such paternalistic set of rights and freedoms.

This paradox is not of legal, but of a higher level. The socialist societies are willing to share everything with their citizens; however, the logic of their economic existence is counter-productive, because they lack adequate motivation and incentives. On the contrary, the market societies (USA, UK, Canada) produce and earn a lot, but “give away” very little to its members out of the market. Often they do not recognize and do not include social and economic rights as gifts of state. As for Ukraine, its constitutional system in the area of economic rights is the socialist one, in the area of the market it is vulgar capitalist one, and in the area of policy it is hypocritical and demagogic. It is unthinkable to grant social benefits according to utopian standards under such circumstances.

Therefore there emerges a systemic contradiction. The Constitution guarantees unrealistic benefits and economic system is unable to produce and distribute these goods. On paper, the Ukrainian state draws chocolate cakes, and in the barn it stores only dried crusts in the hole-ridden sack. Obviously, people may get more money than the State budget earnings permit only through borrowings or currency issue. The latter leads to inflation and inflation to social instability and revolution, revolution to dictatorship, which nobody wants.

The journalists and younger lawyers understand it, although they go on blaming the Constitutional Court for what he had legally taken away from people ... a sort of Turkish or Latin America tragicomedy... However, if the Ukrainian life is not reformed in the nearest future, the Constitutional Court will continue producing legal palliatives. This is a classic pattern: problems of the Constitution are to be corrected in a Court. The Court will make illogical decisions that allow “socialist” rights to survive in an atmosphere of chaotic capitalist priorities ...

The daily routine proves that Ukraine has to change. It is no accident that in Ukraine the Constitutional Assembly and the renewal of Fundamental Law are on the agenda. Thence there is the final philosophical question. Is Ukraine ready to choose renewed constitutional principles?

GENERALIZATION

The twenty-year progress of independent Ukraine is rather modest. By UN standards, 78% of Ukraine’s population still lives below the poverty line. By anti-corruption drive Ukraine ranks 134th out of 180, by the ease of discharge of taxes 181 of 183, by the ease of processing of permits for construction 179 of 183. Moreover, in 2010 Ukraine ranked one from the bottom in Europe in terms of the well-being of its citizens. The annual revenue of a Ukrainian makes the average of \$2,700 (for comparison, in Poland \$28,600, in Russia \$10,000, in Belarus \$6,000). For Ukraine, the withdrawal from socialism became much harder, than optimistic forecasts had promised.

Such naivety in expectations and estimates could not but affect the constitutional level: the Fundamental Law adopted in 1996 turned out to be eclectic, populist and thoughtless as the then mood of the political elite. Now we understand much better that the developers of the Constitution followed the way of copying the existing regulatory models. The experts and law-makers either failed to realize the deep meaning and purpose of borrowed norms and institutions, or, understand their meaning, did not care about their implementation. As a result, it caused curiosities. In particular, the Constitution of 1996:

- 1) confuses the terms *Ukrainian nation* and *Ukrainian people* (Preamble, Art. 11);
- 2) establishes the responsibility before the God of “corporate entity”, i. e. the Verkhovna Rada of Ukraine (Preamble);
- 3) recognizes the individual life the highest social value (part one, Art. 3); this, in a direct effect of constitutional norms (part three, of Art. 8 of the Constitution of Ukraine), makes the society and court agree with the refusal of soldiers to keep fighting even during the

war: all that he will defend in combat — freedom, independence and territorial integrity, and sovereignty of the state, etc. — in accordance with the Constitution, weighs less than his life;

- 4) prohibits *any* abuse of a child (part two, Art. 52), which makes the efforts of parents to take the child away from the sandbox against her/his will anti-constitutional;
- 5) frees Ukraine from *any* ideology (part two of Article 15.);
- 6) socio-economic rights are written in the Fundamental Law as full-scale juridical claims, and despite small (by European standards) size of the State budget. It seems that Ukraine is positioning itself as a social and legal state not due to the presence but due to the absence of mature political and legal consciousness.

The Fundamental Law of Ukraine in 1996 was designed as a central symbol of general political and legal décor; very few people gave a thought to the viability of such constitutional norms. The Ukrainian ruling class did not understand the profoundness of the Constitution, as it can be seen even from the fact that it was not aware of political reform in 2004 as the change of the constitutional order (otherwise, someone, besides other than American judge B. Futey, might point out that Ukraine's transition to a new form of government would need approval by referendum, according to Art. 5 of the Constitution).

Moreover, in Ukraine there was and is no deep understanding of what is universal sense and functionality of organic constitutionalism in general. It is not because of some rules or institutions, but of the false identification of the main values and strategic goal of the Fundamental Law. The majority of Ukrainian politicians and lawyers to the question of what is Constitution in the functional sense and what is its chief value, answer quoting the definition from the Soviet textbook on constitutional law. The post-Soviet nomenclature is certain that the constitution is a fundamental law that establishes the foundations of social and state system, grants rights and freedoms of citizens, regulates formation of state bodies and local governments, and foundations of their competence...

In fact, this approach is wrong, as the Soviet constitutionalism in general. The strategic error that it contains weighs upon all those politicians and lawyers, who consider the ethics of developed capitalism emotionally unjustified. Meanwhile, the content of organic constitutionalism is imbued with the spirit of acceleration of social dynamics. In structural terms it shows in the fact that any organic constitution is the main regulatory factor of establishment and maintenance of market relations, guarantor of freedom and inviolability of the individual and civil society as a whole, legal means of accelerating social interactions. And only after that it may be seen as instructions for the state apparatus, means of ensuring stability of the state system.

Obviously, in today's world there are only two typological approaches in determining the organic constitutional design: American (with the priority of freedom) and European (with the priority of order in the sense of stability that does not deny freedom). As for everything else, it is nothing but variations above the said basic topics. It happens also that they use the term Constitution to denote documents not focusing on the market and freedom. In this case it is not a Constitution, but its external imitation or a shell.

Nowadays the division of organic constitutionalism into American (freedom, which determines the democracy) and European one (democracy, which determines freedom) has not only theoretical but also practical justification. Of course, I say what I think very important in this case, not from the position of some universal approach.

The typical cliché of European constitutionalism — democracy and freedom — why is it not a priority tandem? To my mind, because there is no such thing as an essential European constitutionalism. In terms of its internal logic and main purpose, the organic constitutionalism is freedom that preceded democracy: the state in which freedom and not democracy is a priority. The universal freedom of supply and demand creates a market in which democracy is only a political subdivision. The most important thing in this system of fundamental relationship is that market, and not democracy, enables a qualitative breakthrough in social dynamics, which we associate with organic constitutionalism. *The main purpose of organic constitution is not what but how.* Its mission is not material but procedural matter. The constitutions are functioning due to the activity of people and

institutions. Such interaction of people and institutions is carried out in organic constitutionalism in the fastest and most effective way. It is the speed and fundamentally new relationship among active legal and physical entities that are important in constitutionalism. It brings about a legal system in which anyone can reach the horizons of the market with what s/he has without asking permission in the hierarchical structures of political and administrative power.

It does not matter on which side the actor is: supply or demand. The main thing here is the legal equality of opportunities, direct access to the opportunities and temptations, maximum simplification and shortening of social transactions. Everything here is on civil and horizontal, and not vertical administrative level. The hierarchy of power is not canceled, but recedes into the background. *In organic constitutionalism it is the institutions of governance and not of the market that transform into "shadow" ones.* Merely, if someone invented a computer, s/he may develop further her/his success without waiting for sanction of bureaucratic or democratic institutions. Moreover, as far as the democracy is a part of the market, the political processes may intensify significantly, e.g., the extremely fast, in terms of historical tradition, transformation of shipyard electrician or postmodern playwright into a ruler of the modern European state.

The meaning of organic constitutionalism includes both the freedom and the market, and this American-style union is amazing even today. Having visited the United States recently, Jean Baudrillard writes about American freedom with the same enthusiasm as his aristocratic predecessor Alexis-Charles-Henri Clürel de Tocqueville in 1835. According to Jean Baudrillard, Europeans are not contemporaries in the literal sense of the word, because they do not know the true freedom: not that formal freedom which they are trying to establish everywhere and in any way, but that specific, flexible, functional, active freedom which can only be seen in American society and in the minds of each and every its member.

This remark allows to emotionally reinforce the fact that, in effect, the European constitutional standards do not exist. Instead, we can speak only about the European level of constitutionalism as a measure of social dynamics, degree of effectiveness of human capital, level of individual challenges and reality of democracy. It is possible that it is because of these properties M. Hrushevsky tried to prove the appeal and suitability of American constitutional project for Ukraine.

By allowing a stylistic simplification, one could argue that the organic constitutionalism is a consequence and prerequisite of refined capitalism. And if this is true, it becomes clear why in organic constitutionalism the freedom precedes democracy but is not its product. Indeed, in the historical sense the freedom is a genetic condition of commonwealth. The true democracy can exist only in the community of politically equal and free subjects. On the other hand, the democracy has the ability to limit or even completely destroy freedom. Therefore, in organic constitutionalism it is freedom, and not democracy, is a priority object of protection and security.

Bypassing democracy at the very start, the freedom becomes the highest ideal of constitutionalism precisely because its ultimate goal is the maximum acceleration and facilitation of social interactions. In a sense, constitutionalism is informality embodied in the law. Its goal is not tranquility, but freedom, speed of most interpersonal and interinstitutional interchange. Market is a promoter of progress for which freedom stands as a truly critical factor. *As a result, the strategy of organic constitution targets market without borders, social dynamics and progress.* In turn, the progress is not exactly the object of parliamentary planning.

The world, as Ludwig Wittgenstein observed at one time, "is not moving along a straight line but along a curve constantly changing its direction." That is why the slogan of organic constitutionalism is to be in order to be. The constitutionalism does not lead to any particular material or spiritual goal; it is not a purpose, but method and means to achieve it. Progress is the measure of human success, while democracy plays a more modest role. After all, democracy is a result of numerous majority elections, but progress depends on complex and diverse factors. That is why the ethics of progress and the ethics of democracy are at issue and the former does not directly depend on the latter. Moreover, the democracy and organic constitutionalism are not inseparable, because democracy can hinder progress.

Progress embodies free (spontaneous) political, economic and cultural development. In fact, this is a total market, the effectiveness of which is determined by the number, rate and amplitude of the majority of exchanges. If constitution is the main guarantor of the market, the main purpose of the constitution should be the freedom as a condition of creativity and progress. But if organic constitution is a guarantor of freedom, on which the market and the progress depend, then, finally, the constitutionalism can be logically treated as the supremacy of impersonal rules of the game, i. e. law.

Since there cannot be two incidences of supremacy in one symbolic space, the constitutionalism or meta-law tends to subjugate democracy as well. In this sense, the organic constitutionalism appears as supremacy of free strategy of human life in general. As for the law as requirement for synthetic, artificial rules, it is an important principle of democracy, but not more than one attribute of constitutionalism. That is in organic constitutionalism the democracy is assigned a responsible, but not the most important place.

Paul-Henri d'Holbach once called the constitution a bridle for the leaders and peoples. Its fetish is not democracy, but timely recognition and acknowledgement of skills and talents. Actually, the constitution is a *carte blanche* of meritocracy when it comes to the political side of things. Democracy produces laws which are expected to be constitutional, that is not to impinge on the freedom of a market. And if such encroachment happens, there befalls a crisis or even death of constitutionalism.

That is the organic constitutionalism involves full-fledged market in the first place. The outcome of its work may be seen by example of modern United States. The country whose population is about 4% of the world population consumes more than half of available natural resources, embodies 21% of the global economy, produces the largest GDP in the world, provides 80–90% of global scientific discoveries and has a military budget comparable to the total military budget of the rest of the world. Of the 500 best universities in the world 169, and of the top 20–17 are located in the U.S., while there are four times more scientific workers in the scientific sector of the United States than in the European Union. Increasing the role of knowledge in business and economics, the U.S. also emphasizes the role of culture and, therefore, the fact that some cultures are more productive than the others.

All this shows that the organic constitutionalism as a legal paradigm of total market is really productive. Conversely, the lack of creative achievement and economic progress indicate the illness or absence of organic constitutionalism. The Ukrainian political elite can think what it likes but the statistics show that the Ukrainian constitutionalism is not organic yet. It simply does not contain sufficient guarantees of freedom of market relations. As for democracy, it embodies only the political segment of the market, and democracy itself is not enough for national progress.

Thus, Ukraine is at an early stage of learning of paradigm of the organic constitutionalism and consequences arising therefrom. In particular, Ukraine has no deep awareness of problematic influence that democracy exerts on creative work. Relatively recently the totalitarianism has been done with here, and therefore only authoritarianism and dictatorship are naively considered threats to national development.

In particular, in Ukraine one cannot attract people to the truly productive democracy without prior recognizing of full-scale land ownership. A person who is not allowed to freely sell / buy land or purchase weapons is not a full-grown subject of democracy. People without property, dignity and responsibility tend not to democracy, but to populism. This type of personality is not only indifferent, but also dangerous for progress.

So if Ukraine needs organic constitutionalism, it should start with resolute strengthening of guarantees of property rights and land reform. Of course, there is an alternative: the current state of Ukraine. But it does not suit neither people, nor national elite. On the other hand, people cannot create a new constitution, but elite can and must do it. Of course, drafting a new law will be justified only if in the minds of elites there the corresponding change of priorities will take place.

The United States, wrote Francis Fukuyama, succeeded by observance of the ethics of irrational, which brings about the imperative of protecting everything unpredictable and spontaneous. This impera-

CIVIL ASSESSMENT OF GOVERNMENT POLICY IN THE AREA OF HUMAN RIGHTS

tive is important because democracy has not so creative, as selective ability. According to Giovanni Sartori, democracy can only choose from the previously created. This applies to biotechnology to the same extent as to tying a necktie. If democracy is not preceded by creativity and market, its prospects become unacceptably narrow. The citizens of Ukraine are politically free, but their progress is hampered by narrow economic market. They can choose only from what was produced by really creative communities.

Interestingly, the struggle for civil rights initiated by the U.S. Supreme Court in the 20th century is a direct consequence of the constitutional protection of freedom of conveyance. All executive power of the United States was focused on granting proper implementation of market rules. This is logical, because the U.S. president must (according to his Oath of office) “to the best of his ability to, protect and defend” the Bible of the free market, i.e. the Constitution of the United States.

The protection of the market in the united Europe provides for republicanism, inviolability of property, non-interference into creative work, and the principle of free movement of people, goods, services, and capital. These norms are fixed at both international and constitutional levels. The peculiarities of individual countries become apparent in the intensity of stimulation of market relations. As for transitional societies, they are very slow to perceive the imperatives of organic constitutionalism. Actually, it is apparent in a brief overview of a number of decisions of the Constitutional Court of Ukraine...

**THE OBSERVANCE OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS**

I. THE RIGHT TO LIFE¹

1. SECURITY MEASURES TAKEN BY THE STATE TO PROTECT THE LIVES OF PERSONS UNDER ITS CONTROL

The State is responsible for the life of persons who are under its control, such as in custody or temporary detention, armed forces, public hospitals (especially in places of forced treatment) and so on.

There is a vital problem of numerous violations of the right to life in institutions of confinement or temporary detention (temporary confinement cell, investigative isolation ward, establishments of execution of punishment, etc.). The appalling conditions, often practically non-existent or ineffective medical treatment lead to death of people. On this occasion, the Minister of Internal Affairs of Ukraine noted that for MIA there is a major problem of “unsatisfactory technical condition of penitentiary institutions”, which causes death of detainees who need medical aid².

In addition, the Concept of state program of the development of State Criminal-Executive Service of Ukraine up to 2015 prepared by the State Department of Ukraine for Execution of Sentences admits that Ukraine has a poor health care of prisoners and detainees³.

Thus, the improper organization of medical aid, inadequate funding of health care, as well as denial of treatment opportunities in the institutions of the Ministry of Health of Ukraine lead to many violations of the right to life of confined persons.

A striking example is the case of Olexandra Robeyko who died in Lukianivka investigative isolation ward in Kyiv on September 15, 2011.

28-year-old Olexandra had a number of serious diseases: TB, AIDS etc. On August 15, 2011 the management of investigative isolation ward turned to the Shevchenko district court to provide her medical aid outside the ward because no proper medical aid could be rendered at the ward, but the court ignored this appeal. Moreover, on September 10 Judge Andriy Asaulov imposed sentence on Ms. Robeyko, who was brought to court in a state of unconsciousness. Only on September 12, 2011 she was brought to the Kyiv City Hospital No. 9 where on September 15, 2011 Ms. Robeyko died⁴.

There was another case of Victor Skvortsov, who died in Dnepropetrovsk TB prophylactic center on January 27, 2011.

¹ Prepared by Mikhailo Tarakhkalo, lawyer of KHPG

² Anatoliy Mohyliov: “Any violation of human rights cannot justify solution of crime” /<http://mvs.gov.ua/mvs/control/main/ru/publish/article/518933;jsessionid=154D36442FC05BD6A69A6E21E517E529>

³ The Concept of state program of the development of State Criminal-Executive Service of Ukraine up to 2015 / http://www.kvs.gov.ua/control/publish/article?art_id=73927

⁴ Woman having TB and AIDS died at Lukyanivka investigative isolation ward/ http://gazeta.ua/articles/np/_u-luk-yanivskomu-sizo-pomerla-zhinka-hvora-na-tuberkuloz-ta-snid/400563

Since November 9, 2010 the authorities were aware of the serious condition of Mr. Skvortsov. On this day, they failed to bring him to court because of a serious condition. Then the judge changed the preventive measure and Mr. Skvortsov was sent to the TB prophylactic center for treatment, where he was treated for three weeks. After treatment, his health somewhat improved, and he was able to move independently. However, despite the fact that Mr. Skvortsov still needed treatment, he was transferred to the investigative isolation ward where he was kept until January 26, 2011. And only on January 27, 2011 he was again transferred to the TB prophylactic center, where he died. It should be noted that during the period when Mr. Skvortsov's condition worsened, his family repeatedly requested from the chief of the ward to render him necessary medical aid, but their requests were ignored⁵.

There is also a noteworthy case of Andriy Zhurov, who died at Donetsk investigative isolation ward. It is rather unusual that at the time of death Mr. Zhurov, 180 centimeters tall, weighed 35 kg⁶.

Unfortunately, these cases are not uncommon, and it shows the urgent need for reforms of medical aid to confined persons.

2. THE USE OF VIOLENCE BY STATE AGENTS

There still remains an urgent problem of violence on the part of administration in penitentiary institutions, which in some cases leads to death of prisoners.

Thus, according to info from the official site of the Prosecutor General's Office of Ukraine, "the Volyn Oblast Public Prosecutor's Office sent to the court the criminal case on charges against officers of the Manevychi penal colony number 42 and the Office of the State Department of Ukraine for Execution of Punishments in the Volyn Oblast for commission of tortures and abuse of authority that has caused grave consequences, i.e. the death of prisoner ... Among the ten accused in this case there were Chief of Manevychi penal colony number 42 and militia agent of the UD-DUPVP operational activities management in Volyn Oblast⁷."

There is a separate problem of the death of people in militia under obscure circumstances.

And first comes the fact that the vast majority of cases of violent crime (and in many cases other crimes as well) contain defendants' confessions received from them at an early stage of investigation, often without an attorney and during unchecked detention or arrest for committing administrative offense and so on. The above situation is not acceptable, especially in the light of decisions of European Court of Human Rights regarding Ukraine on this occasion⁸, and, taking into account the number of such cases, suggests that one method of solution of such crimes is the use of coercion, and in some cases even torture, which may lead to the death of detainees.

A striking example of such cases is a case of Yevhen Zvenyhorodsky, who died after visiting Kharkiv Oblast militia department in March 2011.

32 years old Yevhen and his friend Vitaliy Adonin officers were detained by criminal investigation officers, because according to the version of the official website of Interior Ministry of Kharkiv Oblast they were suspected of a crime. And during the detention, according to the eyewitnesses, the officers resorted to forcible actions against Mr. Zvenyhorodsky. Afterwards the detainees were brought to the Chief Militia Department in Kharkiv Oblast, where Yevhen began to complain of

⁵ The mother of the accused person in Dnipropetrovsk blames the administration of the investigative isolation ward No. 3 for the death of her son / <http://www.11channel.dp.ua/news/dp/2011/02/04/18881.html>

⁶ Thirty-two-year-old detainee died from exhaustion at Donetsk investigative isolation ward / <http://ntn.ua/uk/news/corruption/2011/04/01/5695>

⁷ The Volyn Oblast Public Prosecutor's Office sent to the court the criminal case on charges against officers of the Manevychi penal colony number 42 http://www.gp.gov.ua/ua/regions_news_detail.html?_m=publications&c=view&_t=rec&id=98690

⁸ Mikhalova and others vs. Ukraine, No. 10919/05, January 13, 2011; Dushka vs. Ukraine, No. 29175/04, February 3, 2011; Nechiporuk and Yonkalo vs. Ukraine, No. 42310/04, April 21, 2011 et al. / <http://hr-lawyers.org/index.php?id=1295954597>;

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feeling unwell. However, nobody called for an ambulance; his relatives maintain that the militia officers started beating Yevhen instead, and when his condition aggravated, the officers led him out of the chief department and laid on a bench in the nearby park, where Mr. Zvenyhorodsky died.

There is another case of Laszlo Kolomparov, who, during his interrogation at the Lozovsky City Militia Department, Kharkiv Oblast, jumped from the fourth floor and died from his injuries in the hospital. According to relatives of the deceased, the militia tortured Mr. Kolomparov and his wife in front of their little daughter and realizing that after beating a man could not survive, threw him out of the window⁹.

In our opinion, this situation is a result of the lack of effective safeguards that would have averted the use of statements obtained from suspects during the investigation if they claimed that such testimony had been given involuntarily.

3. GENERAL LIFE-PROTECTION MEASURES TAKEN BY THE STATE

In general, the Ministry of Internal Affairs collects statistics of people who suffered from crimes and died in the first quarter of 2011¹⁰:

		Crime victims		Out of them: died		
		last year	this year	last year	this year	
Total		72 133	76 759	1 346	1 350	
per 10,000 of population		15,5	16,7	0,3	0,3	
Victims of	Grave and gravest crimes	30 266	31 389	1 222	1 193	
	Calculated homicide (and attempts)	618	669	515	510	
	Out of them					
	Two or more persons	56	45	41	26	
	rapes (and attempts)	145	118			
	premeditated severe bodily injury	871	781	221	191	
	robbing with violence	1 087	952			
	despoilment	5 481	4 668			
	theft	47 014	50 193			
	human traffic	81	96			
RTA	1 803	1 831	403	408		
Out of the total of victims	Deputies of all levels	11	19			
	Mass media staff	14	48		3	
	Postal workers	18	44	1		
	incl. Letter carriers	8	28			
	doctors	253	381		1	
	Retired persons	6 003	8 241	129	167	
	foreigners	180	334	5	13	
із загального числа потерпілих	CEOs	558	1 255	2	3	
	Finance-and-credit staff	29	97		2	
	military personnel	44	187			
	personnel	home affairs authorities	287	361	2	12
		public prosecutor's office	21	32		2
		courts	14	14		2
		The Bar	18	42		
		SSU	9	10		1

⁹ Willful Kharkiv: Lashyn's militia school / <http://helsinki.org.ua/index.php?id=1307371131>

¹⁰ Crime in Ukraine: Condition and Structure (2011: 1st quarter) <http://mvs.gov.ua/mvs/control/main/uk/publish/article/519179>

In this respect it should be noted that in the first quarter of 2011 the number of grave and especially grave crimes slightly increased, compared with the same period last year¹¹.

However, it should be noted that the statistics of recorded crimes reflects instituted proceedings only. But proceedings may be not instituted, especially in controversial cases or where there is some interest of investigators.

But the protection of lives of people by militia during special operations intended to arrest suspects arouses concern as well. There is a striking example of the process of detention of Mr. Dikayev near Odesa.

On the night of September 30, 2011 the militia planned a special operation to arrest Mr. Dikayev, who was suspected of committing a double murder. Mr. Dikayev's car was put to a stop on the Odesa-Mykolayiv highway, but special operation failed: during the detention Mr. Dikayev and his accomplices, who were in the car, began shooting at militia officers with automatic weapons and threw hand grenades in their direction. As it turned out later, the participating militia officers were unarmed and without body armor. As a result of exchange of fire two militia officers were killed and another four wounded.

The next day Mr. Dikayev and his accomplices were surrounded in a boarding house in a densely populated district of Odesa. The special operation combined not only militia units, but the security service as well, including the special unit "Alfa" backed by army units and armored vehicles. In general, the special operation was carried out by about a hundred soldiers and military militia. However, nobody warned the residents of the nearby houses about the special operation. According to eyewitnesses, they had to hide in the bathrooms during the crossfire.

In general, the special operation took four hours, during which time the house, where the suspects were hiding, was machine-gunned and hit with grenade launcher.

As a result, Mr. Dikayev and one of his accomplices were shot and killed and another accomplice managed flee¹².

Such formulation, development and working out of operational plan cannot be considered adequate, and it causes serious worry because the execution of such plan endangered the lives of civilians.

Moreover, according to the post-operational info, Mr. Dikayev was shot and killed by militia after he had laid down the arms and tried to surrender.

The eyewitnesses told the media that "he ran outside apparently attempting to run away ... They hit his right shoulder. He held his submachine gun in his right hand. He threw it on the ground, raised his left arm and shouted "Do not shoot, I'm unarmed. I give myself up." However, despite this, the militia killed Mr. Dikayev¹³.

Moreover, there is a serious problem of frequent contract killings. Thus, according to media reports, "every tenth murder in Ukraine is a contract killing"¹⁴.

The most obvious example include the murder of Olexandr Korobchynsky, businessman, leader of the Party of Industrialists and Entrepreneurs, committed on January 5, 2011 in Odesa, attempted murder of journalist of the local newspaper "Our Town", which was assaulted on the night of October 19, 2011 and shot at his head, and murder of the head of a brokerage firm in Odesa, who in November 2011 was found shot in the head inside his car.

¹¹ Crime in Ukraine: Condition and Structure (2011: 1st quarter) <http://mvs.gov.ua/mvs/control/main/uk/publish/article/519179>

¹² In Odesa they storm the building, where the killers of militiamen are hiding / http://lb.ua/news/2011/10/01/117381_V_Odesse_berut_shturmom_dom_gde_.html; NG: The Ukrainian militia got down into the Velyky Fontan / <http://ua.korrespondent.net/worldabus/1269565-ng-ukrayinska-miliciya-sila-u-velikj-fontan>

¹³ Killed on Sunday, October 2, hit-man Aslan Dakayev asked the law to stop shooting, but they went on shooting, <http://ru.tsn.ua/ukrayina/svidetel-dikaev-prosil-snayperov-pomilovat-ego.html>

¹⁴ Every tenth murder in Ukraine is a contract killing. The hit-man gets from \$1,000 (home murder) to \$200,000 (pro man) / <http://ru.tsn.ua/ukrayina/killer-bum-v-ukraine-uslugi-naemnogo-ubiyecy-ot-tysyachi-dollarov.html>.

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Therefore the media brought militia under fire criticizing its attempts to hide real statistics of contract killings¹⁵.

It should also be noted that the cases of arms trafficking involving the militia became more frequent.

Thus, according to Head of the Internal Security Department of MIA of Ukraine Oleksandr Michetny: “The Interior Ministry identified the government-issue weapons trafficking in the Kominternivsky Department of Kharkiv City Department of Interior. An armorer, using the fact that the department head appended unauthorized instructions on a document, brought out of the district department guardroom 23 units of the government-issue weapons”¹⁶.

According to Prosecutor General Viktor Pshonka, they identified 11 people involved in arms stealing from the Lviv University of the Interior, which they “sold to all comers”: 126 units including 33 Kalashnikovs, 10 machineguns and 60 pistols of various systems¹⁷.

There remains high death rate of population¹⁸, including infant mortality¹⁹. In this regard, experts point out that Ukraine has actually lost its preventive health care and primary medical aid, and health care is financed on the leftover principle. The experts emphasize that the health care system needs urgent and quality reforms²⁰.

4. THE STATE MUST ENSURE THE EFFECTIVE INVESTIGATION OF HOMICIDE

The state’s obligation to protect the right to life implies that if the person has been deprived of life, a formal investigation must be conducted. Such investigation should be conducted immediately by an independent and impartial body; in the course of investigation they should take all reasonable steps to provide evidence relating to the incident, and so on.

However, the investigation is not always carried out properly, especially in cases, when government officials are involved.

It should be noted that under national law a full investigation cannot be conducted without formal commencing criminal proceedings.

The only act that permits to institute criminal proceedings is a decision to commence criminal proceedings (Part 1 of Art. 98 of the Criminal Procedural Code of Ukraine), which creates legal basis for further procedural actions. According to the legislation of Ukraine only after institution of criminal proceedings one may conduct investigations and other procedural actions. Before institution of criminal proceedings the law makes no provision for questioning, searches, seizures, expertise and other investigative actions. In urgent cases, by way of exception, they may inspect the scene of crime (Part 2 of Art. 190 of the CPC of Ukraine), seizure of correspondence and communication channel info read-out to prevent crime (part 3 art. 187 of the CPC of Ukraine).

Consequently there is a common situation when an investigative organ refuses to institute criminal proceedings in order to avoid investigation. Very often the refusal to institute criminal proceedings takes place in cases of homicide by a law enforcer, deaths in hospitals, deaths as a result of accidents, deaths in custody etc.

¹⁵ Every tenth murder in Ukraine is a contract killing. The hit-man gets from \$1,000 (home murder) to \$200,000 (pro man) / <http://ru.tsn.ua/ukrayina/killer-bum-v-ukraine-uslugi-naemnogo-ubiyey-ot-tysyachi-dollarov.html>.

¹⁶ The MIA gave details of arms trafficking in Kharkiv / <http://kharkiv.unian.net/ukr/detail/198827>

¹⁷ In Lviv the Kalashnikovs and machineguns were sold to all comers / <http://www.unian.net/ukr/news/news-463228.html>

¹⁸ <http://www.ukrstat.gov.ua/> Express Info / Mortality in Ukraine: everyday death from external causes

¹⁹ <http://www.ukrstat.gov.ua/> Express Info / Demographic situation in Ukraine

²⁰ Medicine in the mirror of independence / http://dt.ua/HEALTH/meditsina_v_dzerkali_nezalezhnosti-86400.html; Reforms of the MHC: stop delaying / <http://www.pravda.com.ua/articles/2011/05/23/6211440/>

Later, these refusals can be abated by court, but more often it does not affect the effectiveness of the investigation, because at the initial stage the evidence was not fixed.

In the case of refusal to institute criminal proceedings the procedure of access of victims to case material is rather complicated. The investigative organ almost always denies such persons the access to case material, and the only way for them is to lodge an appeal against the refusal to institute criminal proceedings get access to case material in court.

There is also a problem with recognition of procedural status of victim in public criminal proceedings. A person is recognized as a victim of the crime only under a special decision of the investigator.

The investigation of criminal cases is often carried out slowly and not in quality, especially in cases when suspected perpetrators are public agents.

The investigation of deaths in places of confinement and due to the use by militia and other public agents of lethal force need special attention. In most cases the initial investigation is conducted by a party concerned (administration of the places of confinement, where the said person died, or the investigatory department of the MIA, SSU etc., an officer of which had used lethal force), which collects evidence of guilt or innocence of their personnel, and only then sends these materials to the prosecutor's office. In fact, there is a situation, when the public prosecutor's office decides to initiate criminal proceedings or deny its initiation solely on the basis of evidence collected by the authority concerned, which does not satisfy the requirement of independence.

In 2011, the European Court passed five decisions on violation of Article 2 of the Convention on Human Rights pointing at improper investigation of deaths.

These are as follows: *Mikhalkova and others vs. Ukraine*, No. 10919/05, dated January 13, 2011, *Matushevsky and Matushevskaya vs. Ukraine*, No. 59461/08 of June 23, 2011, *Merkulova vs. Ukraine*, No. 21454/04 dated March 3, 2011, *Kachurka vs. Ukraine*, No. 4737/06 of September 15, 2011 and *Antonov vs. Ukraine*, No. 28096/04, November 3, 2011²¹.

In these decisions, among other things, the European Court found that:

- The investigations were too time-consuming and led to no final decisions on the case that, according to the European Court, largely undermined public trust in justice;
- The investigations contained too many faults, which had been pointed out by national authorities, but had not been promptly corrected;
- A lot of necessary investigations either were not carried out or were carried out with considerable delay and were not conducted on time;
- During the investigation, there were long periods when no investigative actions were conducted;
- Relatives of the victims had no access to the records of investigation and could not participate in establishing the circumstances of the death of their nearest and dearest;
- In one case, during the investigation, key evidence disappeared from the case file etc.

Thus, taking into account the decisions of the European Court, one can conclude that the trend of ineffective investigation of deaths persists. The public authorities take no effective measures to improve the situation.

5. THE DISAPPEARANCE OF PEOPLE

Ukraine has not signed the UN International Convention for the Protection of All Persons from Enforced Disappearance. The said Convention took effect on December 23, 2010, 30 days

²¹ For more details see: <http://hr-lawyers.org/index.php?id=1295954597>

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after the number of participants had reached twenty. As of October 1, 2011 already 30 countries ratified the Convention²².

In this respect it should be noted that one of the resonant criminal cases in 2010 — the disappearance of editor of the Kharkiv newspaper “Novyi Styl” Vasyl Klimentyev — has not been investigated yet.

6. RECOMMENDATIONS

1. Establish effective mechanisms for investigation of deaths, particularly those that were caused by the actions of law enforcers, namely:

- To provide for legislation obliging to institute criminal proceedings in any case of a person’s death so that the investigating authorities could fix the necessary evidence without undue delay, or even opt out of such stage of criminal investigation as institution of criminal proceedings;
- Develop detailed guidelines which fix the minimum set of investigations to be conducted in every case of death to the investigating authorities could question the closure of criminal proceedings;
- to develop detailed guidelines listing the minimum set of investigative actions to be conducted in every case of death so that the investigative agencies could initiate closing the file;
- Conduct regular training (retraining) of investigative personnel to improve the quality of their investigation;
- To bring out in the legislation and minimize the number of grounds for appeal against decisions on institution of criminal proceedings, to prohibit the courts to repeal these regulations on formal grounds.
- To set up an independent agency to investigate deaths of persons in places of confinement and deaths as a result of the use of lethal force by public agents.

2. To amend legislation with additional guarantees for the use of statements obtained from suspects in the early stages of crime investigation and fix the presumption that the investigating agency must prove the voluntariness of such evidence in the case of the statement to the contrary. The variants of such guarantees may include the judicial control, when during the investigative stage all interrogations of suspects and defendants are held only in the presence of a judge or legal requirement to conduct interrogations only in interrogation room with automatic video recording.

3. To legally obligate the investigative agency to inform victims and their relatives about the investigation at reasonable intervals.

4. To amend the law with the possibility of independent forensic examination to assess the cause of the death of the person.

5. To conduct regular training and instruction of militia officers involved in special operations intended to detain criminal suspects.

6. To reform the health care system to prevent the growth of death rate, including infant and child mortality.

7. To amend legislation providing opportunities for individuals in places of confinement to be treated in institutions of MHC, especially in cases when the institutions of MIA and State Penitentiary service cannot render effective treatment.

8. To sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance adopted on December 20, 2006 (UN General Assembly resolution A/RES/61/177).

²² http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en

II. THE RIGHT TO PROTECTION FROM TORTURE AND CRUEL TREATMENT¹

1. SPREAD OF TORTURE

The maltreatment and torture in militia and penitentiary institutions is a special kind of illegal actions that are hidden from the public and statistical records.

Despite the fact that under the MIA of Ukraine the Public Council on Human Rights intended to monitor the work of this department was established, it is almost inactive, and therefore the public has no access to information. The penal system also remains closed to the public.

In addition, quite often the victims of maltreatment do not lodge complaints due to various reasons: they either fear reprisals from militia and penal system, or are simply ignorant of their rights.

As far as violence against the state-controlled detainees is latent by nature, its true extent is rather difficult to assess. Only through media reports about specific cases of torture and statistics of citizens' complaints to human rights activists the general picture can be drawn.

As of October 28, 2011 the network of reception rooms of Ukrainian Helsinki Human Rights Union (UHHRU) registered 183 complaints of torture and other forms of maltreatment.

Former Minister of Internal Affairs of Ukraine Anatoly Mohyliov at his press conference on March 31, 2011 divulged the statistics of the MIA of Ukraine about appeals to the militia with complaints about the use of violence against them by law enforcers. According to his info, only during the first three months of 2011 the Ministry received 1402 complaints from citizens against unlawful actions of militia.

The results of monitoring of the spread of unlawful violence in the organs of internal affairs of Ukraine conducted by the Kharkiv Institute for Social Research indicates a strong tendency to increase the number of cases of torture in militia. According to the last year's assessment of victims of unlawful violence by militia, the estimated number of victims amounted to more than 790,000 people. This year data are even more disappointing: the estimated number of victims of unlawful violence by militia in 2011 has gone up to 980,000 people. We can but state that the militia has begun beating more often, and we gradually draw nigh to that of 2004, when the estimated number of victims made 1 MN and more persons².

2. CASES OF TORTURE IN 2011

2.1. BEATING OF PRISONERS AND CONVICTS

After the decision of European Court in the case of "Davydov and Others vs. Ukraine"³ there were no additional investigations into the mass beating, and no perpetrators were punished.

¹ Prepared by Yana Zaikina, lawyer of KHPG

² Read more on the results of sociological survey of the spread of violence in the organs of internal affairs of Ukraine on the site of Kharkiv Institute for Social Research: <http://www.khisr.kharkiv.ua/index.php?id=1319741619>.

³ Read more in "Human Rights in Ukraine: 2009–2010", p. 73.

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In February 2011 the European Court sent to the Government of Ukraine as communication matter the appeals in such cases as “Karabet and Others vs. Ukraine” and “Danyliuk and Others vs. Ukraine” lodged in connection with mass beating of prisoners at Iziaslav penal colony number 31 in 2007.

Due to the sense of impunity of the staff of penal institutions the cases of mass beatings of prisoners took place in 2011 as well.

Simferopol investigative isolation ward. On the eve of May holidays about forty troopers armed with submachine guns of the special unit of the State Penitentiary Service of Ukraine arrived at the Simferopol investigative isolation ward and set about to mass beatings. Seven names of injured persons are known. Thus, one victim had his leg traumatized, another had his kidney damaged⁴. The official press release of the Crimean Department of the State Penitentiary Service of Ukraine read that, according to the order of the State Penitentiary Service of Ukraine, from April 30, 2011 to May 10, 2011, they carried out the coded “Shchyt” operation in Simferopol investigative isolation ward. As a result of the above operation, as of May 5, 2011, they seized 20 mobile phones, 40 chargers and headsets, DVD players, piercing-and-cutting items etc from the detainees of Simferopol investigative isolation ward⁵.

Dnipropetrovsk PC-89. On July 5, 2011 the troopers of special unit of the State Penitentiary Service of Ukraine committed mass beatings of prisoners in Dnipropetrovsk PC-89. They were caused by the prisoners’ complaint about the conditions of detention. The prisoners maintained that they were hungered and thirsted⁶. As a result of beating 18 prisoners were injured⁷. Many had their ribs broken, limbs wounded, internal organs injured. Some prisoners had their jaws broken⁸. The Dnipropetrovsk Oblast Department of the State Penitentiary Service of Ukraine refutes the info that a special unit of troopers was in the colony and the fact that they beat prisoners. Former Chief of the Dnipropetrovsk Oblast Department of the State Penitentiary Service of Ukraine Anatoly Babets said that actually they conducted a routine search of all objects and personal effects of prisoners in the colony number 89⁹.

2.2. CONDITIONS OF DETENTION

In some investigative isolation wards they resort to torture with detention conditions. Thus, in early May, in Kyiv investigative isolation ward were kept 330 women, although the maximum number of beds for women prisoners is 303. Accordingly, 27 women had no bed, and they either took turns sleeping in bed or on the floor. “In the Kyiv investigative isolation ward they created almost unbearable medieval conditions for women carried in transit through the ward to penal institutions. There is acrid stench In the cells, no fresh air, no sun light, the persons transported under guard do not timely undergo sanitary treatment, anti-epidemic work has long been abandoned,” noted Commissioner of the Verkhovna Rada of Ukraine on Human Rights Nina Karpachova in her representation to President of the Criminal Executive Service of Ukraine Oleksandr Lisitskov in May 2011¹⁰.

The government usually explains the bad conditions of detention by “the limited financial and economic possibilities of the state.” However, the problem of overcrowding of investigative isolation wards is only partially related to the funding of penitentiary institutions. To a large extent it depends on the ideology and criminal justice system regarding detainees. In practice, in many cases

⁴ <http://www.khpg.org/index.php?id=1305032377> and <http://www.khpg.org/index.php?id=1304704212>

⁵ <http://maidan.org.ua/special/pk/?p=2082> <http://kvs.crimea.ua/index.php?limitstart=12>

⁶ <http://maidan.org.ua/special/pk/?p=2412>

⁷ <http://maidan.org.ua/special/pk/?p=2446>

⁸ <http://maidan.org.ua/special/pk/?p=2398>

⁹ <http://maidan.org.ua/special/pk/?p=2412>

¹⁰ http://ombudsman.kiev.ua/pres/releases/rel_11_05_13.htm

there remains a presumption in favor of detention. The recognizance system and other preventive measures are not developing¹¹.

3. MALTREATMENT BY LAW ENFORCERS

One of the main reasons for the spread of torture in Ukraine is a mental perception of militia officers: the detainee is guilty, and one should try to wring out a confession of the crime. The whole system of inquiry and investigation in Ukraine is based on beating a guilty plea out of the prisoner. The involved law enforcers believe that this is nothing but routine work. In addition, there is a stereotyped view in^ “confession is the queen of evidence”. Therefore, the law enforcers try hard to get a guilty plea in any way possible.

In 2011 the cases of militia torturing witnesses, lawyers and journalists became public. The ordinary villagers also suffered unlawful violence by law enforcers.

Torture of a detainee. Charged with murdering his friend, Andriy Onyskiv at his trial accused militia of torturing. In order to make him to give himself up, the militia inflicted injury on him in the form of burns of his private parts. Andriy said that all clues and all places mentioned in the criminal case were dictated to him by the militia and the layout of the victim’s body position he copied from a sample under strict supervision of the militiamen¹².

The use of violence to the witness. In early July 2011 Natalia Kravtsova was summoned to Frunzensky District Department of Internal Affairs, Kharkiv, for interrogation because she witnessed a fight among strangers in a cafe. At the militia station the girl explained that she could not describe wrongdoers in more details, because she had met them in the cafe in the evening, when it came to blows, and had seen them no more. The militia officers were dissatisfied with this explanation. After she replied once more that she did not know those guys, militia officer Olexandr Teriannyk began beating her. Two other militiamen laid her on the couch, twisted her arms and legs, and gagged her with a towel to suppress her crying. Three law enforcers tortured the girl, until she slandered her friends. The girl was released only when the slandered persons were brought to the district militia department. After that she was admitted to the emergency surgery hospital with the diagnosis of “Brain concussion. Linear fracture of the occipital bone. Bruising of the soft tissue of occipital region.”¹³

Beating of a lawyer. On August 17, 2011, about 18:30, the militiamen brought to the Sosnivsky district court, Cherkasy, Kucherenko V.D., who was a client of lawyer Dmytro Karpenko, in order to prolong his detention. The court-fixed term of detention of lawyer Karpenko’s defendant expired that day at 16.30. The law enforcers hoped that the court would extend the term, but the judge had already gone home and there was nobody to make a decision. Instead of releasing Kucherenko V.D. from custody, as required by Article 29 of the Constitution of Ukraine, the investigator together with the officers of the operating unit “Sokil” convoyed him to the service vehicle and started driving him to an unknown destination. At the request of the lawyer to stop illegal activities, the officers of ‘Sokil’ of the Organized Crime Department knocked the lawyer to the ground, handcuffed him and dragged to the service vehicle. They put a black synthetic bag on his head and put him on his hunkers. The law enforcers started beating and kicking him in different parts of his body, mainly on his back, torso and head. The beating was accompanied with swearing and threatening to torture him to death in the basement of the Organized Crime Department. One of the Sokil officers stifled the lawyer, holding his head between her legs. This torture lasted about 15 minutes. The Sokil officers threatened the lawyer to arrest him for 15 days and apply electric current to him. The beating

¹¹ <http://www.khpg.org/index.php?id=1308825893>

¹² <http://maidan.org.ua/special/pk/?p=2057#more-2057>

¹³ <http://maidan.org.ua/special/pk/?p=2123>

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of the lawyer was carried on by new organized crime officers near the building of the Organized Crime Department. Then the lawyer was led out of the gate of the Organized Crime Department and left him there. At the city hospital number 3 the doctors diagnosed that lawyer Karpenko had closed craniocerebral injury, brain concussion, multiple contusions of the soft tissues of the body and limbs, kidney injury, numerous lacerated and slashed wounds on his hands (from handcuffs)¹⁴.

Beating of a journalist. On August 10, 2011, at 23.50, during the dispersal of the picket organized to protect the rights of sacked workers of the urban electric transport in Kharkiv a militia officer injured Nasha Zhizn journalist Denys Korniev, who officiated on the picket. The chief of public order sector of Dzerzhinsky district militia department Volodymyr Chuhayevsky applied to the journalist a hand-to-hand combat hold. The ambulance took the journalist to the hospital, where the diagnosis was made: “multiple bruises and displacement of cervical vertebrae”¹⁵.

Official violence. On the night of September 5, 2011 Chief Kalytianska village militia department Mykpla Symonenko came to Semypolki village disco (Brovary Region, Kyiv Oblast). There he found fault with local resident Vitaliy Zaporozhets, after which the latter brought a hunting rifle from his home and shot and wounded the officer in the stomach. Militia Major Symonenko died from blood loss. The next morning more than two hundred armed riot militiamen began combing the village. They broke into farmsteads and seized young persons. Nearly 20 boys were convoyed to Brovary Town Militia Department. There the troopers beat and interrogated the young persons and insisted that they had to witness against Vitaliy Zaporozhets and tell where he was. The boys were kept in the militia station for almost forty-eight hours. Some boys were taken to the forest near the quarry and, under threat of arms, were told to reveal where Vitaliy Zaporozhets was hiding. The oblast militia fully justifies its subordinates from Brovary Region. Head of Press Service of the Main Office of MIA in Kyiv Oblast Mykola Zhukovych said that militia planned to use troopers to comb the area. But since on September 6, 2011 Zaporozhets had been detained, there was no need in it anymore. People maintaining that they were beaten during interrogation and detained for 40 hours are not even going to file a complaint against these actions of law enforcers. Some are afraid of possible retaliation, others fail to understand that their rights have been grossly infringed¹⁶.

4. INVESTIGATION

The Prosecutor's office is the only organ, structurally independent of the MIA of Ukraine, authorized by the legislation of Ukraine to investigate complaints of maltreatment by law enforcers. However, the statistics of criminal cases alleging maltreatment shows that the prosecution quite rarely files suits after such complaints.

Since 2005 the prosecutor's office submitted to the court only 335 criminal cases concerning crimes in this category, while only during last two years the prosecutors' offices registered over 13,000 complaints and reports about torture and other maltreatment of people in internal affairs organs¹⁷.

Although international law on human rights requires the State to conduct an effective investigation of complaints of torture, in fact, the prosecutor's office is often unable to conduct such investigation.

This is largely due to the ambiguous role of the prosecution: on the one hand it is the prosecutor's office which is responsible for militia actions legality control, and on the other it holds charge

¹⁴ <http://www.advokatura.org.ua/>

¹⁵ <http://www.khpg.org/index.php?id=1313069649>

¹⁶ <http://umdpl.info/index.php?id=1316639430>

¹⁷ http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=72169&fp=931

in court and therefore has close professional links with the militia. This conflict of interest bears upon effective investigation of complaints of torture.

Another problem is that the militiamen investigated because of reports of their use of torture still have the same positions in law enforcement organs.

This situation promotes impunity in law enforcers and the majority of them consider torture and ill treatment not as a crime, but as a routine element of their fight against crime.

It should be noted that among the small number of complaints, which are nevertheless being investigated, they are qualified under Articles 364 (“Abuse of power or position”) and 365 (“Excess power or authority”) of the Criminal Code of Ukraine, not under Article 127 (“torture”) of the Criminal Code of Ukraine.

However, criminal cases brought under them, are not included in the statistics of criminal prosecution for torture, responsibility for which is provided for by Article 127 of the Criminal Code of Ukraine, which hides the real extent of the problem.

4.1. LEGISLATION

The article 127 of the Criminal Code of Ukraine, which provides criminal liability for torture, has been already three times amended. The previous unsuccessful amendments of Article 127 of the Criminal Code of Ukraine were looked into in the reports for 2006 and 2009–2010.

As a result of last amendments (05.11.2009) the new text of the article does not mention the special perpetrator of the crime, i.e. officer, as well as the essence of qualification and meaning of the term “torture” defined in Article 1 of the Convention against Torture.

Unfortunately, in 2011 the situation did not change. The provisions of this article still do not comply with Article 4.1 of the UN Convention against Torture.

5. PRACTICE OF NATIONAL COURTS

5.1. JUDICIAL PRACTICE OF ARRAIGNMENT OF LAW ENFORCERS

As of October 10, 2011 in the State Register of court decisions (hereinafter — Register) of the 17 sentences, under which criminal charges were brought against individuals under Article 127 of the Criminal Code of Ukraine, only 3 court decisions apply to state agents.

At the same time the Register contains sentences, according to which the law enforcers have been held criminally liable for actions that can be qualified as torture under Articles 364 and 365 of the Criminal Code of Ukraine (“abuse of power or position” and “excess of authority or misconduct in office”).

For example, on April 1, 2011 the Shevchenko District Court, Lviv, found guilty of committing crimes under Articles 364 and 365 Part 2 and Part 3 of the Criminal Code of Ukraine two militia agents Lychakiv District Station of the Lviv City Department of the Main Office of MIA of Ukraine in Lviv Oblast, who used physical violence to the suspect “in order to verify his involvement in the theft of about UAH10,000 from the gas station #9.” The militia agents illegally punched, kicked, beat with different objects detained persons injuring various parts of his body, and hanged him on a metal hanger causing him light injuries¹⁸.

This judicial practice also distorts real statistics of criminal liability of law enforcers for torture.

5.2. JUDICIAL PRACTICE OF USING CONFESSIONS DERIVED FROM TORTURE

The practice of using confessions obtained as a result of violence or under compulsion as appropriate evidence also promotes the use of torture by law enforcers as an instrument of inquiry

¹⁸ <http://www.reyestr.court.gov.ua/Review/18015898>

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and investigation. The legislation does not stipulate procedures for exemption of evidence obtained through torture.

Thanks to the European Court of Human Rights the first steps to break the existing system have been taken. One conviction by national courts was abolished by the Supreme Court of Ukraine (hereinafter — SCU) on the basis of the decision of the European Court, which had stated violation of Article 6 (“The right to a fair trial”) in connection with the fact that the conviction had been based on confessions obtained as a result of tortures applied by law enforcers and absence of lawyers¹⁹.

The Donetsk Court of Appeal sentenced Leonid Lazarenko to life imprisonment. The Supreme Court confirmed the sentence. Then the case was referred before the European Court, which delivered the judgment in the case Leonid Lazarenko vs. Ukraine on October 28, 2010²⁰. Having tried the case, the European Court noted that the deprivation of the applicant of the right to use the services of a lawyer and use of his confession made by him in this time period, which influenced his conviction, were sufficient signs of violation of fair trial guarantees, and therefore stated the violations of Article 6 §1 and §3 (c) of the Convention. The European Court also noted that although Leonid in his cassation appeal lodged with the Supreme Court alleged violations of his rights to protection, which, in accordance with national law, is a flagrant violation that could lead to the repeal of the sentence, and the national court ignored this complaint. In this case the European Court decided that the re-trial, review or re-examination of the case is in principle appropriate way to resolve violations of the applicant’s rights. Leonid applied to the Supreme Court for reconsideration of the judgment in his case, and on June 6, 2011 the Supreme Court, for the first time after the European Court had stated the violation of Article 6 in connection with violation by national authorities of the fair trial guarantee, reversed the judgments of the first instance court and court of review and sent the case for re-trial in the first instance court²¹.

In 2011 the European Court stated violations of Article 6 in three similar cases: Nechiporuk and Yonkalo vs. Ukraine (application No. 39582/04, decision of January 27, 2011), Bortnik vs. Ukraine (application No. 42310/04, decision of April 21, 2011)²² and Balitskiy vs. Ukraine (application No. 12793/03, decision of November 3, 2011)²³.

In 2011 the UN Committee on Human Rights (hereafter — the Committee) also made the decision on the cases of Victor Shchitka and Olexandr Butovenko, which read that the suspects were forced to plead guilty of committing crimes as a result of the use of torture to them by Ukrainian law enforcers.

On July 19, 2011 the Committee decided that Victor Shchitka was tortured to obtain his confession in the rape and murder, that there was no effective investigation, that the right of defense and the right to call and examine witnesses were violated, and such falsification and evidence manipulation were equivalent to the denial of fair trial²⁴. On the same day in the case of Olexandr Butovenko the Committee found, inter alia, the use of torture to him to get his confession to the murder, the lack of effective investigation and violation of right of defense.

In its judgments in these cases, the Committee noted that under paragraph 3 (a) of Article 2 of the International Covenant on Civil and Political Rights Ukraine has to render Victor and Olexandr Butovenko effective legal assistance. According to the Committee, in the case of Shchitka such legal assistance should include an effective investigation into allegations of Mr. Shchitka about him being tortured and set up criminal proceedings against those responsible, start reconsidering his criminal case or release him, as well as initiate compensation for damages suffered. In the case of Mr. Butovenko

¹⁹ <http://hr-lawyers.org/index.php?id=1313410341>

²⁰ <http://hr-lawyers.org/index.php?id=1289377962>

²¹ <http://hr-lawyers.org/index.php?id=1309863250>

²² <http://hr-lawyers.org/index.php?id=1295954597>

²³ <http://hr-lawyers.org/index.php?id=1321360325>

²⁴ <http://hr-lawyers.org/index.php?id=1317410175>

the Committee pointed out that an effective legal assistance should include the revision of judgment on his conviction, effective investigation into his complaints about torturing him and prosecute those responsible, as well as initiate compensation for damages suffered.

Victor Shchitka made an attempt to initiate a review of the criminal case after appropriate instructions contained in the decision of the Committee. However, on November 3, 2011 the Judge Panel of the Judicial Court of Criminal Cases of the Supreme Court of Ukraine for handling of civil and criminal cases denied Mr. Shchitka access to his criminal case prior to the Supreme Court proceedings, because it concluded that the Committee does not act as an international judicial institution while in accordance with paragraph 2 of Part 1, Art. 400-12 of the Criminal Procedural Code of Ukraine the reason for the revision of judgments of the Supreme Court of Ukraine, which came into force, may be provided only by an international judicial institution, whose jurisdiction is recognized by Ukraine, eliciting violation by Ukraine of international obligations during trial by a court²⁵.

6. POLICY OF EUROPEAN COURT

Victims of torture in militia and criminal-executive institutions increasingly bring an action before the European Court. The latter has already given dozens of judgments about violation of Article 3 of the Convention by Ukraine. In 2011, the European Court found violations of Article 3 of the Convention in 12 cases against Ukraine.

In the case of *Mikhalkova and others vs. Ukraine* (application No. 10919/05, decision of 13.01.2011) the government did not provide plausible explanations for the occurrence of injuries on the body of the applicant during his visit to militia station; therefore the European Court concluded that these injuries were the result of inhuman treatment in violation of Article 3 of the Convention.

In the case of *Dushka vs. Ukraine* (application No. 29175/04, decision of 03.02.2011) the European Court found violations of Article 3 due to the fact that he received his injuries while being under control of militia. In addition, the European Court opined in this case, that, irrespective of whether he had gone through violence, the use of administrative detention in order to break the resistance of the person and use his vulnerable emotional state to obtain a confession of a crime already constituted a violation of Article 3 of the Convention. The European Court also found violations of Article 3 of the Convention in the improper investigation into his complaint about his being beaten by the militia. In this regard, the European Court paid special attention to the fact that higher prosecutor's office and national courts used to repeatedly reverse judgments of the district prosecutor's office not to institute criminal proceedings on grounds of incompleteness of the court verification.

In the case of *Bocharov vs. Ukraine* (application No. 21037/05, decision of 17.03.2011) the applicant after being under control of the militia was hospitalized with bodily injuries, which were quite serious and needed hospital treatment for a long time. The European Court concluded in this case that the applicant received injuries as a result of inhuman and degrading treatment contrary to Article 3 of the Convention. The European Court also decided that the public organs of Ukraine failed to fulfill their obligations to investigate applicant's complaints of ill treatment by the militia, in violation of Article 3 of the Convention.

In the case of *Nowak vs. Ukraine* (application No. 60846/10, decision of 31.03.2011) the applicant, Polish citizen Piotr Nowak was detained by militia officers in Lviv and deported to Poland. After deportation two Polish doctors diagnosed cigarette burns, bruises on his body and broken tooth. Although the applicant complained of torture by the Ukrainian militia and took the matter to the Polish prosecutor's office, the latter referred all relevant documents to the prosecutor's office

²⁵ <http://hr-lawyers.org/index.php?id=1321523619>

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of Ukraine, nobody launched an inquiry into the abuse. The European Court found a violation of Article 3 of the Convention in this case and noted that public organs are responsible for injuries inflicted on this person controlled by them, if they fail to provide convincing explanations for the occurrence of injuries, which relieve them of responsibility. The public organs must also conduct an effective investigation into arguable allegation of torture by militia officers.

In the case of *Matushevskyy and Matushevska vs. Ukraine* (application No. 59461/08, decision of 06.02.2011) the government failed to provide plausible explanations for the occurrence of injuries on the body of Igor Matushevsky while in investigative isolation ward. Taking into account the nature of the injuries received by Igor, the European Court concluded that they were quite serious, and therefore Article 3 of the Convention was violated.

In the case of *Nechyporuk and Yonkalo vs. Ukraine* (application No. 42310/04, decision of 21.04.2011) Ivan Nechyporuk complained that the militia forced him to confess a crime applying for this purpose an electric current. The European Court, taking into account the severity of abuse and attendant circumstances, concluded that Ivan Nechyporuk became a victim of torture. Accordingly, it found violations of Article 3 of the Convention. The European Court also decided that in this case the authorities failed to take reasonable measures to conduct effective investigations into Ivan's allegations about the use of torture to him by militia, and found violations of Article 3 of the Convention by militia officers.

In the case of *Fyodorov and Fyodorova vs. Ukraine* (application No. 39229/03, decision of 26.07.2011) the European Court concluded that the use of physical force to the first applicant by militia in response to his attempts to determine the legality of his forced hospitalization in a psychiatric hospital was a degrading treatment. The government failed to prove that damage to the first applicant could be done as a result of the use of force appropriate in the circumstances in the militia station, where he tried to express his protest against his hospitalization. The European Court concluded that the use of force was disproportionate and, in fact, it was an inhuman and degrading treatment of the first applicant. The government also failed to supply plausible explanations for the second applicant's injuries, and therefore the European Court stated that she was subjected to inhuman and degrading treatment in violation of Article 3 of the Convention. The European Court also found violations of Article 3 of the Convention in connection with the ineffective investigation of the applicants' complaints of maltreatment in connection with the execution of the order of hospitalization of the first applicant.

In the case of *Oshurko vs. Ukraine* (application No. 33108/05, decision of 08.09.2011) The European Court concluded that the authorities had failed in its positive obligation to protect the physical integrity of the applicant; the applicant was maltreated while in investigative isolation ward, and therefore there occurred a violation of Article 3 of the Convention. The European Court also concluded that the authorities failed to respond adequately to applicant's serious health problems, which amounted to inhuman and degrading treatment contrary to Article 3 of the Convention. In this case the Ukrainian authorities failed to fulfill their procedural obligation to conduct an effective investigation, which means that they had violated Article 3 of the Convention.

In the case of *Korobov vs. Ukraine* (application No. 39598/03, decision of 21.07.2011) the government did not offer convincing explanations of detention circumstances, which had required the use of martial art holds. Moreover, the European Court concluded that the injuries were inflicted not only during the applicant's detention, and that the injuries caused to the applicant were so serious that they fall under notion of torture in the sense of Article 3 of the Convention. The court also found that the national authorities failed to pursue an effective inquiry.

Moreover, in the cases of *Kharchenko vs. Ukraine* (statement No. 40107/02, decision of 10.02.2011), *Izzetov vs. Ukraine* (application No. 23136/04, from 15.09.2011), and *Mustafayev vs. Ukraine* (application No. 36433/05, decision of 13.10.2011) the European Court found violations of Articles 3 of the Convention due to the inadequate conditions of detention in the investigative isolation ward and forced labor camp.

The amount of compensation awarded to the victims by the European Court in the above cases made €274 774. The indemnification will be paid at the expense of the state budget of Ukraine, and not those guilty of the crime.

There is a Law in Ukraine “On the Judicial Decision Implementing and Observance of the Policy of European Court of Human Rights.” The above law stipulates that in cases of damages caused to the state budget of Ukraine because of compensation payments the Ministry of Justice has to file a claim of recourse to the authority which made the breach, or the Prosecutor General with a request to open a criminal investigation to establish the perpetrators. The Ministry of Justice demanded that the Prosecutor General opened 111 such cases, but no action was mounted²⁶. It also promotes militia’s belief in their impunity and lack of any responsibility for torture.

7. PUBLIC ORGANS

7.1. MINISTRY OF INTERNAL AFFAIRS OF UKRAINE

On April 28, 2011 Anatolii Mohyliov, the then Minister of Internal Affairs of Ukraine, officially acknowledged that militia used torture to detainees in order to increase the percentage of crime detection. He also informed the journalists after the meeting in the Ministry of Interior of Ukraine devoted to the issue of realization of human rights in the MIA of Ukraine that his ministry was about to change its policy²⁷.

On January 20, 2011 Minister of the Interior approved the decree number 17 about the new system of evaluation of the militia’s activity within the framework of one-year pilot project. Unfortunately, the hope that the new criteria for evaluating the militia’s activity will not be based on a quantitative approach has come short of reality. The effectiveness of crime detection in accordance with this order should be estimated based on the number of crimes detected²⁸. Therefore it is still too early to talk about eliminating the main causes of torture applied by law enforcers.

On March 31, 2011 the Minister of Internal Affairs signed the order No. 329 “On additional measures intended to prevent cases of torture and maltreatment in militia’s activity,” which stipulated, inter alia, creation of a special supervisory commission for harmonization and coordination of preventive control of torture and cruel treatment in the organs of militia, proper consideration of statements and reports on relevant violations by law enforcers. Moreover, the order provided for surprise inspections of the relevant services of Ukraine organs and departments of the Ministry of Internal Affairs in order to reveal torture and cruel treatment²⁹.

Unfortunately, the activities of the supervisory committee, and unannounced inspections of employees of the MIA of Ukraine will be carried out by the personnel of the same system, and not by an independent body.

On October 5, 2011, during the parliament hearings in the Verkhovna Rada of Ukraine on the reform of the MIA of Ukraine and introduction of European standards Anatoly Mohyliov said that now there is no notion of percentage of crimes detection in the system of Internal Affairs of Ukraine. Moreover, the ex-minister informed about three major areas of reform of the MIA of Ukraine, namely: quality personnel changes, the appropriate logistical, financial, software and dataware supply, as well as creation of stable institutions of civil control over the militia. He said that there should be a continuous dialogue and partnership with public agencies and civil society organizations³⁰.

²⁶ From the answer of the Ministry of Justice to the inquiry of Ukrainian Helsinki Human Rights Union.

²⁷ <http://korrespondent.net/video/ukraine/1212585-mogilev-priznal-primenenie-pytok-v-milicii>

²⁸ <http://umdpl.info/index.php?id=1297444961>

²⁹ <http://umdpl.info/index.php?id=1303471514>

³⁰ <http://www.mvs.gov.ua/mvs/control/mai%20n/ru/publish/article/678418;jsessionid=F73B1FFE2874ECA8D133CAB9431A8085>

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In this regard it should be noted that the Public Council, whose work was stopped in 2010, resumed its work in January 2011³¹. However, this year it spent its time discussing organizational matters. In 2011, the Public Council at the Ministry of Internal Affairs of Ukraine implemented no projects aimed at combating torture and cruel treatment³².

Therefore, the ex-minister's statements about future changes of the principles in the law enforcement and the reform of the MIA are nothing but declarations of intent.

7.2. PROSECUTOR GENERAL'S OFFICE OF UKRAINE

In 2011, the Prosecutor General's Office of Ukraine (hereinafter — the Prosecutor General's Office) has repeatedly raised the issue of torture of persons by law enforcement agencies at the stage of pre-trial investigation.

Thus, on March 29, 2011 in the course of the enlarged session of the Board of the Prosecutor General's Office on the observance of legality in the investigation into the use of torture to the citizens by militia the Prosecutor General Ukraine said that he requires prosecutors to effectively use all legitimate authority to eradicate the use of physical violence by law enforcers³³.

On June 21 at the enlarged session of the Board on efficiency of public prosecution bodies for the first six months of 2011, the Prosecutor General again noted that in Ukraine there was a thorny issue of human rights in criminal proceedings and existence of numerous cases of torture at the stage of pre-trial investigation.

Fully sharing the idea expressed, the Association of Ukrainian human rights monitors (hereinafter — Association) made him a suggestion to set up a working group including representatives of prosecutors, academics and NGOs, which might develop the forms of access to institutions of social control in the investigation of facts of torture and cruel treatment of people in militia's custody.

In his response, Chief of the Main department supervising the observance of laws in the investigation and search operations, inquiry and pre-trial investigation of the Prosecutor General's Office V. Bilous in his letter told the Association that "the current legislation does not provide for participation of public prosecutors in the work of NGOs"³⁴.

Unfortunately, both the Prosecutor General's Office and Interior Ministry of Ukraine resorted to declaration of intent only.

7.3. STATE PENITENTIARY SERVICE OF UKRAINE

On April 6, 2011 the President of Ukraine approved by the decree No. 394/2011 the Regulations on the State penitentiary service of Ukraine (hereinafter — Regulations). According to Head of the State Penitentiary Service of Ukraine Lisitskova O.V., the creation of the State Penitentiary Service of Ukraine reflects the strategic course of state policy towards social reorientation of the process of execution of punishments according to international standards, compliance with the principles of legality, humanism, democracy and justice, and modern global penitentiary doctrine³⁵.

However, the new Regulations repealed many previous positive provisions, such as, for example, ensuring human rights and civil legislation in execution of punishments, realization of legitimate rights and interests of prisoners and detainees³⁶.

³¹ <http://library.khpg.org/files/docs/1277206750.pdf>

³² <http://www.mvs.gov.ua/mvs/control/main/uk/publish/category/47315>

³³ http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=72169&fp=1061

³⁴ <http://www.khpg.org/index.php?id=1314698287>

³⁵ http://depkvs.kh.ua/index.php?option=com_content&view=article&id=408%3Aanalizpolojennya&catid=34%3Aanalytika&Itemid=27

³⁶ <http://www.khpg.org/index.php?id=1312883196>

In the penal system, as before, there are numerous human rights violations. Among the key issues are its isolation, lack of public control, overcrowding of investigative isolation wards and penal institutions.

Year by year the number of convicts and detainees is growing: at the end of 2010 the prisons and investigative isolation wards contained 154 000 people.

In 80 out of the 151 penal institutions housing standards do not meet the requirements of the Penal Code of Ukraine. Such low *standards* are unacceptable, as well as pretrial detention facilities, where detained are forced to sleep in turns and stay in inappropriate conditions that demean human dignity. The overcrowding in cells, insanitariness, lack of proper medical examination, fresh air, clean drinking water, poor nutrition etc. lead to frequent illnesses of convicts and persons taken into custody. As a result, in 2010 over 86 000 cases of diseases were registered among such citizens, i.e. every second fell ill. The rights of prisoners to work are also violated. Adoption of regional programs job creation for prisoners gave no positive results. Today only about 40 percent of able-bodied inmates do useful work. However, the absolute majority of people deprived of their liberty has not a single kopeck on personal accounts, while almost 40 000 of them receive writs of execution for a total of about UAH0.5bn³⁷.

The functioning of the State Penitentiary Service of Ukraine may change radically, if the penal system has a new aim; now it is essentially a repressive system focusing on isolation and punishment of criminals, and not on reformation of their minds and attitudes toward crimes.

Besides, the changes in criminal justice ideology that prefers detention among other precautions would allow to withdraw the investigative isolation wards from occupancy, refocus State Penitentiary Service of Ukraine from finding funds to build new institutions to reconstruction and technical upgrading of existing ones, bring conditions of detention in accordance with European standards.

8. INTERNATIONAL BODIES

8.1. PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

In resolution 1787 (2011) the Parliamentary Assembly of the Council of Europe (hereinafter — PACE) listed systemic problems of some states, including Ukraine. The PACE noted that there are still substantial systemic deficiencies causing large number of cases of violation of the Convention and seriously undermining the rule of law in these States. In particular, we are talking about the facts of maltreatment by law enforcers and lack of real investigation of these cases. The PACE noted that Ukraine needs to take measures to combat excessive use of force by militia officers and carry out inquiries into all reports of maltreatment.

8.2. UN SUBCOMMITTEE ON PREVENTION OF TORTURE

The UN Subcommittee on Prevention of Torture (hereinafter — the Sub-Council), as a result of official visit on May 16-25, 2011, presented its opinion to the Cabinet of Ukraine, which noted the absence of the national preventive mechanism to prevent torture in Ukraine.

Subcommittee Chairman and head of the UN delegation Malcolm Evans noted that although the decision about the form of national preventive mechanism is the prerogative of the Ukrainian authorities, it must be adjusted in accordance with Ukraine's international obligations with regard to the relevant provisions of the Optional Protocol to the Convention against Torture. Evans also said that the mandate, powers and independence of such mechanism should be guaranteed by law and implemented into practice³⁸.

³⁷ <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16737372>

³⁸ <http://umdpl.info/index.php?id=1306388608>

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8.3. EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE (ECPT)

On November 23, 2011 the ECPT published a report on the visit to Ukraine from September 9 to September 21, 2009. The ECPT report contains a number of recommendations for the government of Ukraine³⁹. In particular, the Committee noted that any non-standard items that can be used for abuse and cruel treatment should not be available on the interrogation premises of the organs of interior affairs. The ECPT also recommended that the law enforcers regularly receive clear instructions about the maltreatment “zero tolerance”. The law enforcers should understand that those who apply maltreatment, as well as those who closes his eyes to it or contribute to such practices will be punished. The Committee also urges the Ukrainian authorities to develop more stringent recruitment procedures and increased training of employees of the organs of interior affairs, operative agents and investigators. In the course of training, special attention should be paid to the methods of crime investigation, thereby reducing dependence on crimes confessions received during inquiry. Therefore, investments should be made into the acquisition of modern technical means of investigation (e. g., forensic and laboratory equipment). In addition, admissions made as a result of torture shall not be used as evidence during any trial, but proceedings against the person accused of maltreatment. The ECPT also recommended to ensure adequate conditions of detention in district militia stations and penitentiaries.

8.4. AMNESTY INTERNATIONAL

On October 12, 2011 the Amnesty International presented its report “No legally defined crime: retribution for the impunity of militia in Ukraine.” The report reads that by some estimates hundreds of thousands of people in Ukraine become victims of militia arbitrariness each year. The violations range from non-compliance with the Code of Criminal Procedure to racist acts, extortion, torture and other manifestations of violence and deaths in custody. Wakefulness is the result of impunity culture that took root in the militia environment of Ukraine. Individuals who filed complaints of serious human rights violations are often faced with the standard refusal to institute criminal proceedings “in the absence of legally defined crime.” And the vast majority of cases of human rights violations — both major and minor — do not fall in official statistics because the victims fear reprisals from the militia or do not believe that their cases will lead to positive reaction. The Government of Ukraine has, after all, to enter into commitments to reform the monitoring of militia. These three issues must be resolved in the first place: lack of monitoring of detention facilities, lack of independent investigative bodies and unwillingness to sue law enforcers. The effective solutions to these problems are necessary to eliminate corruption, prevent torture and maltreatment, as well as ensure that the guilty person will be sued⁴⁰.

9. ON THE NATIONAL PREVENTIVE MECHANISM

By ratifying the 2006 Optional Protocol to the Convention against Torture (hereinafter — the Optional Protocol), Ukraine took on the obligation to establish national preventive mechanisms, i. e. body (or bodies), which would freely make inspection visits and monitor institutions of confinement in order to prevent torture. Although the this mechanism should have been created within a year, but it took five years to make the first step only.

On September 27, 2011 the Presidential Decree No. 950/2011 approved the regulations of the Commission on the Prevention of Torture (hereinafter — Commission)⁴¹. The Commission is

³⁹ <http://www.cpt.coe.int/documents/ukr/2011-29-inf-eng.htm>. Answer of the Government of Ukraine: <http://www.cpt.coe.int/documents/ukr/2011-30-inf-ukr.pdf>

⁴⁰ http://amnesty.org.ru/system/files/2011_Ukraine_police_briefing.pdf

⁴¹ <http://www.president.gov.ua/documents/14032.html>

a standing advisory body under the President of Ukraine set up to promote the implementation of Ukraine's commitments under the Optional Protocol.

The Commission shall consist of chairman, executive secretary and other members of the Commission working on a voluntary basis. The Executive Secretary of the Commission shall be ex officio authorized public representative for the European Court of Human Rights. The members of the Commission shall be approved by the President of Ukraine on submission of the Head of the Commission.

The main objectives of the Commission are the facts of torture and other cruel, inhuman or degrading treatment or punishment, making propositions to the President of Ukraine in accordance with the established procedure in order to stop them and prevent their recurrence; participation in the preparation of proposals on amending legislation on the prevention of torture and other cruel, inhuman or degrading treatment or punishment and making proposals to the President of Ukraine in accordance with the established procedure.

In order to fulfill its mission the Commission is entitled to visit in accordance with the established procedure and plan approved by the Commission and, if necessary, or on off-schedule bases places of interim custody, pre-trial detention, penal institutions, psychiatric wards, special teaching and educational institutions, question detainees and obtain information about prison conditions.

The Chairman of the Commission regularly, at least once a month, reports to the President of Ukraine on the activities of the Commission. The organizational and technical support of the activities of the Commission is carried out by the Administration of the Presidential of Ukraine and Public Executive Office.

On November 18, 2011 the Decree of the President of Ukraine approved the composition of the Commission⁴². It includes people's deputies, civil servants, researchers, lawyers, representatives of NGOs and international organizations. The Commission was headed by Andriy Portnov, Advisor to the President of Ukraine, Head of the Main Judiciary Department of the Administration of the President of Ukraine.

Undoubtedly, such Commission created by Presidential Decree, fails to meet the basic requirements of the Optional Protocol. Its main drawback is the financial and structural dependence on public organs. Lack of worked-out procedures of Commission's activity and practice do not allow drawing conclusions about other aspects of its work. So, Ukraine still has no independent preventive mechanism which might meet the requirements of the Optional Protocol and be functionally independent and have independent staff.

10. RECOMMENDATIONS

1. The MIA of Ukraine should develop new criteria for evaluating the effectiveness of militia officers unrelated to the quantitative indicators of crimes.

2. Stop practicing mass beatings in the criminal-executive institutions and interrogative isolation wards.

3. Create an organ, independent from the Ministry of Internal Affairs of Ukraine and prosecution authorities, to conduct effective investigations into allegations of torture by law enforcers and officers of the penitentiary system.

4. The law enforcers, which are under investigation or internal affairs inquiry conducted by special units of the MIA of Ukraine on reported cases of their use of torture, should be suspended from their duties for the whole period of investigation or check.

5. The public organs should recognize the actual scale of torture. To this effect the law enforcement agencies, penal system and courts have to keep statistical records of cases of torture and publish their statistics.

⁴² <http://www.president.gov.ua/documents/14191.html>

II. THE RIGHT TO PROTECTION FROM TORTURE AND CRUEL TREATMENT

6. To create effective mechanisms for public control of law enforcers and officers of the penitentiary system.

7. To begin the work of the Commission on prevention of torture and make its work optimally transparent to the public.

8. To work out a preventive mechanism to prevent torture, which would meet the requirements of the Optional Protocol.

9. To amend the legislation of Ukraine with provisions on the inadmissibility of confessions obtained under pressure or coercion and without counsel as appropriate evidence as well as procedure for removal of evidence obtained through torture.

10. To amend the provisions of Article 127 of the Criminal Code of Ukraine in order to conform to the requirements of the UN Convention against Torture.

11. The Ministry of Justice has to commence recourse actions against law enforcing agencies whose officers resorting to torture if the European Court establishes the violation of Article 3 of the Convention.

12. To amend legislation and change the practice of national courts on the procedure of taking into custody pursuant to the pilot decision of the European Court in the case of *Kharchenko vs. Ukraine*⁴³, which will “offload” the overcrowded investigative isolation wards and, ultimately, bringing detention conditions in line with European standards.

⁴³ <http://hr-lawyers.org/files/docs/1298370111.pdf>

III. THE RIGHT TO LIBERTY AND SECURITY¹

1. SYSTEM PROBLEMS OF PRETRIAL DETENTION IN CRIMINAL JUSTICE

It should be noted that in 2011 the problems of pretrial detention during criminal proceedings became a subject of public discourse because of the celebrated cases against Yuliya Tymoshenko and former members of her cabinet and other related matters. However, these cases did not create additional problems, but highlighted the systemic problems that had existed for long time, and we covered them in our past reports.

1.1. REASONABLE SUSPICION

The law and practice in Ukraine still fail to take into account and analyze by courts the reasonableness of suspicion in the case concerning the person either detained or retained in custody. This requirement is not formulated in the legislation; moreover, the provisions of the Plenum of the Supreme Court of Ukraine directly forbid the courts to determine the reasonableness of the suspicion.

This directly contradicts the requirements of Article 5 §1(c) and 3 of the Convention, which defines the reasonableness of suspicion as a necessary condition for the lawfulness of detention. While these problems are systemic, in 2011 it was in the news due to suits initiated against officials of the Government of Yuliya Tymoshenko.

As a result, the European Court considers two cases where the problem of reasonable suspicion is a key issue: cases of *Korniychuk*² and *Makarenko*³. In both cases, attention is drawn to the fact that charges are based on the same assertions that have previously been recognized by courts as not containing the elements of the crime, which means there is no reasonable suspicion.

In this respect it is worth noting sufficiently progressive provisions of the draft Code of Criminal Procedure (CCP) prepared by the working group on reform of the criminal legal proceedings⁴, which in Article 129 expressly provides that

“The application of the measures of criminal proceedings is not allowed unless the investigator or prosecutor can prove that: 1 — there is a reasonable suspicion of criminal offenses of such severity that entail application of the measures of criminal proceedings.”

1.2. UNREGISTERED DETENTION

The practice of unregistered detention between actual arrest and drawing up a report continues.

¹ Prepared by Arkadiy Bushchenko, executive director of UHHRU.

² *Korniychuk vs. Ukraine*, No. 10042/11

³ *Makarenko vs. Ukraine*, No. 622/11

⁴ http://minjust.gov.ua/files/KPK_20110705.zip

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The European Committee for the Prevention of Torture (ECPT) in a recently published report on the visit to Ukraine in 2009 stated that

“it is concerned with what seems a “gray” period between the moment when a person is forced to stay with the militia and the moment a detention report is drawn up.” The ECPT also noted that militia officers consider such practice a common procedure. During the meeting with the delegates, “the operative officers ... maintained that they have the right to talk for 3 hours prior to transfer of a detainee to an investigator, who informs the person of his rights and draws up a record of detention. This “three-hour period” does not seem to be included into the 72-hour period of detention in militia custody. ... Many persons claimed that they spent a night in the militia department or were chained to a radiator in the hallway before they were officially detained.”⁵

So far no effective measures were taken to combat the practice of “informal” detention. It should be noted that Article 207 of the draft CCP contains an important provision, which can help to eradicate this practice in the case of fair use:

“A person is detained from the moment s/he is bending by force or obeying a command to stay with the authorized officer or at the premises specified by the officer.”

1.3. ADMINISTRATIVE DETENTION FOR PROSECUTION

Since 2004 we have drawn attention to the problem of the use of administrative detention for prosecution in our annual reports. We also recommended amendments to legislation that would preclude administrative detention for prosecution, for example, by providing for mandatory release of a suspect of committing an administrative offense prior to court hearing (see, for example, report for 2009-2010). This problem was also mentioned in the reports of the CPT and the Conclusions and Recommendations of the UN Committee against Torture, and led to the conclusion about an arbitrary nature of detention in the European Court of Human Rights, for example, in the cases of *Doronin*⁶ and *Zaharkin*⁷.

So far no measures have been taken to tackle this systemic problem, which entails the use of torture and inhuman treatment of detainees and violation of their rights to a fair trial.

In 2011, the European Court held its judgments in several cases where this problem was considered. In its *Balitskiy* judgment, the European Court applied Article 46 of the Convention and maintained:

“The practice of placing a person under administrative arrest to ensure his availability for questioning as a criminal suspect had been previously found by this Court to be arbitrary under Article 5 as the authorities failed to ensure the applicant’s procedural rights as a criminal suspect. In the case *Nechiporuk and Yonkalo v. Ukraine* (No. 42310/04, §264, 21 April 2011) the Court emphasised that by having formally placed the applicant in administrative detention but in fact treating him as a criminal suspect, the police deprived him of access to a lawyer, which would have been obligatory under the Ukrainian legislation had he been charged with the offence of murder committed by a group of persons and/or for profit, an offence in respect of which he was in fact being questioned... Having regard to the structural nature of the problem disclosed in the present case, the Court stresses that specific reforms in Ukraine’s legislation and administrative practice should be urgently implemented in order to bring such legislation and practice into line with the Court’s conclusions in the present judgment to ensure their compliance with the requirements of Article 6. The Court leaves it to the State, under the supervision of the Committee of Ministers, to determine what would be the most appropriate way to address the problems”.⁸

⁵ CPT/Inf (2011) 29 http://www.cpt.coe.int/documents/ukr/2011-29-inf-eng.htm#_Toc257811036
http://minjust.gov.ua/files/KPK_20110705.zip

⁶ *Doronin vs. Ukraine*, No. 16505/02, §56, 19 February 2009

⁷ *Oleksiy Mykhaylovych Zakharkin vs. Ukraine*, No. 1727/04, June 24, 2010

⁸ *Balitskiy vs. Ukraine*, No. 12793/03, §§51 and 54, November 3, 2011

To date, there were no attempts to address this systemic violations.

1.4. THE PROBLEMS OF DETENTION WITHOUT LEGAL BASIS

In previous reports, including that for 2009-2010, we paid heed to such systemic problems in legislation and practice, as the absence in the decision on detention of specification of the term of such measure, keeping in custody without any decision between the completion of pretrial investigation and preliminary court hearings.

On February 10, 2011, in the *Kharchenko* case, the European Court acknowledged that such violations are systemic problems of Ukrainian legislation and practice. The Court stated:

“The Court thus regularly finds violations of Article 5 §1 (c) of the Convention as to the periods of detention not covered by any court order, namely for the period between the end of the investigation and the beginning of the trial and the court orders made during the trial stage which fix no time-limits for further detention, therefore upholding rather than extending detention, which is not compatible with the requirements of Article 5 (see, among many other authorities, *Yeloyev*, cited above, §§49–55). Both issues seem to stem from legislative lacunae”.⁹

1.5. GROUNDLESS COURT DECISIONS AS TO THE DETENTION ON REMAND

In *Kharchenko* case the European Court also found the lack of grounds for decision on detention and continued detention to be a systemic problem. The Court noted that

“even for lengthy periods of detention the domestic courts often refer to the same set of grounds, if any, throughout the period of the applicant’s detention, although ... after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty and the judicial authorities should give other grounds for continued detention, which should be expressly mentioned by the domestic courts”. The Court noted that “the issue should be addressed by the domestic authorities, to avoid further repetitive complaints under this head”.¹⁰

However, the state seems to adopt no measures to tackle this problem. In addition, in the known cases against Yuliya Tymoshenko and Yuriy Lutsenko the courts justified the decision on custody so that these decisions themselves interfered with their rights under Articles 6 and 10 of the Convention¹¹.

Moreover, recently the public prosecution department seems to deepen this systemic problem. In some cases, the prosecutor’s office, dissatisfied with the decisions of courts, which, among other things, released suspects from custody because the prosecution had failed to prove the necessity of their detention, i.e. directly implemented the principles laid down in Article 5 of the Convention, the prosecutor’s office resorted to administrative pressure of judges accusing them of “breaching the oath” using its representation at the High Council of Justice of Ukraine. For example, in one case Deputy Prosecutor General of Ukraine Havryliuk, who is also a member of the High Council of Justice, demanded to fire judges of the Appeal Court in Kyiv for breaching the oath as they had released the accused from custody because prosecutors had failed to give grounds for further detention¹².

So, the public prosecution department of Ukraine deepens the systemic problem defined in the *Kharchenko* case, which will only increase the number of applications to the European Court and significant payments from the state budget of Ukraine.

⁹ *Kharchenko vs. Ukraine*, No. 40107/02, §98, February 10, 2011

¹⁰ *Kharchenko vs. Ukraine*, No. 40107/02, §99, February 10, 2011

¹¹ See in more details: “Политические преследования в современной Украине: 2010–2011”, <http://www.helsinki.org.ua/index.php?id=1321887763>

¹² See in more details: <http://www.helsinki.org.ua/index.php?id=1311841868>

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Therefore it is worthwhile to consider the CCP provisions requiring careful study of risks with reference to particular circumstances, obligation of prosecution to provide evidence for such circumstances and the duty of the court to justify why other preventive measures can not reduce the existing risks.

1.6. THE RIGHT TO CHALLENGE DETENTION

As before, under the law, during the preliminary investigation the detainee has no right to challenge the legality of such measure. Meanwhile the draft CCP provides reasonable and well-developed safeguards for detainee's appeal, which, if the bill is approved, can meet the requirements of Article 5 §4 of the Convention.

There remains a problem of complaining against detention at the stage of court proceedings. In several cases against Ukraine the European Court examined this issue, and finally, in the *Kharchenko* case, recognized it to be systemic and concluded:

“As to the right to review of the lawfulness of the detention guaranteed by Article 5 §4, the Court notes that ... it faced an issue of the domestic courts' failure to provide an adequate response to the applicants' arguments as to the necessity of their release. Despite the existence of the domestic judicial authorities competent to examine such cases and to order release, it appears that without a clear procedure for review of the lawfulness of the detention the above authorities often remain a theoretical rather than practical remedy for the purposes of Article 5 §4. Moreover, speediness of review of the lawfulness of the detention seems to be compromised by the fact that such a review is linked to other procedural steps in the criminal case against the applicant during the investigation and trial, while such procedural steps might not necessarily coincide with the need to decide on the applicant's further detention promptly and with reasonable intervals... The Court considers that these issues should be addressed by the domestic authorities, to avoid further repetitive complaints under this head”.¹³

2. DEPRIVATION OF LIBERTY IN OTHER CASES

2.1. ADMINISTRATIVE DETENTION

The Constitutional Court of Ukraine recognized as unconstitutional a number of legal provisions for administrative detention, which approved detaining a person without a court order for a period exceeding 72 hours.

Also, the Constitutional Court found that the “bringing” of a person to militia and keeping her/him there in a state of intoxication is still deprivation of liberty.

This decision indirectly implies that the Constitutional Court understands the concept of “crime” used in Article 29 of the Constitution in a broader sense than the concept is understood in the Criminal Code of Ukraine. This follows from the fact that the Constitutional Court extended the provisions of paragraph 3 of this Article relating, judging from the text of the article, only to “crime” to cover offenses, which are not crimes in the strict sense of the term.

2.2. DETENTION IN CUSTODY PENDING EXTRADITION

In our report for 2009–2010, we drew attention to the CCP novelty concerning extradition issues. Currently there is no sufficient information to evaluate the effectiveness of this procedure. But this year the European Court of Human Rights has handed over to the Government of Ukraine *Kurbanbayev* case¹⁴ where this issue will be examined.

¹³ *Kharchenko vs. Ukraine*, No. 40107/02, §100, February 10, 2011

¹⁴ *Kurbanbayev vs. Ukraine*, No. 42289/09

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2.3. DELAYED RELEASE FROM DETENTION DUE TO ADMINISTRATIVE INCONSISTENCIES

In the *Mokallal* case¹⁵ the European Court found a violation of right to liberty because the applicant remained in detention pending extradition three days after the Iranian government had told our government that the need for extradition expired.

In the *Oshurko* case¹⁶ the applicant was kept in the colony for 14 days after the Court of Appeal decided on his release on parole because of the delay with sending the court decision to the colony.

Earlier, a similar violation has been established in the case of *Kats and Others v. Ukraine*¹⁷.

2.4. MANIPULATION WITH PROCEDURES

The Nowak's case is another — in addition to tempering with administrative detention — example of manipulation procedures used by militia. The applicant was apprehended in Lviv on 20 January 2005 and deported to Poland on 24 January 2005 respectively, as official documents read, according to Article 32 of the Law on the Legal Status of Foreigners. In reality, it was the extradition because the militia had information from Polish colleagues that he was wanted in connection with a criminal case in Poland.

The court also noted that there is no legal regulation of apprehension of aliens that would meet the quality requirements of the law.

3. MECHANISMS OF CONTROL

The report for 2009-2010 noted the actual termination of the Office of Human Rights Monitoring, which was never renewed.

However, the Presidential Decree of September 27, 2011 established the Commission on the Prevention of Torture and Presidential Decree of November 18, 2011 approved the list of members of the Commission. As far as we know, by this time (early December) the Commission has not commenced working, although the fact of its creation should be welcomed.

4. RECOMMENDATIONS IMPLEMENTED

The following recommendations suggested in last years' reports were carried out:

- consent to publish the CPT report compiled after the visit to Ukraine in 2009 was given and the report was made public;
- the law “On Free Legal Aid” was adopted providing, in particular, the right to free legal assistance to individuals whose mental health was called in question.

5. RECOMMENDATIONS

- to amend the law “On Free Legal Aid” with the right of (1) aliens to free juridical assistance in all cases of apprehension and (2) juveniles apprehended under any circumstances;

¹⁵ *Mokallal vs. Ukraine*, No. 19246/10, November 10, 2011

¹⁶ *Oshurko vs. Ukraine*, No. 33108/05, September 8, 2011

¹⁷ *Kats et al. vs. Ukraine*, No. 29971/04, December 18, 2008

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- to hasten the adoption of the new Criminal Procedural Code of Ukraine taking into account the remarks made by experts from the Council of Europe or incorporate relevant provisions into the current Criminal Procedural Code;
- to provide in relevant laws for mandatory recording of any apprehension regardless of the grounds for its application;
- to provide in the relevant laws the duty of immediate release of a person if there is a decision on release or decision, under which s/he was deprived of liberty, expires and to provide for holding responsible for breach of this duty; To provide the Commission on the Prevention of Torture with sufficient resources and authority to carry out visits to places of deprivation of liberty;
- to start drafting a bill on national preventive mechanisms under the Optional Protocol to the Convention against Torture;
- to provide for mandatory release of persons apprehended in administrative procedure after drawing up a record on wrongdoing under the obligation to appear before the body authorized to hear cases of law infringement; and
- to foresee the obligation of the court deciding on detention or prolongation of detention to determine the reasonableness of the suspicion or accusation of a person, and to justify the preventive measure under the circumstances.

IV. THE RIGHT TO FAIR TRIAL¹

1. GENERAL OVERVIEW

Over the last two years right to fair trial has been in the focus of public attention due to the obvious violations of its standards in the course of long-lasting public trials against politicians. On the other hand, the judicial reform carried out in mid-2010 is yielding its first results, which do not give any grounds for optimism.

The old problems of judiciary system persist. In particular, the trials still tend to drag along beyond any reasonable terms; the workload per judge is increasing (on the average, up to 130 cases per year, and 138 materials per judge at the Highest Administrative Court of Ukraine); the court's rulings are not implemented if the state is a party to the case, the corruption in courts never decreased and they are still perceived by the public as the most corrupt bodies; the number of complaints against them grows annually. The selection of judges failed to improve, as was expected², while the structure of their education through higher educational establishments accredited by the Ministry of Education and Science, and not through the independent universities, leaves much to be desired.

Meanwhile, new serious challenges related to further loss of independence by the judges and their further politicizing and outside manipulating. The judicial reform practically identified the only courts' controlling body — Supreme Judicial Council, which, in its turn, is totally subordinate to politicians, and, specifically, to dominating political force. This political dependence brought to life rather bizarre (from the legal point of view) decisions of the courts, from local courts' rulings to the decisions of the Constitutional courts. However, the independence of judges is attacked also in other areas.

In order to establish total control of judiciary system in Ukraine, the power organized staff rotation in the courts. As a result of pressure, lot of judges resigned on principle, although authorities claimed that they did it to get better retirement benefits. In other words, authorities pretend to ignore the loss of valuable and experienced personnel. According to different assessments, more than 1000 out of nearly 8500 judges' positions remain vacant.

In November, 2011 the Council of administrative courts' judges recommended Ihor Temkizhev for the Chief Justice of the Supreme administrative court. Earlier this position was held by Olexandr Pasenyuk, recently appointed the judge of the Constitutional court under parliamentary quota. One week earlier (on November, 17) Temkizhev was transferred to the Supreme administrative court from the economic courts' system, within which over the years 2002–2010 he served as a Head of economic court in Donetsk oblast'. From December 2010 he was the Head of Dnipropetrovsk Appellation economic court. The Council members unanimously approved Temkizhev's candidature. The judges had no questions for him till the voting started. It means that administrative court judges

¹ Prepared by Arkady Bushchenko, attorney, executive director of the UHHRU and Volodymyr Yavorsky, UHHRU Board member.

² See e. g. *First judges election under the new law; Did the sieve crack?* Roman Kuibida, Center for Political and Legal Reforms <http://www.pravo.org.ua/index.php/2010-03-07-18-06-07/laworganisandstatussuddiv/249-2011-05-25-10-17-07>.

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recognized that they did not have any worthy candidates capable of becoming the Head of Supreme administrative court. It's quite possible that national judicial system for the umpteenth time demonstrated appointment of upper officials on the instructions from above, despite the legal provision that the candidate should be nominated by the judges' self-governance body. It looks as if they were just complying with political requests. Inertia and lack of any opposition of judges in this situation confirms their total subjugation to the political power.³

Today the heads of the key judiciary institution all originate from Donetsk oblast' and have no work record in respective courts. Instead, they are all somehow linked to the power in force. For example, the Head of the specialized court for civil and criminal cases Leonid Fesenko, contrary to the law, for a lengthy period of time combined his position with the duties of Supreme Rada deputy from the Party of Regions. The Head of Supreme Economic court Viktor Tat'kov was formerly the Head of Donetsk Appellation economic court and had no work experience in the cassation courts.

The Supreme Court of Ukraine remained the last entity not controlled by the authorities. The struggle to gain that control lasted for a long time, despite of the fact that the competences of its Head were terminated on September 29, 2011. Initially, the judicial reform deprived the Supreme Court of Ukraine of all its remit. By the end of 2010 the Head of the SCU V. Onopenko was pressurized to make him resign. Attempts to make him resign by the SCU Plenum's decision "on lack of trust" failed.

It was probably after this fiasco that the prosecutor's office filed a criminal case against ex-deputy Minister of Justice Yevhen Korniychuk, who is Onopenko's daughter husband. The action was performed with utmost cynicism: on December 22, 2010, right after his daughter was born, he was subpoenaed to the prosecutor's office and detained there. He was accused that on February 23, 2009 (two years prior to arrest), he signed a letter concerning purchase of legal services for one of the suppliers — "Magister" LTD — in the "Naftogaz" case. Meanwhile there are solid grounds to argue that this persecution is directly linked to Onopenko. Earlier a criminal case against Onopenko's daughter was filed. By the end of November 2011 it became clear that Onopenko would run for the SCU Chief Justice position. At the same time it became known that the prosecutor's office re-qualified Korniychuk's actions as milder offense⁴ and the attorneys appealed for amnesty, which was granted by the court in early December 2011.⁵

However, Onopenko's removal from the SCU did not help in supporting the candidate offered by the authorities. That's why these latter introduced the changes to the legislation, aimed allegedly at the implementation of EC Venice Convention on broadening the SCU competences. It became obvious, however, that not a single recommendation of the EC has been implemented, and the actual goal of amendments was totally different⁶. The law enlarged the staff of the SCU up to 48 judges (as opposed to former 47). The 48th judge later can become the Chief Justice of the Supreme Court of Ukraine. Four judiciary chambers, headed by four deputy-heads were restored (the total number will now amount to five instead of one). The members of Higher Qualification Board of judges of Ukraine, appointed from the SCU judges will be entitled to participate in the Plenum meetings, whose remit covers the election of the SCU Head. In reality, it means that two members of the Supreme Judicial Qualification Board — I. Samsin (the Head of the Board) and M. Pinchuk (the deputy head), appointed to it by the SC, will be able to take part in the meeting. Their participation could affect the redistribution of votes and even candidates in the election of the SC Head election by Plenum, for the benefit of the candidates supported by the President. Obviously, the consideration by the Supreme Judicial Council of case concerning the dismissal of former judiciary chamber

³ *Ukrainian judges obsequiously obey authorities' instructions*. Roman Kuibida, Center for Political and Legal Reforms <http://www.pravo.org.ua/index.php/2010-03-07-18-06-07/laworganisandstatusuddiv/422-2011-11-26-10-12-19>.

⁴ See. <http://www.unian.net/ukr/news/news-473030.html>.

⁵ See. *Yevhen Korniychuk out of the office* // "Kommersant Ukrainy" newspaper No. 207 (1481), 12.12.2011, <http://www.kommersant.ua/doc-rss/1834394>.

⁶ See in detail: *President signed the law on loyal Supreme Court*, Roman Kuibida, Center for Political and Legal Reforms <http://www.pravo.org.ua/index.php/component/content/article/464-2011-11-10-16-28-31>.

for criminal cases' judges on the allegation of breach of oath was also aimed at the redistribution of votes. Judges were even threatened with criminal accusations against all of the members of the former SCU chamber for criminal cases, who in 2009–2010 allegedly illegally changed verdicts for 15 persons convicted for life, to 15 years of imprisonment. Moreover, the general prosecutor's office speaker announced that the staff of the SCU chambers for criminal cases "set free" defendants who have committed most dangerous crimes against society. In other words, the Supreme Court judges were publicly accused of liberating the criminals.⁷ In fact, this law and trials served political interests, i.e. redistribution of votes at the SCU Plenum.

In the end authorities anyway failed to appoint their own candidate. The SCU Plenum supported more neutral candidate Petro Pylypchuk, who was elected the Chief Justice of the SCU by parliamentary voting on December 23, 2011, although his term of office will come to an end once he turns 65, i. e. in October 2012, and there will be enough time to get ready to the new elections of the SCU Head.⁸

The case of the former Chief Justice of the Appellation Court of the ARC Serhiy Lunin is also worth mentioning. On September 9, 2011, the prosecutor's office of Crimea, helped by the special NSU unit "Alfa" held a search with subsequent confiscation of documents from the Appellation Court of the ARC. On September 12 the Chief Justice of the Appellation Court of the ARC Serhiy Lunin was charged under two articles of the Criminal Code with abuse of authority and violation of the law on state secret. The case was classified as "top secret", so that even Lunin himself had no access to its materials. Mass media divulged the information, according to which the alleged violation of the law consisted in moving a certain "secret" office from one floor to another. One of the media version sustained that criminal case against Lunin was initiated by the NSU and prosecutor's office revenge for Lunin's refusal to sanction the tapping of cell phones belonging to three members of Higher Judicial Council, including the Council Head. Lunin himself refrained from any comments with regards to the fact and motives of filing criminal case against him.

On September 29 he submitted request to resign, which was satisfied by the Supreme Rada on October 6. On October 12 the prosecutor's office of the ARC closed the case on the grounds of absence of criminal evidence.⁹

This case is a vivid example of pressure, under which the judges have to operate without any protection.

Significant restriction of access to justice due to the constant changes in competences, reductions in statutes of limitations, setting up of a specialized SACU chamber for the cases against President and certain other bodies of authority, whose decision cannot be appealed, is another manifestation of violation of right to fair trial.

The changes to the Law "On access to court decisions" also deserve mentioning in this context. According to them, not all the court rulings will be entered into the national registry of court decisions, but only those, the records of which will be recognized as necessary by the Council of Judges of Ukraine with the approval of National Judicial Administration of Ukraine. Let's remind that the Unified National Registry of Court Decisions is the database of all the courts' rulings, open to all the Internet users. It was set up on the NGOs initiative despite the opposition of certain

⁷ Deputy head of the Prosecutor's General office Mykhailo Havrylyuk held a briefing; info from the Prosecutor's General PR office of November 7, 2011. http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=98834&fp=31; *Corruption scandal in the SCU: is power getting ready to the Court Head elections?* UNIAN, 08.11.2011, <http://www.unian.net/ukr/news/news-467161.html>; *Cynical seizure of power by authorities goes on* // Ukrainska Pravda, November 09, 2011. <http://www.pravda.com.ua/articles/2011/11/9/6743901/>.

⁸ See also. *Operation "Supreme Court of Ukraine"* Dzerkalo tyzhnya, Olexander Prymachenko, No. 45, December, 09.2011, http://dt.ua/LAW/operatsiya_verhovniy_sud_ukrayini-93476.html; *Supreme Court of Ukraine: power tricks and laws of nature* // Ukrainska Pravda, December 12, 2011 <http://www.pravda.com.ua/articles/2011/12/12/6831251/>.

⁹ *Case without crime* // Law and business No. 47 (1034) 19.11–25.11.2011, http://zib.com.ua/ua/6302-kriminalnu_spravu_stosovno_sergiya_lunina_zakrito.html; "Classified" charge // Law and business, No. 38 (1025) 17.09.2011–23.09.2011, http://zib.com.ua/ua/5081-zasekrechene_obvinuvachennya.html.

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dishonest judges who were afraid of making courts' decisions open for public at large. Now these judges have authority to "filter" the said courts' decisions with total disregard of public opinion, for whose benefit the Registry was set up. Under these circumstances the Registry will no longer serve as an instrument of public control over judiciary branch of power.

At the same time the fulfillment of promises to improve the funding of the judiciary branch was for the umpteenth time transferred from the year 2012 to 2013.

Ukraine persists in ignoring the rulings of the European Court of Human Rights and keeps doing nothing to put an end to the violations of right to fair trial. By the Court pilot ruling in the case "*Yuriy Mykolyovych Ivanov vs. Ukraine*"¹⁰ the state was obliged to introduce efficient mechanism (or set of measures) for the legal protection, which would ensure adequate and sufficient protection in case of non-compliance or delays in complying with the national court's decisions, for which the state is responsible under the principles, established by the practices of the European Court of Human Rights. In compliance with the said decision, the Ministry of Justice developed a draft law of Ukraine "On state guarantees of compliance with courts' rulings", which on January 14, 2011 was submitted to the Supreme Rada of Ukraine for consideration. Later it was revoked, and on September, 8 a similar draft law was submitted.¹¹ It is noteworthy, that it was passed in the first reading just next day following its submission to the parliament. We believe that this law does nothing to improve compliance with courts' decisions. It is aimed, rather, at reducing the number of court claims vs. state and respectively at decreasing the number of rulings passed against the state. Nevertheless, the European Court of Human Rights on the motion from the Ministry of Justice, continued the term for complying with pilot decision by July 15, 2011, by its letter of January 21, 2011. The decision, however, was not complied with by the new date either, so that the new term was not defined.

In September the EC Committee of Ministers approved an interim resolution on Ukraine's compliance with the European Court of Human Rights pilot ruling in the case "*Yuriy Mykolyovych Ivanov vs. Ukraine*" at the meeting on the monitoring of the countries' compliance with the European Court of Human Rights. In its resolution the EC Committee of Ministers greeted the approval of the first reading of the draft law "On state guarantees of compliance with courts' rulings", granted by the Supreme Rada of Ukraine on September 9. the EC Committee of Ministers called out to Ukraine to complete this legislative process successfully and to allocate respective funding needed to comply with European Court of Human Rights pilot ruling in the case "*Yuriy Mykolyovych Ivanov vs. Ukraine*" and to ensure harmonizing the said draft law with the principles of European Convention for Human Rights.

The EC Committee of Ministers also called out to Ukraine to strengthen its efforts in regulating similar cases filed with the European Court of Human Rights.¹²

Generally speaking, the systematic approach and continuity are still lacking in the area of implementing national policy with respect to the right to fair trial. As demonstrated above, the authorities are often guided by narrow political interests or short-term cost-savings, while this attitude leads to much larger losses in the future.

¹⁰ Decision of October 15, 2009 available in Ukrainian <http://ovu.com.ua/articles/5613-sprava-yuriy-mikolayovich-ivanov-proti-ukrayini-za>.

¹¹ See draft law No. 9127 of September 8, 2011 "On state guarantees for compliance with courts' rulings", http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=41092, а також критика законопроекту від УГСПЛ: <http://helsinki.org.ua/index.php?id=1316774325>.

¹² See here <http://www.coeukraine2011.mfa.gov.ua/komitet-ministriv-radi-evropi-skhvaliv-rezolyutsiyu-pro-vikonannya-ukraiinoyu-pilotnogo-rishennya-evfor> for text in English: Interim Resolution CM/ResDH(2011)184 "Yuriy Nikolayevich Ivanov against Ukraine and of 386 cases against Ukraine concerning the failure or serious delay in abiding by final domestic courts' decisions delivered against the state and its entities as well as the absence of an effective remedy", https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec%282011%291120&Language=lanEnglish&Ver=volres&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383#P9032_536470.

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For example, instead of complying with the decisions of the national courts they do quite the opposite. First they ignore the obvious, i.e. legal norms, spelled out in the law and refuse to abide by them, thus forcing citizens to go to court. As a result, more than 200 cases, related to the payments of social benefits, are waiting for decisions in Ukrainian courts annually. Next, the state tries to annihilate the very law, the protection of which people are seeking. Or it can raise the tariffs for court services through establishing additional legal fees, thus complicating access to court. Alongside with that, it discriminatorily shortens statute of limitation in cases, where administrative bodies act as respondents, i.e. in administrative justice. Let us remind that statute of limitations in civil cases amounts to 3 years, while in administrative case it's been reduced to 6 months, and in some cases — to one month. Courts, in their turn, somehow charge the state only within the statute of limitations. Into the bargain, the jurisdiction for social and economic rights-related cases is constantly changing. Over the period between January and March of 2010 and September–December 2011 cases, related to social benefits payments, were heard within the framework of administrative justice, and over the period between March and September 2010 — within the framework of civil justice. In fact, power is erecting more and more obstacles for the citizens' access to courts, where they hope to protect their rights. The state spends millions of hryvnas for over 200 thousand hearings a year — for the cases which by merit do not contain legal dispute. The local authorities are obliged to appeal the decisions in appellation or cassation courts. And the state throws much more money to the wind, transferring the cases from administrative to civil courts and back. This policy engenders another problem — overload of judiciary system, deterioration of the quality of courts' operation in their desperate efforts to meet the deadlines for each case.

And, finally, the government literally provokes the responsible bodies not to comply with the courts' decisions. For example, the UHHRU learnt about the instruction to suspend payment of pensions by the courts' decisions and to stop immediately the funding of notifications for the payment of pensions by the courts' decisions. This information was obtained from the letter No. 13024/02–20 of 24.06.2010, sent out to the heads of chief departments of Pension Fund of Ukraine in the ARC, oblast's, and the cities of Kyiv and Sebastopol, signed by the deputy head of department V. Nykytenko and distributed by electronic mail. In other words, the bureaucrats are instructed to disobey the courts' orders, which came in force. On the basis of this letter the head of the Pension Fund department in Kharkiv oblast' V. Achkasov and the deputy head of Pension Fund department in Donetsk oblast' ordered their subordinates to suspend payment of pensions by the courts' decisions and recalculate the amount of pensions without any consideration of court's decision. Later UHHRU learnt that this instruction was stopped, but we do not believe that it was the only document.

2. INDEPENDENCE OF JUDGES AND COURTS

As was mentioned above, the Supreme Judicial Council became the main instrument of exerting pressure on judges. This body concentrates extremely important functions:

- key role in appointing and dismissing judges;
- right to initiate, through its members, a disciplinary action against judges, and broad competences, allowing to request any documents (in spite of the fact that requesting the documents of the case in progress, has been recognized unconstitutional);
- appointment of chief justices (this function is in direct contradiction to Constitution).

Moreover, this entity remains highly politicized. Under the Constitution the Supreme Judicial Council is composed of twenty members. The Supreme Rada of Ukraine, President of Ukraine, congress of judges of Ukraine, congress of Ukrainian lawyers and convention of higher legal educational establishments and scientific institutions appoint three members each to the Supreme Judicial Council, while all-Ukrainian conference of the prosecutor's office representatives appoint two members to the Council. By virtue of their office the Chief Justice of the Supreme Court of Ukraine, the Minister of Justice of Ukraine, and the Prosecutor General of Ukraine are members

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of the Supreme Judicial Council. Changes in the procedure for appointing council members involve Constitutional changes; that's why they are being postponed. It does not justify, however, the extraordinary authority vested in this body.

Therefore, under the circumstances, when the parliamentary majority and the president belong to the same political force, which appoints high executive officials (heads of higher legal educational establishments, ministers, Prosecutor General etc.) only 7 members of the Supreme Judicial Council, at most, can remain independent.

First of all, the SJC influence was manifested in dismissing the judges for the breach of the oath. A most vivid example of this influence was given above, i.e. the beginning of investigation concerning all the judges of the "criminal chamber" on the eve of the SJC elections. This investigation, by the way, was instigated by the Prosecutor General office.

Human rights activists believe that the SJC turns into a kind of "Gestapo", i. e. an instrument of bullying and punishing the judges.

In our previous report we stated already that mass resignation of judges as well as mass violations of disciplinary actions against judges can result from this pressure.

Probably it is the main reason of amazing obedience, demonstrated by the Council of Administrative courts' judges, who unhesitatingly and unanimously recommended for Chief Justice of the Highest Administrative Court a person, absolutely unknown to them, who had worked a week only in the said court.

The SJC is not the only available mechanism. There are many others — probably, less rigid, but efficient enough. For example, the meetings between executive officials and judges, when these latter are "advised" as to the rulings, needed by the authorities.

Thus, a round table "Problematic issues of application of the law, regulating social benefits for certain categories of citizens in Ukraine, held in Vinnytsa on October 14, 2011, was no exception. Although it was dedicated mainly to legal problems of the application of law, some discussions demonstrated that the meeting was aimed at showing the judges the "right" way of dealing with disputes related to the payment of social benefits. As stated deputy Chief Justice of the Highest Specialized Court for civil and criminal cases M. Pshonka "presently the state, taking into account its financial constraints, is incapable of timely returning all the money due and paying all the social benefits". He also stressed that the more "wrong" decisions will be passed by the courts, the larger will be the state debt, and as many people go to the European Court for Human Rights, seeking protection of their rights, this debt will increase even further. Hence, the judges should show maximum "caution" in handling these cases in order to avoid decisions which can be harmful for the state finances. We found this position, voiced by the representatives of the judicial branch, whose calling is to protect the law and not the state finances, most unusual.

2.1. PROSECUTOR'S OFFICE INFLUENCE, EXERTED THROUGH THE SUPREME JUDICIAL COUNCIL

The cases, when the prosecutor's office, through its representatives in the Supreme Judicial Council instigated disciplinary action against judges for the breach of oath, have become more numerous. Allegedly, the judges passed the rulings, which were "incorrect from the prosecutor's office point of view", in lawsuits where the prosecutor's office represented the state.

The documents, which became available to the Ukrainian Helsinki Human Rights Union, showed that on June 7, 2011 deputy Prosecutor General of Ukraine Mykhailo Havrylyuk, who is also a member to the Supreme Judicial Council, approached the Supreme Judicial Council with the proposal concerning dismissal of three judges of appellate court in Kyiv — Ihor Moroz, Valeriy Lyashevych and Lyudmila Bartashchuk — from their office.

The Prosecutor General Representative intended to penalize the judges for their adherence to the Constitution of Ukraine and to the European Convention on Human Rights. The thing is that the judges in question passed a decision to acquit a defendant due to the absence of specific evidence which would justify his further stay behind the bars. This decision is completely in line with article 29 of the Constitution of Ukraine and article 5 of the European Convention on

Human Rights, which stipulate the right to freedom as inalienable human right; it means that no one needs to prove that he/she has grounds to stay free. It is also supported by the practices of the European Court, which many a time stressed that “there is a presumption for the benefit of acquittal”, that “prior to conviction a person is presumed not guilty” and that “he/she should remain free till the verdict is passed, as his/her stay in custody becomes unjustified”. In fact, the deputy Prosecutor General accused the judges of failure to provide justification for keeping a person in custody. The court prosecutor did not provide any material evidence to support such decision.¹³

UHHRG sent numerous appeals to the bodies of power. In the meantime the Prosecutor General office revoked its motion concerning the judges in question.

In November 2011 the Center for legal support supplied information about another case. It received the documents concerning Prosecutor's General petition requesting dismissal of the judge Roman Brehey. He fell into disfavor for passing two acquittal rulings based on completely reliable evidence. Alongside with this decision the judge passed a special resolution specifying investigation faults. The Appellation court invalidated these verdicts and remanded the case for the new hearing. The Prosecutor General office, however, decided to use out-of-court means to get rid of the unwanted judge.¹⁴

It is also noteworthy that Prosecutor General Office also initiated all the SJC investigations against all the judges of the Criminal Chamber. Besides, it was on the motion of the first deputy Prosecutor General and the Supreme Judicial Council member R. Kuzmin that the SJC started to look for the evidence to dismiss four judges of the Supreme Court (V. Zagoldny, V. Pyvovar, A. Red'ka and A. Skotar) for the alleged breach of oath when dealing with the appeal in a criminal case in the years 2004 and 2008.¹⁵

The unconfirmed data, which cannot be checked with the help of available sources, show that the Prosecutor General Office pressure on judges through SJC has become multiple and systematic.

The situation, when one of the parties to the process, unhappy with the results of court hearing has a right to influence the court by means of administrative mechanisms, is totally unacceptable. Under the European standards of judges' independence, “the judges must pass their rulings absolutely independently and have an opportunity to act without any restrictions, illegal influence, instigations, pressure, direct or indirect interference, harassment, regardless of who and on what motives tries to initiate these actions. The law should envisage the sanctions against persons trying to influence the judges” (EC Committee of Ministers Recommendations No. (94) 12).

2.2. JUDGES' RESPONSIBILITY AND PRESSURE THROUGH CRIMINAL INVESTIGATION

In 2010 Supreme Judicial Qualification Board received 6 108 complaints against judges' actions, including 480 against the Donetsk oblast' judges. In 2011 17 538 were received. In 2011 116 were held disciplinarily accountable¹⁶. It means that only 0,7% of complaints involved disciplinary consequences for the judges, or that 99,3% of the complaints have been groundless. However, it is hardly believable; it is more likely that for some reasons the judges manage to dodge responsibility.

¹³ See in more detail: *Prosecutor general office wants to punish judges for their adherence to the Constitution and European Convention for Human Rights Protection* 28.07.2011 <http://www.helsinki.org.ua/index.php?id=1311841868>; Administrative pressure on judges continues. Center for legal assistance, A. Bushchenko, attorney <http://hr-lawyers.org/index.php?id=1317139884>; Unacceptable pressure on judges exerted by the Prosecutor general office GPO appeals to SJC: <http://hr-lawyers.org/index.php?id=1311595142>

¹⁴ See more: New attempts to influence judges Новые попытки давления на судей, Center for legal assistance <http://hr-lawyers.org/index.php?id=1321538484&w=%EA%E8%F0%EE%E2%EE%E3%F0%E0%E4>

¹⁵ Kuzmin continues verifications in the Supreme court // *Ukrainsla Pravda*, November 16, листопада 2011, <http://www.pravda.com.ua/news/2011/11/16/6759259/>

¹⁶ Інформація про притягнення суддів до дисциплінарної відповідальності (рішення за 2011 рік), <http://vkksu.gov.ua/ua/distiplinarne-provadjennya/informatsiya-pro-prityagnennya-suddiv-do-distiplinarnoi-vidpovidalnosti/informatsiya-pro-prityagnennya-suddiv-do-distiplinarnoi-vidpovidalnosti-2011/>

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On the other hand, the SJQB sometimes becomes an instrument of bringing pressure upon judges. Prosecutor General Office uses this mechanism in the same way it uses the Supreme Judicial Council. Thus, in November, the SJQB censured Darnitsa district court judge T. Trusova, who, contrary to the Prosecutor General office's wish, changed the preventive measures with regards to the detained. Evidently, this occurrence gave a hint to other judges on how to choose preventive measures "correctly", i. e. in accordance with Prosecutor General office's wishes.¹⁷

In July 2011, the Prosecutor office of Kyiv oblast' proposed to hold the judge of Irpin town court (Kyiv oblast') Serhiy Anipko disciplinarily accountable. The fact of the matter was that the judge disagreed to keeping the suspect, from whom 21 pieces of arms and significant number of ammunition were confiscated, in custody. Instead the judge imposed the written undertaking not to leave. The SJQB member V. Masliy asked the judge what positive characteristics he found with the suspect, which led him not to order keeping him in custody. S. Anipko pointed out that the motion submitted by the prosecutor office, contained no grounds which warranted custody. Besides, the judge stressed that according to case documents some pieces of arms were registered. SJQB members inquired what the judge's grounds for taking suspects in custody in his former cases have been. The judge explained that it was his first case involving taking into custody. "And the last as well", added the SJQB member Nina Fadeyeva, thus showing her contempt of the judge. The SJQB decided to make a motion to the Supreme Judicial Council requesting S. Anipko dismissal from the office, as in the judges' opinion his actions could be classified as breach of oath.¹⁸ It was another lesson to the judges on how to obey the Prosecutor's office orders. The Supreme Judicial Council refused to dismiss the judge, although this latter publicly recognized his mistake, stating that now he would have passed a different decision. So in the future he hardly can be expected to turn down another prosecutor's office motion on arresting a person.

Over the period between 2005 and November 25 2011 the Supreme Judicial Council passed only 15 decisions on motions concerning judges' dismissals once the verdicts against them have come into force: in the year 2005 — 0, 2006 — 2, 2007 — 0, 2008 — 1, 2009 — 0, 2010 — 10, 2011 (as of November 25) — 2 decisions were passed. Between September 2010 and December 2011 the HQBUJ passed 14 decisions concerning judges' removal from office due to the start of criminal proceedings against them.¹⁹

In 2008, 4929 public complaints against judges' actions were submitted to the Supreme Judicial Council; in 2009 — 4533 complaints, in 2010 — 8587, between January and September 2011 — 7356.²⁰

According to the data provided by the SJC Head, 566 inspections of 793 judges' professional operation (10% of all the countries' judges —author's note) were warranted. In 218 cases absence of breach of oath was found. Motions on dismissal due to breach of oath were made with regard to 39 judges. суддів. 8 of them were renewed in office on the decision of the Higher Administrative court. Altogether 117 such motions have been made over the last 12 years.²¹

The tendency of increase in number of complaints is obvious. Naturally, some of them can be unjustified, but hardly whole 99,3%.

¹⁷ *На суддю наклали стягнення за противників Лукашенка* // Закон і бізнес, No. 48 (1035) 26.11.2011–02.12.2011, http://www.zib.com.ua/ua/6510-suddya_yaka_vidmovilasya_sankcionuvati_trimannya_pid_vartoyu.html.

¹⁸ *Is Pretrial detention center needed?* // Law and business, No. 31 (1018) 29.07–06.08.2011, http://www.zib.com.ua/ua/4201-bez_sizo_ne_obiytysya.html.

¹⁹ "Crime of punishment" // "Dzerkalo tyzhnay", No. 4, 03 лютого 2012 року, http://dt.ua/LAW/zlochyn_pokarannyam-96699.html.

²⁰ Ibid.

²¹ Head of SCJ Kolesnychenko "Breach of judge's oath is not a crime" // Censor NET, 06.04.11, http://censor.net.ua/resonance/163884/glava_vsyu_kolesnichenko_naruszenie_prisyagi_sudi_eto_esche_ne_kriminal

Another observation is also of interest. In general, results of different assessments prove that the courts are rather corrupt; nevertheless, the cases of holding the judges accountable are rare despite a substantial number of facts of bribing. Why, then, it happens? We can offer a number of possible reasons:

- poor quality of criminal investigation, not leading to the logical conclusion of a case — however, it's hardly believable, as the structure of our Inquisition-like system would not allow anyone go unscathed regardless of his/her guilt or innocence;
- law enforcement professionals' corruption — i. e. they agree to terminate criminal prosecution for certain fee — this version seems more close to life and probably clarifies some cases;
- the use of criminal prosecution documents for future blackmail — this version seems the most credible. It is not easy to find the levers, which would force a judge to make right decisions. However, when the prosecutor's office has some "material" against the judge, it will always achieve the desired goal within the statute of limitations of the crime. It is much more important for the prosecutor's office and law enforcement bodies than a sporadic bribe for closing a criminal case against the judge. This latter should always be kept in suspense.

It is this last cause, which is pointed at by the reporters in the course of journalists' investigations.

Thus the journalists from "TVi" in their program made public the testimony of the former Chief Justice of Lviv Appellation Court Zvarych, who was sentenced to 10 years of imprisonment with confiscation of property. The case became widely known in Ukraine.²² In his testimony Zvarych revealed that many bureaucrats, and in particular, the then Chief Justice of the Highest Administrative Court of Ukraine Pasenyuk, who is now judge of the Constitutional Court of Ukraine, received bribes. However, for the reasons unknown, some portion of investigation concerning some people was removed from the case file, while the investigation concerning others was practically stopped.²³ Obviously, the materials in question were needed to hold a lot of bureaucrats in suspense.

2.3. INFLUENCE EXERTED BY CHIEF JUSTICES

The functions of the Chief Justices practically were not affected by the judiciary reform. Therefore they can be used as an instrument of influence. Although they no longer have the right to assign cases to judges, they still maintain their influence through other professional functions (granting vacations, giving awards, professional advancement etc.).

In a certain case, the Chief Justice of Shevchenko district court in Kyiv submitted a motion requesting judge D. Matlsev dismissal for decision he made. Chief Justice disliked the ruling that nullified the decision on starting criminal proceedings. The situation when Chief Justice evaluates court rulings and passes decisions by means of "administrative whip" seems rather odd. The Justice' decision later was invalidated by an appellation body and remanded for further consideration to the same Shevchenko district court in Kyiv. The decision which will be passed by another judge in the case is easy to predict. Unfortunately Chief Justices do not fully appreciate the concept of judges' independence and unacceptability of any interference into their operation even on the part of Chief Justice.²⁴

²² See in more detail: Judge Zvarych caroled 10 years in jail. // "Tyzhden", September 20, 2011 poky, <http://tyzhden.ua/Politics/31150>.

²³ See Court corruption as it is <http://blogs.pravda.com.ua/authors/ashevchenko/4ed5234ab8a58/>.

²⁴ See petition text: <http://hr-lawyers.org/index.php?id=1317136477>, an its brief analysis : <http://hr-lawyers.org/index.php?id=1317139884>.

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2.4. FUNDING

Judiciary reform also failed to provide instruments to ensure financial independence of the justice system. Although the funds and their use has been under control of the courts since State Court Administration was transferred under judiciary branch, the courts themselves never received guarantees of due funding.

Despite the fact that over the last 2 years courts funding has substantially increased after cutting down the expenses in 2009, it still covers less than 50% of the needs, and in some years — no more than 30%. Into the bargain, the allocated funds are transferred irregularly and often only by the end of the year, which precludes their use for repairs or construction, for example.

Judiciary reform postponed improvement of courts' and judges' funding for some time in future, and it can be postponed even further. For example, in December, 2010 while adopting the budget, certain norms for courts funding were again continued for one year.

On the other hand, the use of allocated funds by courts also raises a lot of questions. Thus, some courts are held literally in palaces, while others have no hearing rooms at all. The Accounting Chamber of Ukraine in May made public the results of the audit carried out in the Highest Economic Court. The auditors found out that over the last three years no inventory has been taken of either non-negotiable instruments or material values, or of the accounts and respective balance sheets. Moreover, the Highest Economic Court of Ukraine has no structural department for internal control and audit.²⁵

3. RIGHT TO LEGAL ASSISTANCE AND RIGHT TO DEFENSE

The right to defense in the criminal proceedings is not properly guaranteed. There are several reasons for that, some being the result of manipulations with procedural norms, and the others — result of general faults in the Bar structure and, in particular in the organization of legal assistance *probo*.

Let's remind, that in the years 2008 and 2009 the court passed rulings in the cases of *Yaremko*²⁶, *Lutsenko*²⁷ and *Shabelnik*²⁸, in which it drew attention to the violation of right to remain silent and right to defense. These rights were infringed upon through manipulation with the suspects' status. In the first case the gravity of charges was "reduced", while in the second a suspect was questioned as a witness under the threat of punishment for the refusal to testify.

In all three cases the decisions of the European Court were not complied with by the national bodies of power. In particular, there was no adequate response from the higher judicial bodies of Ukraine. As a result in 2011 the European Court of Human Rights passed two stricter decisions concerning the right to defense, in relation to procedural manipulations and gravity of charges. In the cases of *Nechyporuk*²⁹ and *Balytsky*³⁰ the claimants were interrogated on the matter of aggravated homicide, without their lawyer present, while formally they were detained for an administrative tort. In both case the European Court found that prosecution needed this manipulation to evade the requirement of mandatory representation. Besides, in *Balytsky* case the court ruled referring to article 46 of the Convention:

²⁵ Checking economic activity of the Highest Economic Court 24.05.2011, <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16736947;jsessionid=351A6229883979961782B87F09772DB8>.

²⁶ *Yaremko v. Ukraine*, No. 32092/02, 12 June 2008

²⁷ *Lutsenko v. Ukraine*, No. 30663/04, 18 December 2008

²⁸ *Shabelnik v. Ukraine*, No. 16404/03, §57, 19 February 2009

²⁹ *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, 21 April 2011

³⁰ *Balitskiy v. Ukraine*, No. 12793/03, 3 November 2011

“Practices of administrative arrest of a person for the opportunity to interrogate him as a suspect in the crime are classified by the court as arbitrary under article 5 of the Convention, as the authorities failed to ensure the claimants’ procedural rights as suspects in the crime. In the case *Yonkalo and Hechyporuk vs. Ukraine* the European Court pointed out that formal detention of a claimant for administrative tort with his subsequent treatment as suspect in the crime practically deprived him of the opportunity to use the services of attorney’, whose presence would have been mandatory under the Ukrainian law, had the detained been charged with homicide, perpetrated by a group of people and/or for mercenary ends — as this was the crime, in connection with which he was questioned... Taking into account the essence of the problem, the European Court stressed that immediate legal and administrative reform is due in order to bring the legislation and practical operation into compliance with court rulings on this case and with provisions of article 6. The court entitled the state to find most appropriate ways to resolve this problem under Cabinet of Ministers’ supervision”.³¹

Another aspect of the right to legal assistance was manifested in *Zagorodny* case.³² The claimant found a legal expert to defend him, but the court banned him from the defense, virtually forcing the claimant to use services of the attorney not chosen by him.

The European Court pointed out that the restriction in choice of attorney does not constitute a Convention violation per se. It then elaborated that the problem of unregulated issue of legal experts’ participation in the proceedings has been in place in Ukraine since November 2000, i. e. since the Constitutional Court of Ukraine passed a ruling in *Soldatov* case.³³ The Court found that by evading this problem for considerable time, the state created situation which is incompatible with the principle of legal determination.³⁴

As to the problems of the Bar, the respective law on the Bar, stipulating setting up of a professional association with mandatory membership, still has not been passed. It seriously hinders implementation of any reforms, especially in criminal justice.

Meanwhile significant progress, although with some reservations, has been achieved, by passing a law “On free legal assistance”³⁵. The law-makers failed to take into account numerous recommendations made by European Council experts,³⁶ but, nevertheless, certain positive steps in the area of legal representation have been made:

1. The list of categories of individuals entitled to legal assistance was broadened. Specifically, all the persons detained through administrative and criminal procedure, and individuals in custody have been granted the right to legal assistance. It will help to do away with systematic violations of right to defense, referred to in the decisions of the European Court of Human Rights (see above).

At the same time, it is noteworthy that viability of these provisions is seriously threatened, as militia officials are not required to inform the legal assistance Centers about detainees, if a detained individual “defends him/herself personally”³⁷. It will lead to manipulations and preservation of status quo, when a person is forced to sign a refusal from legal assistance, which is a violation, also noted by the European Court of Human Rights.

2. The principles of attorney pro bono operation within the system of free legal assistance are spelled out, although not directly, in the law. It is the Concept of the free legal assistance system in Ukraine³⁸ that envisages that “relations between attorneys and the state in the area of secondary free

³¹ *Balitskiy v. Ukraine*, §§51 та 54

³² *Zagorodny v. Ukraine*, No. 27004/06, 24 November 2011

³³ Ruling of the Constitutional Court of Ukraine of November, 16, 2000 in the case concerning the right to free choice of defense attorney. <http://zakon2.rada.gov.ua/laws/show/v013p710-00>

³⁴ *Zagorodny v. Ukraine*, §55

³⁵ <http://zakon2.rada.gov.ua/laws/show/3460-17/print1320311424269317>

³⁶ <http://minjust.gov.ua/0/19278>

³⁷ <http://zakon2.rada.gov.ua/laws/show/3460-17/print1320311424269317>, chapter IV of the law, p. 3

³⁸ Presidential Decree of June 9, 2006, No. 509/2006, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=509/2006>

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legal assistance should be based on voluntary participation of attorney in providing such assistance and on the contract between attorneys and state”. The law envisages tenders, contracts and agreements signed on the voluntary basis by both parties.

The voluntary principle in providing free legal assistance is one of the largest achievements of this reform. First, it provides the Bar members with the chance to influence the system and its funding. Second, as free legal assistance was not available till now, its availability can also contribute to other reforms, e. g. more efficient criminal action, decrease in number of people arrested and held in custody, reduction in number of groundless charges etc.

3. The system of free legal assistance management, absent in Ukraine for 20 years, has been set up. Despite the criticism of the proposed system, the existence of competent management of free legal assistance gives hope that it will eventually become efficient.

4. The quality of free legal assistance still leaves much to be desired. The reform, therefore, conations provisions for its improvement. The intentions of the state to comply with article 6 of the Convention, i.e. not only appoint an attorney, but also ensure efficient defense, is most laudable³⁹. On the other hand, the quality assurance can entail some threats to the independence of Bar members. That’s why the bodies in charge of the system should give heed to the principles of independence and self-sufficiency of the attorneys in legal representation.

One can conclude that the Ministry of Justice is facing a very ambitious task of implementing this Law in practice. The situation in the offices of free legal assistance operating in Bila Tserkva, Kharkiv and Khmelnytsky is most complicated indeed.

Today the practical aspects of the Law implementation give grounds for concern. In 2012 state budget should allocate 1855.7 hryvnas “for the purposes of organizing public legal assistance”⁴⁰. Considering that actual tariff for legal assistance amounts to 25,1 UAH/hour, 73 932 hours of legal assistance should be funded in 2012.

However, the analysis of only three categories of people, entitled to free legal assistance, shows that planned funding is inadequate, to put it mildly.

For example, under the court statistics,⁴¹ 12.2 thousand cases of juvenile delinquents have been heard (article 14 §1(7) of the Law), 40.4 thousand persons were taken in custody (article 14 §1(6) of the Law) and 66,5 thousand persons were taken under administrative arrest (article 14 §1(4) of the Law) in 2010. Totally it amounts to 119.1 thousand cases, the parties to which are entitled to free legal assistance. If we add those, detained under administrative and criminal proceedings, we will come out with a figure of at least 350–400 thousand persons entitled to free legal assistance; the intended funding will cover 10–15 minutes of free legal assistance in each case.

Considering the acting system of legal assistance one can analyze the practice of free legal assistance offices operating in Bila Tserkva, Kharkiv and Khmelnytsky. Attorneys of these offices spent altogether 27600 hours of working time assisting their clients in 2010. Even if one assumes that the offices meet the need for legal assistance in their respective cities, it means that 37% of the working hours, which the state intended to fund in 2012 in the whole country, have been spent in these three cities alone.

One should keep on mind that the Law stipulates the setting up of free legal assistance centers in each oblast’ center by January 1, 2013, which entails capital investments and other expenditures.

If legislator does not change the approach to free legal assistance funding in the state budget for 2012, it is hard to believe that the system will be viable or radically reformed.

³⁹ *Artico v. Italy*, 13 May 1980, §33, Series A No. 37.

⁴⁰ Draft State Budget of Ukraine for 2012 http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=41157

⁴¹ Analysis of administration of justice by the courts of general jurisdiction in 2010 (source-court statistics), <http://www.scourt.gov.ua/clients/vs.nsf/0/4034B350D7EB0B50C22578AF00236E6D>

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

4. PRESUMPTION OF INNOCENCE

The right not to incriminate oneself is a part of presumption of innocence. However, there are still frequent occurrences when a person is first gives testimony as a witness and then this testimony is used against this person.

The system of remanding cases to courts for further investigation can also be classified as violation of the presumption of innocence.

Number of criminal cases remanded to courts of the first instance⁴²

No.	Indicators	2007	2008	2009	2010	I six months 2011
1.	Number of criminal cases heard in courts (including cases remanded by the prosecution under article 232 CCP of Ukraine and excluding the cases filed on the aggrieved party motion)	185773	181415	181501	196135	93251
2.	Cases remanded to courts of the first instance for further investigation (articles 246 and 281 CCP of Ukraine) (excluding the cases filed on the aggrieved party motion)	6858	5751	4870	5086	2293
	% of the total number of criminal cases which ended in criminal proceedings by public prosecution	3,69	3,17	2,68	2,59	2,46
3.	cases remanded to courts under article 2491 CCP of Ukraine	1444	1250	950	886	353
	% of the total number of criminal cases which ended in criminal proceedings by public prosecution	0,78	0,69	0,52	0,45	0,38
4.	Revoked from the courts by prosecution under article 232 CCP of Ukraine	2873	1826	1393	1281	450
	% of the total number of criminal cases which ended in criminal proceedings by public prosecution	1,55	1,01	0,77	0,65	0,48
5.	In total criminal number of cases remanded to courts or revoked from the courts by prosecution (excluding the cases filed on the aggrieved party motion)	11175	8827	7213	7253	3096
	% of the total number of criminal cases which ended in criminal proceedings by public prosecution	6,02	4,87	3,97	3,70	3,32
6.	Number of persons, with regards to whom decisions (rulings) for remand of cases for further (pretrial) investigation were nullified after appeal.	2029	1959	1801	2137	1172
7.	Number of decisions concerning violations of law in the course of investigation and pretrial discovery	2348	2452	1986	1989	904

Negligibly small number of acquittals is another serious problem related to presumption of innocence. This situation can be characterized as a legacy of Soviet era, when criminal proceedings

⁴² Data provided by State court administration of Ukraine for 2007–2011. Available on official site <http://www.court.gov.ua>. Cases heard in appealation courts and local courts of general jurisdiction and were remanded for further investigation or revoked by the prosecutors (excluding those filed on the aggrieved party motion). Data do not cover the Supreme Court of Ukraine operation.

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were inquisition-like, their competitiveness was limited, especially at pretrial stage, there existed an institute of additional investigation (if the evidence of guilt is insufficient, the courts often remand the case to the investigation bodies for “further action”, and the case is often closed without verdicts of acquittal. The judges are still reprimanded for “not-guilty” verdicts, which can become ground for prosecutor’s office investigation.

Number of “not-guilty” verdicts⁴³

Year	Number of persons granted the verdict of “not guilty” by local courts	Number of persons, who on the motion from the appealation body, received a new verdict, as the groundless verdict of “not guilty” has been nullified
2008	672	12
2008	539	8
2009	579	13
2010	661	15

In 2010 the number of acquittals increased to 661, 15 of which were nullified by the appealation body with a new verdict and 66 (26 — in the first half of 2011) were invalidated, while the case was remanded for the additional investigation. We do not possess the data for 2011.

5. SPECIFIC GUARANTEES OF JUST CRIMINAL PROCESS

5.1. REGULATIONS CONCERNING EVIDENCE

There are no clear or well-defined rules on evidence in the system of national justice. However, due to the efforts of the European Court of Human Rights, the national bodies have to elaborate certain regulations concerning evidence.

Under the ruling of the European Court in the case *Leonid Lazarenko vs. Ukraine*⁴⁴ The Supreme Court of Ukraine invalidated the court decision sentencing the claimant to life imprisonment. The Supreme Court referring to the European Court findings, pointed out that “the violations in question were not proved or assessed legally and did not entail passing of respective decision at the court hearing and case re-consideration by the cassation court, despite the fact that L.Lazarenko more than once pointed at the violations of his right to defense, in particular, in cassation claim. The use of claimant’s testimony, obtained in violation of right to defense, for the benefit of prosecution, is in the Court’s classification, a violation of right to fair trial as spelled out in article 6 of the Convention, as this testimony was used for conviction and became the basis for pressing charges. The Court ruled that the use of the claimant’s testimony, appealation court attitude to it, court response to Lazarenko’s appeal against unlawfulness of the way the evidence was obtained, has irreversibly restricted claimant’s right to defense, regardless of how this evidence affected his conviction, or what the claimant’s response might have been if he had had a defense attorney, or whether he could use the attorney’s services later, or what means of competitiveness were used in the further action. The Court believes that the violation of right to fair trial, discovered by analyzing the circumstances of the case, can be duly amended by a new trial, review of the case or reopening of the case on claimant’s motion.

⁴³ Data provided by State court administration of Ukraine (<http://www.court.gov.ua/home/>). These figures reflect both verdicts which came into force and those which didn’t.

⁴⁴ *Leonid Lazarenko v. Ukraine*, No. 22313/04, 28 October 2010

Therefore, proceeding from the factual and legal circumstances The Supreme Court of Ukraine considers that the rulings in criminal case *L.Lazarenko vs. Ukraine* cannot remain in force, but shall be nullified. The violations under analysis could have been clarified, legally classified and amended while the case was considered on its merits. However it never happened. The nature (content) of the violations, defined by the Court, their legal meaning, stage of action, at which they occurred and could have been amended, claimant's status, caused by these violations, possible way of restoring the infringed right give grounds to believe that justice can be restored by the new court hearing. At this stage presumption of innocence would be applicable to L. Lazarenko and the claimant would be able to exercise his right to defense, based on arguments, presented in the claim, in due order, defined by Code of Criminal Proceedings of Ukraine, and the court would ensure this right".⁴⁵

The court decisions in Kornev's case were invalidated in the similar way. Referring to the ruling made by the European Court in the case *Kornev and Karpenko vs. Ukraine* the Supreme Court point out that⁴⁶,

"the European Court in paragraph 56 of its ruling found that testimony given by witness V.Shcherbak were crucial for the case, as she was the only person who directly participated in drugs purchase from the claimant and could testify that he sold her the drugs. The European Court also ruled that the claimant and his lawyer were not given an opportunity to interrogate this witness at any stage of court proceedings, even as an anonymous witness, while the national courts based their decisions on her written testimony, submitted in the course of pretrial investigation. The ruling underlined that the authorities ignored the need to guarantee the balance of interests of all parties concerned, and, specifically, witness "Shch." interests...

Proceeding from the factual and legal circumstances The Supreme Court of Ukraine considers that the rulings in criminal case *D.Kornev vs. Ukraine* cannot remain in force, but shall be nullified. Taking into account the stage of action when violation was committed, and the fact that it can rectified at the hearing of the case on its merits, the case should be remanded for the new hearing to the court of first instance."⁴⁷

Thus, Supreme Court of Ukraine ruled that the testimony given by the defendant as a result of manipulation with the gravity of felony should not be used in the investigation. It means that the testimony, obtained from the defendant in the case of aggravated premeditated homicide, without his attorney present, cannot be used in the case, if formally he was charged with lesser offense.

The witness's testimony, obtained in the course of pretrial proceedings cannot be used either, if a defendant was not given the opportunity to question the witness in court (even with observance of all the security measures).

Besides, the Constitutional Court of Ukraine passed a decision concerning acceptability of evidence. In the case, filed on the motion of Security Service of Ukraine, the Court, giving official interpretation of part 3 article 62 of the Constitution of Ukraine, decided that charges cannot be based "on factual data, obtained as a result of operative-investigative actions of official investigator, in violation of constitutional provisions or due order established by the law, or received by specific actions aimed at their collecting and registering by means, stipulated in the law of Ukraine "On operative investigation activity", by the person not qualified to perform these actions".⁴⁸

As the language of this Court decision is rather non-specific, it is hard to foresee possible practical consequences of its implementation, but, anyway, it is good to have certain criterion which can be instrumental in assessing the acceptability of evidence, and, specifically, "the purposefulness of action".

⁴⁵ <http://www.reyestr.court.gov.ua/Review/16938373>, see also <http://hr-lawyers.org/index.php?id=1309863250>

⁴⁶ *Kornev and Karpenko v. Ukraine*, No. 17444/04, 21 October 2010, <http://hr-lawyers.org/index.php?id=1288179865>

⁴⁷ <http://www.reyestr.court.gov.ua/Review/16938317>, також <http://hr-lawyers.org/index.php?id=1313410341>

⁴⁸ Decision of October 20, 2011, Case No. 1–31/2011, <http://www.ccu.gov.ua/doccatalog/document?id=160046>

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5.2. OTHER ISSUES

In Blahoy's case the European Court raised the question of whether the situation when pending criminal case is renewed by the prosecutor's office is in line with the requirement of article 6 of the Convention. A similar question was asked in relation to article 5 of the Convention in Korniychuk's case.

Such arbitrary actions of the law-enforcement bodies are persistent problem of criminal justice. They permit the said bodies to hold anyone in suspense for practically infinite time, closing and re-opening criminal proceedings.

5.3. DRAFT CODE OF CRIMINAL PROCEDURE

In 2011 rather significant changes were introduced into the draft code developed in the years 2006-2009 by the working group of the National Committee for the strengthening of democracy and supremacy of law. Some changes helped to improve the draft code language, although it still has a lot of unnecessary bureaucratic formulations, while other amendments change substantially the former concept of criminal justice.

One of the greatest faults of the current version of the draft code is the cancelling of jury. Although the words "jury" remains in the text, it means "public assessors" — a concept, well-known from the Soviet times. And the competence of this "jury" is restricted to the cases where the defendant faces imprisonment.

Renewing the institute of "public assessors", whose inefficiency was time-proven, seems most odd. Moreover, in the situation, when the system of justice has no public trust, the jury trial had a chance of becoming an instrument of restoring public trust and control over judiciary system. We share the conclusions issued by European Council experts in this regard:

"A jury trial paid important role in setting up modern systems of criminal justice, in particular, in safeguarding the independence of judiciary power and in making trial more significant. Thus, it doubtless helped to strengthen procedural guarantees for the defendant, having created a model of competitive trial. At the same time it reinforced the principles of oral trial, directness and equality of parties in the court proceedings. Existence of jury had great influence on various court proceedings, presentation of facts, norms of exclusion of evidence and ensuring the rights to defense.

In the systems, where democracy is not rooted deeply enough and needs support, the jury trial can be regarded as very useful institute for eliminating or reducing the risks which threaten judiciary power and its independence. Similarly, within the system which is moving away from the "Inquisition" methods and towards competitive court proceedings, the jury trial will push forward the transformation in the direction of oral concentrated trial by impartial judge, where the parties play decisive role in presenting the evidence, and finally, in the trial outcomes. Therefore, the restrictions, imposed on the jury, should be revised, as presently the jury trial is warranted under article 378 of the draft code only on the defendant's motion in criminal cases, entailing life imprisonment"⁴⁹.

The new version of the draft code also empowers the prosecution with more competences, which can lead to abuses as in the former version they were the prerogative of judiciary power only, e.g. continuation of investigation or burden of proof. The rules of argumentation, without which competitive court proceedings are impossible, are practically taken out of the new version, so that judge's discretion remains only criterion for the assessment of acceptability of proof.

⁴⁹ Conclusions on the draft Code of Criminal Proceedings of Ukraine, Strasbourg, November 2, 2011, DG-I (2011)16, <http://www.coe.kiev.ua/news/2012/01/Opinion%20on%20Draft%20CPC%20UA%20Ukr.pdf>.

6. EXECUTION OF THE NATIONAL COURTS' DECISIONS

The rulings of the national courts are not executed.

In November 2010 the new version of the Law “On executive action” was passed. It broadened the rights of state executor and strengthened the responsibility of the debtor, but the extent of execution of court decisions remained almost unchanged.

The work overload of state executors is one of the main reasons for undue and delayed execution of court decisions with regards to private debtors. Each of the executors has several hundred decisions for execution, and sometimes an execution of just one decision might take the whole day. Beside executive functions, the executor has to represent executive service in courts, respond to complaints etc.

The fact that the state and its institutions and entities are serious debtors themselves does not help in resolving the problem.

In December 2010 the system of bodies in charge of courts' decisions execution was reorganized. State Executive Service was set up. However its practical operation started only in the second half of 2011.

Unfortunately, by February 2012 its site contained no summarizing information concerning the execution of courts' decisions in Ukraine.

7. COMPLIANCE WITH RULINGS OF INTERNATIONAL BODIES

Compliance with rulings of international bodies specifying the breach of international obligations is an integral part of adherence to international treaties, ratified by the country.

This year, however, the rulings of international bodies were lamentably disregarded, in part, due to imperfect legislation, and, in part, due to rather arbitrary interpretation of law by the judges of higher judicial bodies.

In 2011 Committee against torture (a body set up under the International pact for civil and political rights) passed three decisions. Two of them, among others discovered the violation of article 14 of the Covenant, pointing out that the claimants were convicted as a result of unfair trial — see cases *Shchytko vs. Ukraine* and *Butovenko vs. Ukraine*.⁵⁰ The unfair rulings, therefore, could have been invalidated as it happened in Lazarenko and Kornev cases.

However the Highest Specialized Court prevented Viktor Shchytko's petition on court decision review, from reaching Supreme Court of Ukraine, stating in its resolution of November 3, 2011⁵¹, that it does not recognize Committee for human rights as international judiciary body under article 400-12 of Code of Criminal Proceedings. We do not have any information with regards to Butovenko case, but it is most probable that scenario will be more or less the same.

It is hard to say whether the law-maker really wanted to eliminate the possibility of applying article 400-12 of CCP to the decisions of the Committee for human rights. In any case, the decision should have been made by the Supreme Court of Ukraine and not by the Highest Specialized Court in assessing the admissibility, since in this issue it has very limited competence, i. e. to verify petition compliance with formal requirements for such petitions.

Besides, the legislation and its practical implementation make it very difficult for a person, whose conviction was recognized as unjust, to submit a petition on judicial review, even if it warranted by the European court decision.

First, the Highest Specialized Court interpreted the law in a way that deprives such a person of the right to legal assistance, having prohibited any action through attorney. This practice is widely

⁵⁰ <http://hr-lawyers.org/index.php?id=1321567157>, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/450/11/PDF/G1145011.pdf?OpenElement>

⁵¹ <http://hr-lawyers.org/index.php?id=1321523619>

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spread in criminal justice contrary to the clarification provided by the Highest Specialized Court Plenum with reference to the articles 353–360 of the Code of Civil Proceedings of Ukraine⁵².

Such approach to the right of legal representation, combined with the fact that petitioners more often than not are incarcerated, make other requirements look like a mockery, e.g. supplying “duly notarized” copies of disputed decisions, “duly notarized” authentic translation of the European Court ruling and correspondence with the Court with regards to the ruling’s status as final etc.⁵³

8. RECOMMENDATIONS

1. Changing the mechanism of forming the Supreme Council of Justice: in particular, all its members have to be elected by judges’ congress; or abolishing this body with transfer of its functions to the bodies in charge of independent setting up a judicial power body.

2. Broadening the competences of the Supreme Court of Ukraine; in particular, providing opportunity for all the litigant parties to appeal to it in specific cases of competences conflict, different interpretation of material or procedural law norms. Granting the Supreme Court of Ukraine competences to resolve the issue of case reviews.

3. Ensuring sufficient state budget funding for the programs aimed at providing free legal assistance.

4. Accelerating the adoption of new Code of Criminal Proceedings taking into account EC and national experts’ recommendations.

5. Introducing changes into the law, which will preclude the use of testimony obtained outside the court without the defendant’s attorney present.

6. Accelerating the passing of new law on the Bar, which envisages setting up professional lawyers’ association with mandatory membership and respective provisions, guarantying timeliness and high quality of legal assistance.

7. Amending hearing procedure for the cases involving administrative infringements, setting up guarantees for free trial, envisaged by article 6 of the Convention for human rights protection.

8. Introducing changes to procedural legislation and law on executive action, which would ensure mandatory entry of all court decisions into the Unified State Registry of court decisions.

9. Introducing changes into the Code of Criminal Proceedings of Ukraine (and/or envisage respective approaches in draft CCP), with the goal of simplifying the court review procedures for the rulings which have come into force, as a result of international legal bodies’ decisions.

10. Clarifying in the law or its respective interpretations by higher court institutions that the international bodies entrusted with resolving private complaints are the international legal bodies entitled to initiate the court review of the rulings passed.

11. Providing legal support for the operation of independent experts and expert offices.

12. Developing and adopting legal norms defining acceptable terms for case settlement. Envisaging the possibility of recompensing the individuals whose rights were violated due to non-adherence to the defined time frame for cases settlement.

13. Introducing a State Budget line which will allocate funds for execution of Ukrainian courts’ decisions, under which the state, its authorities, governmental institutions and offices are the debtors.

⁵² Resolution No. 11 of September 30, 2011 року, <http://hr-lawyers.org/index.php?id=1319116281>

⁵³ See in more detail <http://hr-lawyers.org/index.php?id=1317129918>

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Violation of human rights when issuing writs on applications of enterprises of all forms of ownership dealing in housing and communal services¹

1. GENERAL COMMENTS

On July 7, 2010, the Law “On the Judicial System and Status of Judges” made changes to the Civil Procedural Code of Ukraine (CPC), under which the judges started issuing court orders for recovery of outstanding claims of companies that provide housing and communal services. During the follow-up period over 70,000 court orders for claims of enterprises that provide housing and communal services (hereafter in this text: housing and communal services) were issued. The changes worsened the condition of realization of the right to a fair trial in cases where judges issued such court orders. In the section II of the CCP “Mandatory Proceedings” the spirit and the letter of changes aimed at prioritizing businesses, not citizens; actually they legalized the principle of presumption of guilt of the consumer (there also emerged a byword “presumption of rendering service by a business”); the positions of protection of legitimate rights of the consumer were artificially transferred from the field of substantive law to the field of procedural law.

The social context of such changes of the rules is very clear: the housing and communal sphere and relations in it are too intricate to implement the Mandatory Proceedings, which does not consider the issue in essence and turns into a procedure of lapidary tackling the issue for service applicant’s benefit (manufacturer or rather producer).

Legally, the issue of realization and protection of public services consumer in a market economy has not been elaborated upon in the national legislation, and implementation of mandatory process holds the development of market relations and genuine reforms of municipal engineering away. The legislation of other countries contains no analogues of such standards of mandatory process.

The mandatory process related to the legal relationship in the field of housing and communal services violates many aspects of the right to fair trial: the presumption of innocence, access to justice, and right to protection. Of course, the human dignity is offended and rights to property and freedom of contract are violated. The access to legal assistance and right to know their rights and responsibilities in dealing with municipal services become vital for the socially vulnerable citizens in these situations. According to human rights organizations, more than 50% of the orders with which people turn to NGOs for assistance in restoration of their violated rights are usually canceled for

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reasons of misjudgment. The vast majority of canceled orders contain not one but several violations of human rights. These violations will always create a situation opposing the rights and legitimate interests of the citizen and in favor of public utilities.

This section discusses the issues of access to justice and rights to protection.

2. THE RIGHT OF ACCESS TO JUSTICE

2.1. LACK OF INFORMATION FOR A CITIZEN

The violation of this right begins with the absence of public-oriented information on:

- The fact of receipt by a court of application for issuance of a writ against her/him;
- The content of the petition and availability of evidence of the outstanding amount in it;
- The fact of issuing a court order for the recovery of debt.

The absence of such information under conditions of certain court actions concerning people created for the latter an unfavorable situation, which sowed discord and stress in their lives. Below we cite examples that show various forms of concealment of part or of all information from the public while they become objects of actions associated with certain legal relationships or their lack or uncertainty, and people get into a situation of open violation of their rights.

Example 1: citizen M. G., resident of Luhansk, suddenly got a resolution of Artemivsk Regional Department of the State Executive Service (DSES) of 23.09.11 about the initiation of execution pursuant to court order No. 2n/1203/1166/2011. This writ was issued on 19.05.2011 pursuant to the application of urban public utility “Zhytloservis.” However, M. G. did not receive either the court order, or the collector’s application with supporting documents, though she resided at home and did not leave her residence.

The citizen regarded the fact of issuing the court order by default as a violation of her right to justice, and she disagreed with the amount of debt specified in the Resolution about the initiation of proceedings. So she turned to Artemivsk District Court of Luhansk requesting to hand her the writ. They handed her the writ, but with infractions, that is directly in court without the collector’s application and without the attached copies of documents showing the amount owed. In the absence of relevant information citizen M.G. had to submit her affirmative plea to the court requesting to cancel this order, and the affirmative plea to the state executive service to suspend the proceedings.

On 06.12.11, the judge adopted a resolution on the abolition of this court order.

The employees of UPU “Zhytloservis” took advantage of the lack of complete and timely information and related complications related to the access to justice by the citizen and applied additional moral pressure. Simultaneously with the decision to cancel the court order in December 2011 M. G. received a letter from the UPU “Zhytloservis” without signature, without seal, which contained the requirement to indemnify — allegedly by a court decision on 5.19.11 (the date of the issuance of this order rather than cancellation) her debt for the maintenance of buildings, including threats with executive service and property inventory.

Example 2: On 04.12.2011 citizen S. O., resident of the city of Luhansk, found in her mailbox an envelope with a stamp of Artemivsk District Court. In the same envelope there was a piece of paper signed by the judge; the message included the case No. 2n–1019/2010 and information that “the Artemivsk District Court, Luhansk, send her a copy of a court order of 22.11.10 together with a copy of the collector’s application and a copy of enclosed documents.” However, the envelope neither copy of the court order nor a copy of collector’s application with copies of enclosed documents.

As S. A. made out, the communal enterprise “Zhytloservis” applied for the recovery of her debt concerning payments for the maintenance of houses and buildings and neighboring territory amounting to UAH 2,513.10, with which the citizen disagreed, because she did not receive services for this amount .

On 07.12.10 S. A. filed the Head of Artemivsk District Court a complaint stating that:

- a) violation of Part 1 of Art. 104 of CPC of Ukraine three times:
- she was not sent a copy of a court order;
 - the letter was sent without notification of delivery;
 - by date on the envelope and date of court order it is evident that the copy of the court order was sent to the debtor not on the day after adoption of order, but with a delay of 8 days;
- b) breach of Part 2 of Art. 105 of the CPC of Ukraine, namely, the debtor was not sent a copy of the application for the issuance of order with enclosed documents.

The court order was canceled on 02.07.2011.

The lack of legally guaranteed information about the writ made the citizen to exert herself to obtain this information which complicated the access to justice for her.

In both cases, the court employees showed negligence providing information to citizens about the fact of issuance of the court orders; the public utilities did not directly provide consumers with any information about filing the complaint. In both cases, the citizens learnt about the issuance of the court order with delay.

In both cases the right to information as a condition for fair trial was violated.

2.2. THE LACK OF OPPORTUNITY TO A FAIR AND PUBLIC TRIAL FOR INDEBTEDNESS OF THE CONSUMER OF URBAN UTILITIES

Under the law, in the case of mandative proceedings the review of appeal for the recovery of debt is held without the participation of the consumer. This does not take into account the situation when the consumer may have no debts to the enterprise that provides housing and utility services, or her/his debt may be less than that which is drawn by the applicant company.

According to public reception of the human rights organizations, on the average the enterprises drew debt by 30–50% above the real amount or that which is recognized by law.

In all 100 cases of analyzed court orders the application of utility enterprises were considered by the judge alone. Formally this procedure met the standards of Part 2 Art. 102 of the CCP, but in fact the citizen was estranged from her/his right to a fair hearing, judicial protection of her/his rights and legal interests.

As a rule, the citizens received a copy of the finished court order, and only after that they could be present when considering their applications for cancellation of court orders. But, according to the complaints of citizens, this consideration was conducted formally. Moreover, during mandatory process, as compared with litigious procedure, the judge ignored the norms of laws that protect human rights in housing and communal sphere. In particular, there is a widespread practice of ignoring by judges of the unquestioning character of demands of the applicant. The paragraph 3, Part 2, Art. 98 of the CPC of Ukraine, requires that “the application shall contain: ... 3) the requirements of the applicant and the circumstances on which they are based”; it is often ignored in mandatory trial on the stage of reception by the judge of the documents from the applicant or consideration of the application for issuance of a court order.

According to public reception rooms of human rights organizations, during the mandatory proceedings, in most cases, four typical violations of unquestioning character of the applicant’s requirements turned out regarding: a) the amount of debt; b) the fact of services and confirmation of their good quality; c) proper applicant; and d) appropriate debtor. The definition of criteria of the unquestioning character of requirements is an important condition for achieving justice in mandatory process.

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Example 3. Citizen M. T., resident of Luhansk, received the delayed copy of a court order for the recovery of her debt payment for the maintenance of buildings and structures and adjacent areas to the tune of UAH 4,323.87. The order was issued by the judge of Leninsky District Court of Luhansk on 28.03.11 in case No. 2n-689/11 in answer to the application of utility enterprise "Standard-Luhansk". M. T. applied to cancel the order in legal term. During the application review on 23.05.11 the representative of "Standard-Luhansk" Utility requested to adjourn the court to prepare an explanation to his statement "about the issuance of the court order." Thus he confirmed that his evidence is not indisputable. At the next session on 25.03.11, after consideration of objections from the utility to an application for cancellation of the court order, the court order of 30.05.11 was canceled.

This case demonstrated that the question of the unquestioning character of the applicant's request did not rivet the judge's attention when he admitted the statement of claim from the utility; however, it came to light during the consideration of the citizen's application for cancellation of the court order.

3. THE RIGHT TO PROTECTION

3.1. NARROWING THE RIGHTS TO JUDICIAL PROTECTION IN MANDATORY PROCESS

Narrowing of the rights to judicial protection was caused by cancellation of previous rules of the CPC of Ukraine in redaction before 03.08.2010 about unconditional cancellation of a court order in case of disagreement with his debtor. Compared with the previous redaction of the CPC, the debtor must justify her/his request for cancellation of the court order, whereas previously the affirmative defense sufficed without justification. For their part, judges are trying to recognize the justification provided by the citizen insufficient and keep the current court order.

The idea of court orders was discredited.

The sense of court orders is to simplify the procedure of satisfaction of apparent requirements of the weaker party against the strong one. There is a number of similar court orders for recovery of wages, for recovery of alimony, etc. concerning the protection of the individual against the stronger party: concerning a child against an adult or of an employee the production administration. The housing and utility services do not fit into the logic of protection of the weaker member of society against the stronger one or before the whole production or state apparatus. The law did not give the citizen the right to file the application for issuance of writ concerning public enterprises in such cases as failure to provide adequate quality of service or ungrounded disconnection of service. On the contrary, the law empowered the housing and utility companies to apply against a weaker and unprotected party, i.e. consumer. Violated were such basic principles of justice, as legality, equality of all participants in a trial before the law and the court, provisions for the proof of guilt, contested procedure and freedom to provide in court their evidence and to prove their credibility in court.

The low legal awareness of the employees of the housing and utility services superimposes inadequate legislation and is supplemented with imperfect practice. The shortcomings in the application of court orders appear in some cases when the judge joins the utility staffer against the rights and interests of citizens, i. e. the stronger party (the company) makes questionable demands of the weaker party (citizen) which shows violation of human rights of the latter and questionable lawfulness of judges decision.

Much of the above defects of mandatory process do not arise in the action proceedings.

Example 4. On 25.02.2011 the judge of Artemivsk District Court in Luhansk issued the court order upon application of the Luhanskvoda Ltd. in case No. 2n/1203/2391/11r for the recovery of arrears of citizen B. N. in the amount of UAH1,581.21.

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Instead of sending a copy of the court order to the debtor within the next 24 hrs, the court sent it with such a delay that B.N. received the copy only 2 months later, on April 22, 2011, from the hands of a neighbor and the mail carrier signed the receipt.

The citizen had to apply to the district court, then to the Court of Appeal to set the time of application for cancellation of the court order.

Besides this violation of rights, another violation was fixed, which is becoming more common in jurisprudence: on 04.08.11, the judge decided to leave the question open claiming that the statement of cancellation of the order shall specify: reference to evidence with which the debtor proves his objection to the plaintiff's claims. However, the judge did not require the plaintiff to submit evidence against the citizen. First of all the applicant had to provide unquestionable proof of his claims to the debtor that would justify the amount owed. In legal literature the conclusiveness is defined as a final and incontestable fact that is recognized by both parties. The citizen put in another application noting that the requirement of the court to add to the debtor's application any documents that prove the absence of debt is unfounded and does not meet Art. 105 of the CPC of Ukraine.

After six months of citizen's importuning in court the order was canceled on 12.08.11.

Example 5. Citizen M. I., resident of Luhansk, received a copy of court order and documents attached to about the recovery of his debt for gas supply for nearly 15 years, i.e. for the period from 01.01.1996 till 01.09.2010, amounting to UAH 6661.72 in favor of public JSC "Luhanskhaz." Together with other payments the total sum of recovering payment made UAH 7187.49. The court order was issued on 05.10.10 by the judge of Kamyanobridsky District Court in Luhansk (Judge No. 1).

On 14.10.10 citizen M. I. applied to cancel the order and stated that in accordance with Clause 2, Part 1, Art. 208 of the CC of Ukraine and Clause 3, Part 2, Art. 21 of the Law of Ukraine "On Housing and utility services" the consumer and contractor have to enter into an agreement while there was no such agreement between the plaintiff and the debtor. According to Art. 267 of the CC of Ukraine, the issuance of the order deprived him of his right, to apply for limitation action.

On 25.11.10 the judge complied with the V. I.'s appeal on the basis that from this statement the court found that there is a dispute between the parties, and abolished the order.

Later in the action proceedings, the case No. 2-289/11 was considered by the Kamyanobridsky District Court. The judge No. 2 tried to ignore the right of citizens to general limitation period, although the plaintiff PJSC "Luhanskhaz" computed the "Calculation of debt" on its own and so determined the amount of debt taking into account the limitation period, i. e. UAH 1,928.31 for the period from 26.11.2007 till 01.11.10.

Therefore, MI was forced to turn to the Court of Appeal of Luhansk Oblast. As a result citizen M. I.'s debt was found to make UAH 1,928.31 for the period from November 2007 to November 2010, the limitation period including. Thus, the amount owed was UAH 1928.31, and not UAH 7187,49.

In this case, the acting proceedings conducted after mandatory proceedings and publicity of the case led to the decision in favor of the legitimate rights of the citizen. This example of collation of acting and mandatory proceedings on the same occasion testifies to the action proceedings as having more in securing justice.

3.2. IGNORING THE SIGNS OF DISPUTE BY THE COURTS OF LAW

The vast majority of court orders are canceled due to the existing dispute about the law because jural relationships between consumer and provider of service in the field of housing and public utilities is based on a contract, and contract (choice of executor, terms of the contract) is a realization

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of human rights. Therefore, the scope of mandatory proceedings on disputes arising in the provision and receiving of housing and utility services among consumers and service providers which is inadequately expanded to apply to disputes about the law should be narrowed due to declining conditions of restoration of human rights.

It is in terms of signs of a dispute about the right it is worthwhile to pay attention to the following defects of court practice.

The law, strict observance of which prevents possible violations of human rights both in the field of housing and utilities and the right of access to justice, remain beyond the attention of lawyers of public utilities and courts and therefore it becomes possible to breach the rights of citizens while issuing court orders.

The court usually accepts applications not from the providers of housing and utility services, as specified by the Law of Ukraine “On public utilities”, but from manufacturers and service providers to intermediate companies and not to the end-of-the-line consumer. The Code of Civil Procedure does not specify the provider; part 2 of Art. 95 reads: “A person, to whom belongs the right to claim, can apply for a court order issuance.” However, according to the Law of Ukraine “On public utilities” consumer establishes jural relationships only with the provider of services as defined in Art. 1: “the executing or economic agent dealing in providing municipal services to the consumer under the contract.” In accordance with the requirements of Article 21, Part 2, Clause 3 of the Law of Ukraine “On public utilities,” the duty of the economic agent is “to conclude an agreement with the consumer for the provision of utility services specifying the responsibility for compliance with the terms of execution under the typical contract.”

Any contract is the right of parties. The absence — contrary legislation — of properly concluded contract or breach of contract is a dispute about the right. However, the judges accept applications from companies that provide utility services and fail to request a copy of the contract, or a proof of the volume of services corresponding to the alleged debt. The trial in such cases is based on illegal grounds, which they name with the colloquialism “the presumption of rendering service.”

Example 6: Citizen K. A., resident of Luhansk, received a court order issued by a judge of the Leninsky District Court in Luhansk at the request of municipal public utility “Teplokomunenergo” the recovery of debt for 15 years in the amount of UAH 7,380.39 (case No. 2n-360/11).

However, K. A. did not agree with violations of her consumer’s right to establish relationships directly with the provider of services and the right for three years of general limitation period. In her court preference about cancellation of the court order she referred to these circumstances and provided as evidence the following supporting documents:

- a) The urban public utility “Teplokomunenergo” has no right to demand payment from the citizen. It is not a heat supplier to her house and apartment. It is only the manufacturer of service, which delivers heat to the “operational boundaries of belonging,” that is only to the foundation of the house, and thus its line of responsibility is only up to the distribution point near the foundation, where the heat carrier is transferred to the executor or the urban utility “Standard-Luhansk”, with which the urban public utility “Teplokomunenergo” concluded the relevant agreement.
- b) The urban public utility “Standard-Luhansk” in its turn failed to conclude the contract on supply of heat to the apartment of citizen K. A. The urban public utility failed to submit evidence that it supplied heat to the apartment. The urban public utility dropped the claim.
- c) Citizen K. A. enjoys the right to a three-year term of general limitation period, all the more so for several years she did not live in this apartment, being abroad on business, about which she timely addressed an application to the utilities. The court order was canceled.

This is a typical example: wrong applicant, another executive agent, no direct contract with the consumer, inflated debt, and limitation period is ignored. That is, there are signs of a dispute about right.

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Example 7. On August 25, 2011, citizen Sh. O., resident of the city of Kherson, in Suvorovsky District Court of Kherson, personally and directly received the court order issued on June 21, 2011 for the recovery of debt in favor of open JSC “Khersongas” in the amount of UAH5179, 77 (case No. 2 “n”–1919/11).

The applicant, open JSC “Khersongas”, concealed the following facts in its application:

- a) In 2005, the citizen accumulated the debt for gas. Under the false pretence an employee of open JSC cut off gas supply to the citizen’s apartment without a sound basis, allegedly because of the lead damage. But citizen S. A. twice sent for the representatives of OJSC “Khersongas” to confirm the integrity of lead and thus received two test certificates on the integrity of the lead. Thence there is a long-standing dispute of fact between the contestants.
- b) In 2009, the citizen and the OJSC signed an agreement on discharge of debt for gas supply. As of May 1, 2011 the debt was repaid and there is almost UAH30 overpayment compared to scheduled payments. Data on the overpayment for gas were reflected in the calculation provided by the applicant–recoverer at the time of applying. However, the judge did not study or evaluate evidence properly, did not request full information, which was obviously needed for clarification of overpayment–for–gas information. The judge issued an order to the citizen to settle the five-year debt.

After the citizen had applied for cancellation of the court order, the latter was abrogated.

In this case, the applicant concealed from the court the documents that pointed to important factors: the existence of a dispute about the right of citizen to receive services, for a complete restructuring of debt-based contract. The judge absently studied the documents, which permitted to establish the fact of the lack of information provided by the applicant, and hence there emerged the need for in-depth study of the circumstances of the case. Grabbing the opportunity to issue a court order, the applicant decided to exact money from the citizen for the time beyond the statute of limitations. The judge also ignored the law on the limitation period and supported the applicant’s claims that violated the rights of the citizen. Obviously, the court violated the dispositive norm of law.

Thus, there was no fair and complete consideration of the case by mandatory process, and only the efforts of persistent citizen helped to reach the appropriate legal decision.

Having analyzed 100 court orders from different cities of Ukraine, in 92 cases we were unable to find any evidence that the application for a writ contained attached documents that would indicate the applicant’s status as the service provider. That is, the mandatory judicial practice shows that jural relationships among consumers and service providers remain legally unregulated. The utilities conceal this fact from the court and do not provide evidence that they are service providers with all mutual rights and obligations, that is that they have right in action.

The only case of a reference to the fact that there had been an agreement was found in the application of Pavlograd private enterprise “K-P-1”, Dnipropetrovsk Oblast, which carried out maintenance of buildings and structures and adjoining areas. This company put in an application to Pavlograd urban district court for issuance of a court order for debt recovery to the tune of UAH 1,079.88 from citizen F. O., resident of Pavlograd.

In her request to cancel the order citizen F. O. proved that during 10 years she had not received service for such sum, she did not live in this apartment, and added that the applicant’s contract attached to the documents she had not signed and had no idea who had done it. The judge abrogated the writ.

4. RECOMMENDATIONS

1. Improve the legal framework regulating the relations of citizens-consumers of housing and utility services and companies that provide services such as:

- a) to amend the Civil Procedure Code of Ukraine:
 - To narrow the grounds for mandative procedure in the case of applications for the recovery of debts for consumed utility services (elimination of provisions of the previ-

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ous mandative court proceedings for all cases of the said indebtedness of citizens, i. e. exclude Part 3 from Art. 118, and go over to exclusively action proceedings in cases of accumulation of debt beyond the total period of limitation of 3 years, that is to amend paragraph 3) Part 1 of Art. 96 of the CPC of Ukraine;

- make amendments to Article 104 in terms of clearer legal procedure of handing the citizen (debtor) copies of the court order.
 - b) to bring into regulation the requirements to ensure unquestioning character of plaintiff's acting in proceedings for collection of utility debts from consumers; the permissible evidence of amount of indebtedness, belonging of the debtor and creditor in the said mandative procedure.
2. To improve the enforcement of legislation regulating relationships among consumers and utility agents (especially concerning contracts between consumers and service providers, increase consumers' control over the quality of housing and utility service enterprises, etc.).
 3. To expand opportunities for free legal assistance to vulnerable, low-income consumers of housing and utility services.
 4. To improve legal education of citizens on these issues.

Members of the Panel express their gratitude to Zdir O. H. for her materials which were used in this section.

VI. THE RIGHT TO PRIVACY¹

In Ukraine, the right to privacy is guaranteed by Article 32 of the Constitution of Ukraine, which provides that: “No one shall be subject to interference in his or her personal and family life, except in cases envisaged by the Constitution of Ukraine.” some aspects of privacy are also additionally protected at the constitutional level. Thus, the protection of the inviolability of housing is guaranteed by Article 30 of the Constitution, privacy of correspondence, telephone conversations, telegraph and other correspondence (communication privacy) is guaranteed by Article 31 of the Constitution, prohibition of collection, storage, use and dissemination of confidential information about an individual without her/his consent (information privacy) is guaranteed by Article 32 of the Constitution, prohibition to subject a person without her/his free consent to medical, scientific or other experiments (protecting certain elements of physical privacy) is guaranteed by Article 28 of the Constitution.

Interference with privacy is possible only if it falls within the exhaustive list of legitimate reasons and conditions for such intervention. The normative regulation of privacy is in the making now; as a result, the law enforcement procedure is characterized by inconsistencies and contradictions and largely does not ensure respect for the right to privacy.

There still remains a pending question² of regulation by law of obtaining court permission to take measures to temporarily restrict human rights and use of the received data. So far, this procedure, contrary to Article 31 of the Constitution of Ukraine concerning the necessity to provide for restrictions on the rights and freedoms by law, is regulated by by-law³.

The legal guarantees in channels-of-communication data pickup and mail interception are clearly insufficient, and the legislation of Ukraine does not define unambiguously the limits and conditions of the authorities’ discretion in this area.

So far, there is no adequate protection against undue interference by public authority with the right to respect private life and correspondence. Moreover, the legislation still contains no clear instructions for persons liable to such measures and circumstances in which they can be used, as well as due scheduling of such actions. The legislation also bears no requirement for an interim review of the interference with the right to respect private life and correspondence within reasonable time periods, or any terms for such interference; it also contains no provisions for judiciary supervision of the activities of law enforcement agencies in case of their interference with private life. In turn, the fact that the public authorities do not have to notify a person about the surveillance activities against her/him narrow the opportunities to challenge the lawfulness of government’s interference with the right to privacy⁴.

¹ Prepared by Ruslan Topolevsky, Center for Legal and Political Studies “SIM”.

² <http://www.helsinki.org.ua/index.php?id=1233228499>

³ The Enactment of the Cabinet of Ministers of Ukraine from September 26, 2007 No. 1169 “On approval of the procedure of receiving court permission to take measures to temporarily restrict human rights, and use of the received data” // <http://zakon2.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1169-2007-%EF>

⁴ *The Volokhs vs. Ukraine* (2006).

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Listing a phone number as one belonging to a criminal offender in order to get a court order for tapping is one of the schemes, which, according to media reports though denied by the Security Service, the SSU uses against journalists, public figures and representatives of the opposition to tap telephone conversations of a person without institution of legal procedures. In other words, they unlawfully enter the phone numbers for tapping into the list pertaining to real investigation and search operations against a person reasonably suspected of committing a crime.

On October 13, 2011 Ex- Minister of Interior Affairs Yuriy Lutsenko said that the law enforcement officers set up observation of witnesses in his criminal case⁵.

The searches in politically motivated cases have become widely spread and are currently used for pressure. For example, on July 7, 2011, the search was conducted at the office of the Kharkiv oblast organization of the party “Batkivshchyna”; on September 6, 2011 the search was conducted at the premises of the Prostoprint Co., which, observers believed, related to the imprints on shirts “Thanks to Donetsk residents...”, but the Ministry of Internal Affairs maintained that it related to the breach of copyright⁶. On October 12, 2011 the search was conducted in the house and office of People’s Deputy (faction BYuT-Batkivshchyna) Yevhen Suslov⁷; on October 13, 2011 the fiscal militia began searching the public association of Afghans “Nobody but us”, who were among the co-organizers of peaceful assemblies against liquidation of social benefits⁸. On October 19, 2001 the search was conducted of the apartment of ex-Minister of Coal Industry Viktor Poltavets⁹; on October 27, 2011 the search was conducted of the apartment of the former accountant of the corporation United Energy Systems of Ukraine (UESU) Lidiya Sokolchenko¹⁰. According to reports, the searches are also conducted at the enterprises, which either belong to opposition politicians or finance opposition activities¹¹.

On February 4, 2011 the legal proceedings were instituted against the daughter of the Head of Supreme Court of Ukraine Vasyl Onopenko Iryna on a fraud charge. Iryna Onopenko and her ex-husband were suspected in non-clearing-off the \$300,000 debt. Later, the investigators searched five houses, including Vasyl Onopenko’s house, where, according to a tip, Iryna Onopenko might stay¹². The observers believed that this was one way to pressure and control the Supreme Court of Ukraine. The charges were withdrawn after the meeting of the Head of the Supreme Court of Ukraine with President of Ukraine Viktor Yanukovych.

The problem concerns the procedure of searches and seizures carried out not at home or other estate, because such actions need no court order that does not meet international standards. Certain problems arise during the search of attorneys’ premises which may contain information that the persons entrusted to their lawyer and that need special protection. However, in practice there is no such protection.

In order to counter the so-called “computer terrorism” the SSU takes measures to control Internet users and regulate the Ukrainian segment of the network. Although there is no legal definition of SSU empowerment in this area, it still installs technical capabilities to monitor Internet users.

⁵ <http://korrespondent.net/ukraine/politics/1271707-lucenko-miliciya-sledit-za-svidetelyami-po-moemu-delu>

⁶ <http://ua.korrespondent.net/ukraine/events/1258967-mvs-kompaniyu-prostoprint-obshukali-ne-cherez-futbol-ki-spasibi-zhitelyam-donbasu>

⁷ <http://ua.korrespondent.net/ukraine/events/1271465-mvs-zayavlyae-shcho-soratnik-timoshenko-pidozryuetsya-v-pidrobcu-dokumentiv>

⁸ <http://korrespondent.net/ukraine/politics/1271849-v-mvd-zayavili-cho-obysk-v-ofise-afgancev-provodit-nal-ogovaya>

⁹ <http://ua.korrespondent.net/ukraine/politics/1276049-mogilov-nazvav-prichinu-obshukiv-u-ministra-kab-minu-timoshenko>

¹⁰ <http://ua.korrespondent.net/ukraine/politics/1276957-siloviki-provodyat-obshuk-u-kvartiri-kolishnogo-golovnogo-buhgaltera-kompaniyi-eesu>

¹¹ <http://ua.korrespondent.net/bbc/1239196-ft-ukrayinska-vlada-vzyalasya-za-sponsoriv-opozyciyi>

¹² <http://novynar.com.ua/politics/153387>

Although the Law of Ukraine “On protection of personal data” (adopted June 1, 2010)¹³, which regulated the relations connected with the protection of personal data during their processing, entered into force on 1 January 2011, many people learned about it only in December 2011 due to the fact that from January 1, 2012 legal liability might be imposed for failure to provide information on databases compiled by legal and natural persons covered by the law, which stirred fever in data transfer. However, problems regarding the implementation of the law arose from the lack of general information about the law and its shortcomings.

The Law covers personal database creation and processing with the exception of individual PIMs only for non-pro personal or household use; journalist performing his official or professional duties; and professional authors for creative activity.

By the law, all personal information other than impersonal personal data are classified data withheld from general circulation, except where law prohibits referring data to classified personal info of certain categories of citizens or their exhaustive list.

In particular, one cannot withhold from general circulation personal data of an individual claiming to hold or holds an elected office (in the representative bodies) or a civil service post in the first category, except for the information so classified by law.

Under the law, the personal data should be processed on purpose only; in case of changes a new person’s consent will be needed for personal data processing, and the PIM should be commensurate with the purpose of processing.

PIM processing cannot be allowed without person’s prior consent, except in cases determined by law and only in the interests of national security, economic prosperity, and human rights. After expiration of time necessary for their purpose, all personal data must be impersonalized.

Although this law was passed to ensure implementation by Ukraine of the Convention of the Council of Europe “On Protection of individuals with regard to automatic processing of personal data”¹⁴, but its redaction proved to be faulty and contained a number of shortcomings and contradictions. Thus, the lack of separation of general (full name, name and patronymic, citizenship, place and date of birth) and sensitive personal data creates unnecessary obstacles and leads to bizarre situations in which fixation of names of persons may be considered a transgression. For example, the academic registering in high school may be pronounced PIM processing in terms of this law.

Similarly, the requirement of processing of personal data for scientific, statistical and historical purposes in impersonal form can lead to absurd situations when the use of family names, names and patronymics in the scientific and historical works can be viewed as a violation of the law, as well as collecting information about famous historical figures, publishing biographies or memoirs, which contain a list of persons mentioned in them.

There remains an unresolved question about publishing of personal data, if they are of public interest, particularly in the context of the Law “On Access to Public Information.”

It should also be recognized that the law does not answer the question concerning personal data of deceased.

It is unclear what to do when the person withholds her/his consent to process personal data under contractual relationship between the parties, such as replacing faulty household appliances under warranty or in the case of employment relationship, as well as in the case of the right to education of a person who disagrees with the processing of personal data or to transfer personal data to the third parties.

The law provides for the duty of the personal data holder to inform in writing the subject of personal data of her/his rights in connection with the inclusion of her/his data into personal data base within 10 working days from the date of such placement. However, it is unclear what to do when there is no mailing address of such person.

¹³ <http://zakon1.rada.gov.ua/laws/show/2297-17>

¹⁴ http://zakon1.rada.gov.ua/laws/show/994_326

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The fuzzy definition of personal data removal may lead to numerous conflicts related to the requirement of subjects of personal data to remove personal data, whereas without such personal data the relevant social relations are impossible.

The law does not cover personal data processing for the use of media.

According to President of Imena.UA Olexandr Olshanskiy, the Law “On protection of personal data” led to the fact that, due to unclear formulation, the registrars of domain names had to abandon the public availability of Whois data, despite that, strictly speaking, such information is not personal data¹⁵.

On 02.06.2011, the Verkhovna Rada of Ukraine adopted the Law “On Amending Certain Legislative Acts of Ukraine Regarding Enhancement of Responsibility for Violation of Legislation on Personal Data Protection”, which came into force on 01.01.2012, but later the legal validity date was postponed¹⁶.

The Law makes changes in the Code of Ukraine on Administrative Offenses and provides that “failure or untimely notice of the subject of personal data of her/his rights in connection with the inclusion of his personal data into the database of personal data, the purpose of collecting these data and the persons to whom these data are transferred” shall result in inflicting a fine from 200 to 300 tax-free minimum incomes (tfmi), and guilty officials and individuals-entrepreneurs shall pay from 300 to 400 tfmi. In addition, for “failure or untimely notice of the specially authorized central executive body for the protection of personal data of change in information submitted for state registration database of personal data” the guilty person will be fined from 100 to 200 tfmi, and officials and businesspersons from 200 to 400 tfmi. If the infringement is repeated during the year, the person will be brought to administrative responsibility and fined from 300 to 500 tfmi, and the officials and citizens-entrepreneurs from 400 to 700 tfmi.

In case of evasion of the state registration of personal database the imposed fine shall make from 300 to 500 tfmi (officials and citizens-entrepreneurs from 500 to 1000 tfmi). At the same time, failure to observe the legislation on personal data protection in PIM database that has resulted in unlawful access to them shall be fined from 300 to 1000 tfmi.

Article 182 of the Criminal Code has been also amended; the new redaction stipulates that for “illegal collection, storage, use, destruction, publication of confidential information about a person or an illegal change of such information, except in accordance with other articles of the Code” the fine shall make from 500 to 1000 tfmi or correctional labor for up to two years, or imprisonment for up to six months, or imprisonment for up to three years. In the event that such actions are committed repeatedly, or if they have caused any substantial damage to legally protected rights, freedoms and interests of individuals (damage in the form of material damage is considered substantial if it is 100 or more times greater than minimum subsistence income), the guilty person shall be punished with arrest for a term of three to six months or imprisonment for a term of three to five years, or imprisonment for the same term¹⁷.

On May 25, 2011, the Cabinet of Ministers of Ukraine issued Resolution No. 616 “On approval of the State Register of Personal Data and Its Maintenance”¹⁸.

The Ministry of Justice of Ukraine is the main central authority responsible for development and implementation of national legal policy on personal data protection.

¹⁵ <http://www.pcweek.ua/themes/detail.php?ID=132037>

¹⁶ <http://zakon1.rada.gov.ua/laws/show/3454-17>

¹⁷ Up to 01.07.2012 the following redaction of Article 182 of the Criminal Code shall take effect:

“The illegal collection, storage, use or publication of confidential information about individuals without their consent or publication of this information in a public addresses, publicly displayed work, or media are punished by the fine up to fifty tax-free minimum incomes, or correctional labor up to two years, or imprisonment for up to six months, or imprisonment for up to three years.”

¹⁸ <http://zakon1.rada.gov.ua/laws/show/616-2011-%D0%BF>

The Decree of the President of Ukraine dated April 6, 2011 No. 390/2011 approves the Regulation on the State Service of Ukraine on Personal Data Protection¹⁹ that defines the tasks and functions of the State Service of Ukraine on Personal Data Protection. The Service shall be responsible for: 1) advancing proposals on the state policy on personal data protection, 2) implementation of state policy on personal data protection, 3) control over compliance with legislation on personal data protection, and 4) implementation of international legal cooperation in the area of personal data protection.

The discretionary powers of the State Service of Ukraine on Protection of Personal Data are extremely broad. Specifically, there are very wide margins of sanctions provided for violation of relevant rules, not to mention the extraordinary in comparison with other articles of the Code of administrative violations, the size of penalty. There are also doubts concerning the expediency of the absolute right of access to premises where the processing of personal data takes place.

According to representatives of the State Service of Ukraine on Protection of Personal Data, 18 applications for registration of databases were submitted in July 2011, 144 in August, 248 in September, 452 in October, 12,272 in November, and over 400,000 in December. According to preliminary estimates, it comes to registration of about 3 million databases²⁰. This number of databases indicates the overly broad scope of this Law.

However, there is a likelihood that the provisions of the Law “On protection of personal data” are employed to carry out selective pressure on certain businesses or organizations.

On January 18, 2011 on the orders of the Administration of the President of Ukraine to gather information as part of the program to prevent spread of the AIDS epidemic among drug addicts the heads of regional departments of the Ministry of Internal Affairs of Ukraine received the instruction No. 40/2/1-106 of the MIA of Ukraine “On the monitoring of persons participating In substitution therapy.”

It included the following objectives: to establish full legal and actual address of hospitals providing replacement maintenance therapy (RMT), number of people involved in it, separately noting those who use methadone and bupremorphine; while following instructions for the listed assigned drug addicts and RMT patients it is advisable to interview each person, her/his family filling in the questionnaire. The explanation form and appended sheet include as follows: PIM, treatment circumstances, psychological and physical condition, and HIV info.

Subsequently, the chief management of the regional departments of the Ministry of Internal Affairs (MIA) sent requests for lists of RMT patients and their PIMs to the heads of narcological dispensaries²¹.

It should be noted that at present the main electronic classifier, which is based on the collection and processing of personal data of citizens of Ukraine by public authorities, is the identification number provided by the State Tax Administration. The sphere of its use goes far beyond the purpose for which it was established by law, i.e. tax accounting. In the absence of an identification code the legal employment, access to pensions, realization of the right to education, receipt of scholarships and unemployment benefits, processing subsidies, bank accounts, registering of a business entity, receipt of state diplomas and more are impossible. So, there is an established administrative practice of deliberate violation by public authorities of the Law of Ukraine on a single register of natural persons-taxpayers and use of tax numbers for other purposes than those covered by this Law.

However, one can expect that the Law “On protection of personal data” will provide an opportunity to limit such use.

On September 27, 2011 the Verkhovna Rada of Ukraine adopted the Law “On the documents that prove identity and citizenship of Ukraine”, which provided for the introduction of biometric

¹⁹ <http://zpd.gov.ua/R/perelik/perelik/24.htm>

²⁰ <http://biz.liga.net/all/it/intervyu/2108926-gossuzhba-pisma-s-zayavleniyami-po-bazam-dannykh-prikhodyat-meshkami.htm>

²¹ <http://helsinki.org.ua/index.php?id=1296465225>

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passports in the form of plastic cards, which would replace the internal passport of the citizen of Ukraine. It was to include an embedded chip with biometric information and a number of additional security features. The passport card should contain the following information: country name, title of the document, document type, country code, document number, person's name, nationality, date of birth, number of SIS record (State information system for registration of individuals and their documentation), sex, place of birth and date of issue, authority which issued the document, term of validity, "digitized image of a person," and "digitized signature."

The law was severely criticized by journalists, opposition, civil organizations, and by the Ministry of Justice of Ukraine²².

On October 21, 2011 the President of Ukraine vetoed this Law²³.

However, earlier, on October 20, 2011 the Ministry of Internal Affairs signed an agreement with the consortium EDAPS to purchase equipment for the first phase of introduction of passports with biometric data. The cost of the transaction amounted to UAH59.93 million. It was an uncompetitive one-bidder auction. Due to the veto, V. Hrytsak, allegedly participating in EDAPS, accused the Minister of Justice in agreement on the production of passports with the German enterprise²⁴.

In November 2011 the President of Ukraine instructed the Prime Minister to print driver's licenses using the equipment owned by MIA²⁵. The observers believe that such actions are related to the monopolization of the document production market by EDAPS Corp. and fixing of inflated prices²⁶.

On January 31, 2011 the National Bank of Ukraine issued the Resolution #22 changing the rules of the instruction "On the implementation of financial monitoring by banks" and determining the term from April 22 to October 22 for banks to collect in-depth data about customers. Now, what matters is not only the passport data, identification number, place of employment, position, telephone number and email address, but also such sensitive data as information about the movable and immovable property of the customer, accounts in securities, forecast of the volume of transactions and the sources of income. Some banks refused to serve customers in case of refusal to fill in such forms²⁷.

On September 23, 2011 there came into force the NBU Resolution No. 278 of 21.09.2011 which revised the currency exchange operations in Ukraine; according to the new scheme, when buying or selling currency (equivalent to UAH 50.000) the customer should present a passport or other document of identity providing evidence of residence.

The National Bank of Ukraine also sent a letter No. 28-211/3760-11058 of 21 September, which obliged the banks and exchange offices to keep copies of pages of identification document containing data on which the identification of the person was made, and this requirement covers all currency exchange operations equivalent to UAH 50.000²⁸. Subsequently, the National Bank of Ukraine made changes providing that if a person sold foreign currency, s/he did not need copying her/his passport.

There remains an unresolved issue of legal principles of video surveillance in public places. According to European standards²⁹, the video surveillance can take place, but it must meet the fol-

²² <http://tyzhden.ua/Politics/31786>, <http://tyzhden.ua/News/31433>, <http://helsinki.org.ua/index.php?id=1306315204>

²³ http://news.dt.ua/POLITICS/yanukovich_vetuvav_skandalniy_zakon_pro_biometrichni_pasporti-90007.html

²⁴ http://news.dt.ua/POLITICS/za_den_do_veto_yanukovicha_mogilov_zaplativ_edapsu_60_milyoniv-90326.html

²⁵ http://news.dt.ua/ECONOMICS/yanukovich_vidibrav_u_edapca_pravo_drukuvati_vodiyski_prava-92628.html

²⁶ http://news.dt.ua/POLITICS/brodskiy_upevneniy_scho_yanukovich_vetue_zakon_pro_pasportni_kartki-88737.html, http://news.dt.ua/ECONOMICS/edaps_prodae_ukrayintsyam_zakordonna_pasporti_na__10_dolariv_dorozhche_nizh_britaniya-94052.html

²⁷ <http://tsn.ua/groshi/nacbank-zbiraye-dosye-na-kliyentiv-usih-ukrayinskih-bankiv.html>

²⁸ <http://tyzhden.ua/News/31225>

²⁹ 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).

lowing requirements: the zones of video surveillance should be systematically mark; there is a need to establish an independent national body for independent control of organization of video surveillance, as well as storing and using information about the person.

The compulsory medical procedures, such as centralized vaccination of children, are still discussed in media³⁰. For example, in the absence of vaccination the child cannot be admitted to school or kindergarten. However, the procedure of vaccination is not indisputable³¹. Thus, on May 10, 2011 the Ministry of Justice canceled the decision on state registration of the Calendar of preventive vaccinations in Ukraine approved by the Ministry of Health Care of Ukraine from February 3, 2006 No. 48 registered with the Ministry of Justice of Ukraine on June 2, 2006 for No. 665/12539³².

The opponents of vaccination refer to domestic legislation, arguing that vaccination may take place only with the consent of the person, and if the person is less than 15 years of age the consent of her/his parents shall be needed. As for the ban to attend child-care facilities for non-vaccinated children, they argue that it is contrary to the constitutional right to education.

The European Court of Human Rights continued making new decisions concerning violation of the right to privacy by Ukraine. By this time, however, the law has not been changed in accordance with the judgment in the case “The Volokhs vs. Ukraine” concerning the procedure of tapping communication channels.

On 21.07.2011 the European Court of Human Rights in the case “Hrymkovska vs. Ukraine”³³ adjudged the state guilty of violating Article 8 of the European Convention on Human Rights and ordered Ukraine to pay the applicant €10,000 indemnification for the fact that in 1998, the street near the house, where she lived, made trafficable for trucks, turning the street with a block of houses on it into a part of international superhighway. As a result, the local residents suffered from excessive noise, vibration, and dust. On the road that was not designed for such loads appeared potholes. According to the applicant, the local authorities, instead of repairing the road, filled the potholes with coal waste. The sanitary station, which had studied the ecological situation on the street, found that 130 vehicles drove by hourly. Half of them polluted the environment above the norm, experts said. In particular, the copper and lead content exceeded the maximum permissible concentration 23 and 7.5 times, respectively. Although in 2001 the claimant appealed to the local court and sought to force local authorities to provide family with another dwelling and compensation due to family health hazard, the court dismissed the petition without a reasonable explanation.

The European Court of Human Rights took into account that the Ukrainian authorities have not conducted necessary research before making the street trafficable for trucks. In addition, Natalia Hrymkovska had no opportunity to defend its position in the national court, because her claim was rejected in the very first instance. Although the Court had no evidence that it was the superhighway that influenced the development of diseases of Natalia Hrymkovska’s family members and cracks in her house, the Court concluded that the cumulative effect of noise, vibration, air and soil pollution had a negative impact on the family life of the applicant.

On February 10, 2011 the European Court of Human Rights found a violation by Ukraine of Article 8 of the European Convention on Human Rights in the case “Dubetska et al. vs. Ukraine”.

The applicants (eleven Ukrainian citizens) have argued that the authorities had violated the right to housing, personal and family life, not protecting them from excessive pollution created by two state-run industrial enterprises: mine “Viseyska” and Public Corporation “Lviv Coal Company.” These enterprises contaminated underground water and soil, caused dust settling, damaged buildings of applicants who lived in the buffer zone of the mine. Drinking water was delivered irregularly and destruction of buildings caused by soil flash was not indemnified. In addition, severe

³⁰ <http://podrobnosti.ua/podrobnosti/2011/12/20/810720.html>

³¹ <http://odessa-daily.com.ua/component/content/article/162/42263-vredonosnaya-datskaya-vakcina.html>

³² <http://www.minjust.gov.ua/0/35059>

³³ <http://helsinki.org.ua/index.php?id=1311581724>

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environmental factors led to the complication of family relations. Contamination led to devaluation of their houses and inability to sell them and move to environmentally cleaner area.

Despite the fact that the authorities (in particular, sanitary inspection) repeatedly demanded that the mine takes measures to control the buffer zone of the enterprise, including issuing orders to close it; nevertheless it continued to work. Although the director of the mine was obliged to provide new housing habitation for the buffer zone residents, he failed to comply pleading the lack of state funding. Appeals for protection to the national courts were inconclusive.

The court obliged Ukraine to pay the victims monetary compensation of €65,000 and also found it necessary to implement decisions of national courts on resettlement of the applicants to a safe place.

On July 7, 2011, the European Court of Human Rights found a violation of Article 8 of the European Convention on Human Rights on the case “Fedorov and Fedorova vs. Ukraine.”

On June 15, 2001 psychiatrist of Poltava Central Hospital F. examined the applicant in the courtyard of his house in connection with the complaints of his neighbors. The doctor did not warn the applicant that he performs psychiatric examination. This conversation lasted about 10 minutes, after which the applicant had tried to take pictures of the doctor and ambulances. Based on this examination of the applicant, the psychiatrist set the diagnosis “raving chronic disorder.” The letter with this diagnosis and opinion about the necessity of forensic examination of the applicant for further inpatient treatment signed by the head of Poltava Central Hospital was sent to the Poltava District Court of Poltava City.

Subsequently, the applicant repeatedly complained that he was illegally examined and inspected.

The Court decided that in the case of the first applicant the violation of Article 8 of the Convention on the conduct of his psychiatric examination against his will took place on June 15, 2001 with diagnosis set as “chronic manic disorder.” The Court appointed the first applicant just satisfaction in the amount of €15,000, and the second applicant €2,000 in respect of incorporeal damage.

RECOMMENDATIONS

1. Improve the Law of Ukraine “On protection of personal data”: to finalize it and remove gaps and contradictions, providing, inter alia, for the implementation of the following principles:

- bring out common (last name, first name, middle name, citizenship, date and place of birth) and sensitive personal data, providing for them different access mode;
- different ID numbers (databases of different authorities) should be used separately; the uniform code to collect all information about a person is not allowed;
- sharing information among authorities must be clearly regulated and conducted by law or court order with proper notification of people about it and the right of appeal.

2. It is necessary to stop the administrative practice of unlawful use of ID numbers (code) of the taxpayer for any other purpose not provided for by law. It is necessary also to discontinue the use of the term “personal number”, the usage of which is not provided by any law.

3. Annul the Resolution of the Cabinet of Ministers No. 1169 from September 26, 2007 “On approval of the procedure of receiving court permission to take measures to temporarily restrict human rights, and use of the information” and adopt a relevant law instead, which should clearly define the procedure for channel tapping (tapping phones, cell phones, e-messaging tracking, monitoring of Internet browsing):

- procedure for obtaining a court order to do so and the terms on which this can be done;
- procedure for periodic review by the court of granted sanctions;
- post-notification of the person about tapping and dismissal of the charge or termination of criminal proceedings;
- the individual’s right to appeal this action to court and claim compensation in case of unjustified actions of the authorities;

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- procedure of data storage and future use.
- 4. Amend the legislation providing for independent control of the activities of the State Service for Special Communication and Information Protection of Ukraine, Security Service of Ukraine and other law enforcement agencies regarding the tapping, publishing of annual report containing impersonal data regarding the tapping for operative crime detection activities.
- 5. Establish procedures in litigation allowing for procedure for appealing against the actions of law enforcers conducting search of a person, her/his home and workplace, and ability to claim compensation in case of violation of the search procedure.
- 6. Introduce a regulation about annual publishing by law enforcement agencies of the total number of permits for tapping and permits for interception of correspondence and searches.
- 7. MIA should stop unmotivated collection of sensitive personal data about a person (information on political creed, religious beliefs, sexual orientation, participation in substitutive therapy, etc.).
- 8. Change the law on secrecy of adoption (keeping secrecy even from the child). In particular, you should make exceptions to the provisions of the law, which establishes the absolute secrecy of adoption (Articles 226, 229, 230 of the Family Code, Article 168 of the Criminal Code).
- 9. Adopt a bill and regulations protecting the rights of patients, particularly in the implementation of compulsory medical procedures and privacy of health info.
- 10. It is necessary to amend the legislation and legal practice in order to resolve the contradiction between compulsory vaccinations for attendance of child care centers and the right to education for children whose parents deliberately refuse to carry out such vaccinations, especially when such vaccinations are contraindicated for the child or cause harm.
- 11. It is necessary to amend legislation that would adjust Ukrainian legislation in accordance with the practice of the European Court of Human Rights concerning the procedure of tapping (tapping of phones and mobile phones, timing of calls, tracking movements of the mobile phone owner, e-messages tracking, monitoring of Internet browsing, etc.):
 - procedure for obtaining a court order for such actions and their timing;
 - strict list of offenses which may lead to wiretapping;
 - limiting to cases in which the actual reason to suspect a person of committing a grave or especially grave crime was established by other means;
 - procedure for periodic review by the court of granted sanction;
 - notifying the person of the fact of wire tapping after the event and dismissal of the charge or termination of criminal proceedings;
 - the individual's right of appeal in court and claim compensation in case of unjustified actions of the authorities;
 - data storage and use;
 - circumstances under which records can or should be erased;
 - mechanism for handling copies or rewritten material if the accused person is acquitted.
- 11. Regulate video surveillance in public places, providing for, among other things, storage and erasure of records.
- 12. Stop using searches as politically motivated means of ensuring loyalty and persecution of political opponents.

VII. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION¹

1. OVERVIEW

The situation in this area has not changed significantly. On the one hand, there is a relative freedom, especially in comparison with other FSU countries. On the other hand, there remain old problems associated partly with the old legislation².

The members of all denominations can sufficiently enjoy the freedom of religion. The state does not give anyone special privileges and does not impose significant restrictions on religion. This is due to the fact that the law stipulates that religious organizations may well exist without official registration.

Ukraine compares favorably with the FSU countries providing basic level of religious freedom. Even in spite of the outdated and sometimes strict laws on freedom of conscience and religious organizations, its shortcomings are largely compensated with mostly liberal administrative practice of the authorities. Although it is clear that because of the absence of clear legal guarantees of religious freedom the situation remains unstable and unpredictable and for the most part dependent on government policy.

The same opinion is also expressed in the reports of international institutions, such as the U.S. State Department³.

There remain the old problems of complicated registration of religious organizations. On the average the registration of the statutes of these organizations, even widely known and recognized, can last from 9 to 18 months. This procedure also contains many violations of European standards, is very bureaucratized and is not clearly defined. However, the religious organizations put up with this, because after such registration there is practically no further control of their activities, except when the foreigners are involved.

However, the changing political situation brings about policy changes in this area. First of all it concerns certain preferences in the actions of authorities often associated with the dominant religion in this area. In particular, it is evident in land allocation for the construction of religious buildings and restitution of churches confiscated by Soviet authorities and so on. On the other hand, the authorities, mostly local ones, can raise difficulties for the development of other religions in favor of the dominant church. However, since such dominance is different in different areas, it is not easy to bring out specific trends within the country.

¹ Prepared by Volodymyr Yavorsky, Executive Director of the Ukrainian Helsinki Human Rights Union.

² See: the overview of freedom-of-religion legislation deficiencies in the Report of human rights organizations "Human Rights in Ukraine: 2009-2010" which is of current interest as well: <http://www.helsinki.org.ua/index.php?id=1298305235>.

³ July-December, 2010 "International Religious Freedom Report", September 13, 2011, http://www.state.gov/g/drl/rls/irf/2010_5/index.htm

The analytical data show that the UOC-MP added over 200 religious buildings in 2010. The majority of them are leased premises. On the average it is twice as much than any other religious organization. However, this does not give grounds to say that public policy in general has a bias towards one religious organization.

The issue of discrimination on religious grounds is quite serious; however, the majority is ready to put up with this when it concerns only the public sphere of social life. The more so there are no legal instruments to combat discrimination at home.

According to statistics, as of January 1, 2011 the religious network in Ukraine consisted of 35,861 religious organizations which is 677 more than in 2009. At the same time 1884 religious communities have no legal status, that is, they function without registration, which is not mandatory. The registered religious organizations with legal status include 32,521 religious communities (581 more than in 2010), 88 (+3) centers and 274 (+9) administrations, 459 (+20) monasteries, 357 (+10) missions, 78 (+2) brotherhoods, and 200 (+1) religious educational institutions. The religious organizations operate 12,762 (+4) Sunday schools. 30,199 priests are going about affairs of churches and religious organizations in Ukraine. There are 386 (+9) religious periodicals is units. The religious organizations are using a total of 23 159 (+372) and adapted for religious worship buildings: 3,947 buildings have the status of architectural monuments and 7718 are premises adapted for prayer. According to statistics, 2403 (+5) religious buildings are under construction. For worship, religious and social activities the churches and religious organizations take on lease 6963 (+166) premises and buildings. If we compare the available number of registered religious organizations with the number of buildings and premises used by them, the churches and religious organizations in Ukraine are provided with religious buildings for worship only for 68%.

On the whole, the past trend persists: the number of religious organizations in western and central regions of the country is going up⁴.

Following the Presidential Decree number 1085/2010 of December 9, 2010 “On the optimization of the system of central bodies of executive power” the State Committee on Religions was abolished. The newly created State Registration Service of Ukraine had to register religious organization. At the same time the functions of implementation of the state policy on religion were transferred to the competence of the reorganized Ministry of Culture of Ukraine. The decree was quite unexpected, and reorganization dragged on for months.

Under Article 14 of the Law on Freedom of Conscience and Religious Organizations registration of statutes (regulations) of religious organizations is in the competence of the state body for religious affairs, oblast, Kyiv and Sevastopol city state administrations, while in the Republic of Crimea it is the competence of the Government of the Republic of Crimea. In this way the Decree of the President of Ukraine No. 1085/2010 contradicted the law concerning the transfer of the function of registration of statutes (regulations) of religious organizations to the State Registration Service of Ukraine⁵.

Only on April 6 the new regulations on the Ministry of Culture with updated functions were approved. These regulations — contrary to the provisions of Presidential Decree, but in accordance with the law — left the function of statutes’ registration to the Ministry of Culture and administrations. That is, these functions were not transferred to the registration service.

In October at the Ministry of Culture they created the Department of Religious Affairs and Nationalities.

In 2008–2010 under the guidance of the State Committee of Religious Affairs and Nationalities they continued working on the new draft Bill of Ukraine “On the Freedom of Conscience

⁴ *There are 35,800 religious organizations 30,000 priests in Ukraine*; official data, Institute of religious freedom, http://www.irs.in.ua/index.php?option=com_content&view=article&id=827%3A1&catid=34%3Aua&Itemid=61&lang=uk. See the more detailed estimation: “Religious network in Ukraine: present state and trends of development”. “Religion and government in Ukraine: problems of relations”, Analytical info for the Round table about “Public and confessions in Ukraine: their relations and trends of development”, February 8 2011 http://www.uceps.org/upload/prz_2011_Rlg_sml.pdf.

⁵ *President V. Yanukovich liquidated the State Committee for Nationalities and Religions, Institute of Religious Freedom*, http://www.irs.in.ua/index.php?option=com_content&view=article&id=754:1&catid=34:ua&Itemid=61

VII. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

and Religious Organizations.” But the bill was not submitted to the Government for the following submission to the Parliament due to the fact that a number of denominations had expressed their objections to the bill.

On January 12, 2011 the Decree of the President of Ukraine No. 24/2011 “About the Action Plan for implementation of obligations and commitments of Ukraine resulting from its membership in the Council of Europe” ordered the Culture Ministry to submit in due course to the Cabinet of Ministers of Ukraine for the following submission to the Verkhovna Rada of Ukraine a draft bill on amendments to the Law of Ukraine “On the Freedom of Conscience and Religious Organizations” (new version).

On February 17, 2011 Minister of Culture of Ukraine M. Kulyniak met the members of the All-Ukrainian Council of Churches and Religious Organizations, which led to the decision on formation of a working group within the Ministry for preparation of bills on the freedom of conscience with the participation of the Secretariat of the All-Ukrainian Council of Churches and Religious Organizations (AUCCRO).

On March 16 and April 8, 2011 the meeting of the said Working Group of the Ministry of Culture took place which produced the new approach intended to improve the legislation on the freedom of religion generally maintaining that there is no urgency in adopting a new redaction of the law on the freedom of conscience; however there remained a need for amended branch legislation regulating the activities of religious organizations in some areas of social life⁶.

On April 21, 2011 the meeting of the President of Ukraine and All-Ukrainian Council of Churches and Religious Organizations (AUCCRO) took place. It was the first meeting of Viktor Yanukovich as President with the religious leaders of Ukraine, because since 2010 this body was not convened.

On July 21 the All-Ukrainian Council of Churches and Religious Organizations appealed to the President to postpone the development of a new redaction of the law on freedom of conscience and religious organizations. “In the absence of consensus on the proposed amendments at this stage the development of the new Law of Ukraine “On the Freedom of Conscience and Religious Organizations” should be delayed,” — read the statement adopted at the meeting. All in all this is due to stable and predictable current administrative practice of the law on freedom of conscience and religious organizations, as well as fears that any changes will limit the freedom of religion, as it happened in many FSU countries.

On June 30, 2011 the Parliament passed over the bill number 3347 on a moratorium on privatization of property intended for religious purposes. It took two years to reconsider the bill and it was finally supported by AUCCRO.

In April 2011 the Ministry of Defense approved the concept of Ministry in the Armed Forces of Ukraine⁷. According to the Order, the MOD is going to introduce the Institute of Military clergy (chaplains) in the Armed Forces of Ukraine.

2. FREEDOM TO PRACTICE RELIGION OR BELIEF

2.1. ESTABLISHMENT AND ACTIVITIES OF RELIGIOUS ORGANIZATIONS

In our previous reports we gave a detailed account of the problems of legislation on registration of religious organizations. Nothing changed in 2010 and our estimate is fully consistent with the current situation.

⁶ Olexandr Zayets. *The topical problems of development of the legislation of Ukraine on the freedom of conscience and worship*, 27.05.2011, Institute of Religious Freedom, http://irs.in.ua/index.php?option=com_content&view=article&id=872%3A1&catid=37%3Aart&Itemid=64&lang=uk.

⁷ Order of the Minister of Defense of Ukraine No. 220 from April 22, 2011. http://irs.in.ua/index.php?option=com_content&view=article&id=861:1&catid=63:va&Itemid=86.

However, during 2011 there were numerous cases of termination of religious organizations in court after actions brought by tax authorities under the Law on State Registration. These are cases of failure to submit their tax reports. However, this practice does not comply with the law on religious organizations, since it contains no such grounds for liquidation of the organization. This fact was also stressed by HACU. However, this practice persists.

2.2. THE ORGANIZATION OF PEACEFUL RELIGIOUS ASSEMBLY

The Law on the Freedom of Conscience and Religious Organizations — contrary to Article 39 of the Constitution — establishes the authorization procedure for peaceful religious assembly. In practice, the peaceful public religious events are fraught with more problems based on discrimination, intolerance, and arbitrary interpretation of the law.

Sumy

The scandal erupted on June 9 around the sports and music action “Youth for Healthy Lifestyle” on the Nezalezhnist Square. Its initiators were NGO “Sumy Initiative” and the Full Gospel Church “The Ark”. The action consisted of several parts: the first part included the competition of young rollers, skaters and bicyclists as a new stage of Sumy Extreme Style, it was followed by the rock concert featuring local bands as well as NLM band from the USA, and at the end American preacher David Pierce addressed the crowd. It was the last part that some Sumy citizens disliked. There erupted some minor conflicts that police controlled in due time.

But there were frictions among the Sumy citizens participating in the action and passers-by; therefore this issue was discussed during the meeting of the City Commission for promotion of the observance of legislation on freedom of conscience and religious organizations. Natalia Taranets, a member of that committee, maintained that the City Rada had neither a grievance against the Church “The Ark” nor the NGO. “At the same time, the precedents with various churches who make arrangements in the city center even when we reasonably do not recommend them to rally or advice on moving to another location or to choose another date,” she said and explained that at the next meeting of the Executive Committee of the Sumy City Rada they will consider the decision about prohibition of religious and educational rallies in the city center. It is known that the ban may cover the Nezalezhnist Square and Taras Shevchenko park. However, this decision does not comply with Article 39 of the Constitution. Asked whether the ban will affect cross processions regularly held in downtown, Natalia did not answer directly but said that during rallies there never occurred incidents, even on this past May 22, when there were simultaneous cross processions of the faithful of the Ukrainian Orthodox Church of Moscow Patriarchate to the temporary cross on Nezalezhnist Square and of the faithful of the Ukrainian Orthodox Church of Kyiv Patriarchate crossing the square and heading toward the monument to Shevchenko⁸.

As a result, at a meeting of the Executive Committee of the Sumy City Rada on August 2 they passed a decision approving the list of places where one cannot hold public of religious and educational events. Now in Sumy there are only two places where the City Commission for promotion of the observance of legislation on freedom of conscience and religious organizations will allow religious communities to gather: summer stage of Kozhedub City Park and Theatre Square⁹.

Odesa

On June 26 the Odesa Catholics for the first time in many years were not allowed to organize the traditional procession of the Body of God around their own cathedral. The icon-bearing pro-

⁸ *In Sumy they intend to ban the downtown religious rallies*, October 13 2011, RISU, http://risu.org.ua/ua/index/all_news/community/freedom_of_conscience/43132/.

⁹ *In Sumy the Executive Committee banned downtown religious rallies*, RISU, August 3 2011, http://risu.org.ua/ua/index/all_news/community/freedom_of_conscience/43636/

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cession with the Holy Gifts was banned by the District Administrative Court on the grounds of application of the City Hall. The ban was based on the formal pretext showing though of the city authorities for public disorders control on the streets of Odesa. The thing is that Catholics' request to the City Rada was preceded by that of the local diocese of the UOC-MP to allow at the same time and place (including the environs of the Catholic cathedral) the procession "in honor of Orthodoxy" in Odesa. "We have been holding this procession for 7 years now in celebration of God's Body and Blood of Christ. We never disturbed the peace," said Bishop of Odesa-Simferopol diocese Bronislav Bernatsky. The representatives of Catholics suspected that the alternative procession was purposefully organized for their frustration. For some reason the Orthodox wanted to hold their procession near the Catholic Cathedral, although their church is two blocks farther, they stressed¹⁰. According to the "Katolytsky Krym"¹¹, the Berdychiv authorities also denied Roman Catholics to hold the procession celebrating the Body of God.

In August, local Odesa authorities once again prohibited the Roman Catholic cross procession. This procession took place for many years in the scope of the VI diocesan youth day. But this year, for the first time, the Odesa authorities have not issued a permit for such a procession and did nothing to block the street traffic. Therefore on their way to Cathedral the participants of the Youth Day silently proceeded along the sidewalk. Groups of young persons with priests, nuns and Odesa parishioners (over three hundred people) walked along the streets¹².

In Odesa, on the eve of Independence Day in August the concert of the Catholic priest and singer father Vitold Levytsky and Christian Choir "Quo Vadis" was interrupted. Although the program was approved by the City Department of Culture, during the event father Vitold was approached by a man in civil attire, who presented himself as MIA Colonel, and demanded to remove the priest from the scene. As a result the concert was interrupted and believers trying to avoid conflict with the authorities dispersed¹³.

In October, again in Odesa, the Roman Catholics were forbidden to hold cross procession, in particular, to carry the relics around the block where the temple situated with cross procession, as required by religion¹⁴.

Other cases

It took several months to plan the festival "God is always near" in Smila, Cherkasy Oblast. The organizers invited American evangelist Don Betts, Cherkasy Baptist Church choir, and music players. The city kept preparing for the festival in advance: advertising, sending invitations, and pasting bills. On Sunday, January 23, at 15:00 about 700 people gathered in the House of Culture. But it turned out that the entrance to the hall was closed. About 15:30 arrived the Deputy Mayor accompanied by the militia detachment and banned the festival; he motivated the authority's decision by the fact that the place does not meet certain requirements. The festival organizers were forced to stop the program¹⁵.

¹⁰ *The Odesa Roman Catholics boil over official ban to hold the traditional procession celebrating the God's Body*, June 28, 2011, RISU, http://risu.org.ua/ua/index/all_news/state/church_state_relations/43075/.

¹¹ See: <http://www.crimeacatholic.info/>.

¹² *The Odesa authorities have once more prohibited Catholic cross procession intended to mark the 6th Eparchial Youth Day this time*, August 23, 2011, RISU, http://risu.org.ua/ua/index/all_news/community/freedom_of_conscience/43964/

¹³ *The US and Germany look into violation of Catholic's rights in Odesa*, RISU, September 5, 2011, http://risu.org.ua/ua/index/all_news/community/freedom_of_conscience/44185/.

¹⁴ *The Odesa Catholics and Protestants are filled with indignation because of the policy of the new public authorities*, October 18, 2011, RISU, http://risu.org.ua/ua/index/all_news/community/freedom_of_conscience/44912/.

¹⁵ *The Smila authorities dispersed the Baptist festival*, RISU, January 25 http://risu.org.ua/ua/index/all_news/state/church_state_relations/40366/2011.

2.3. THE RIGHTS OF FOREIGNERS AND STATELESS PERSONS

The legislation goes on substantially restricting the freedom of worship for foreigners and stateless persons. It shows in the inability to establish religious organizations and restraints on preaching and other religious activities. In addition, these restrictions apply even to people permanently residing in Ukraine. The preaching by foreigners is permitted only at the official invitation of a registered religious organizations (although their registration is not mandatory) and permission from the authorities taking care of religious affairs. Absence of permit may entail administrative responsibility for foreigners (fine), and warning followed by possible forced dissolution for religious organizations.

With the liquidation of the State Committee for religious affairs, especially the first six months, it was difficult or even impossible for foreigners to get official approval of religious activities. In certain cases, it took many months to obtain an approval.

Since June 2011 the new procedure for issuing visas to enter Ukraine was introduced incurring displeasure of religious organizations. It restricted the rights of foreigners even more, because now the religious visa was issued only for employment in a religious organization and did not allow working without employment, and, contrary to established legislation, it required approval of the Ministry of Culture, and not an authority registering the statute of the religious organization¹⁶.

On September 22 the Parliament passed the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons”. The most important in the context of religious freedom are changes that involve simplification of visa procedures for foreign clergy. Thus, the legislators took into account the comments of the All-Ukrainian Council of Churches and religious organizations on these issues. According to part six of Article 4 of the Law, the foreign nationals and stateless persons will have the right to stay in Ukraine “to preach, perform religious rites or other canonical activities at the invitation of religious organizations.” Before the adoption of these amendments the Government Resolution No. 567 of June 1, 2011 stipulated that foreign priests could only be employed by religious organizations. The law allows the religious organizations to obtain consent at the place of registration of their statutes (i.e., oblasts, AR of Crimea, Kyiv and Sevastopol) and not to apply to the Ministry of Culture of Ukraine, as required by the above-mentioned government decree. According to Article 15 of the adopted law, the foreigners and stateless persons staying in Ukraine in connection with participation in the activities of religious organizations enter Ukraine and leave Ukraine with their passport documents and temporary residence permits. In the absence of such permit, there should be an appropriate visa or visa-free regime established with individual countries¹⁷.

3. STATE AND RELIGIOUS ORGANIZATIONS: PRINCIPLE OF NON-IDENTIFICATION AND NEUTRALITY

Adherence to these principles is one of the biggest problems in the administrative practice of the authorities, which is often based on backing of dominant local religions and discrimination against religious minorities. This is primarily due to the fact that the authorities fighting for electoral support always favor dominant religions. Obviously, this patronage informally makes it clear that the dominant religious organizations have more rights.

This is clearly shown by the examples of resolving property issues, including allocation of land for building of the houses of worship or the return of the religious property confiscated by Soviets.

¹⁶ *The All-Ukrainian Council of Churches states further complication of visa procedures for foreign priests*, September 7, 2011, Institute of Religious Freedom, http://www.irs.in.ua/index.php?option=com_content&view=article&id=915:1&catid=34:ua&Itemid=61.

¹⁷ *The foreign priests will be able to get a temporary residence permit in Ukraine by a new Law*, 26.09.2011, Institute of Religious Freedom, http://www.irs.in.ua/index.php?option=com_content&task=view&id=921&Itemid=61.

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In addressing such issues, this commitment acquires a practical dimension. The positive decisions on these issues, with few exceptions, are made for the benefit of dominant religious organizations only. It should be noted that in this context the dominant religious organization is the most prevalent organization in a particular area (oblast). Thus in each area different religious organizations dominate, usually the UOC-MP or UOC-KP.

In consequence, some religious organizations may be allocated a site for religious buildings, others may not. In certain cases, which have become widespread, the UOC-MP just captured sites for construction of religious buildings without conclusive legal documents. At the same time the authorities let illegal activities drift.

In particular, such a case was recorded in the Youth Park in Sviatoshyn district, Kyiv. The representatives of the UOC-MP communities explained that they ran into difficulties obtaining a site area without bribes and this was the only possible way to build a church. However, the public made a protest against the construction. In such cases the protesters were approached informally by a Security Service officer, who wondered why compromise the UOC-MP. Similar cases occurred in other parts of the city, for example, near the Church of the Dime. In all these cases the local authorities and law-enforcement agencies kept aloof from illegal activities of religious organization.

In 2010, there were cases of seizure of religious premises by other churches. It is often done with secret local administrative and law-enforcement support.

In February 2011, the Presidium of the Political Council of the political party “Our Ukraine” urged President of Ukraine Viktor Yanukovich and Prime Minister Mykola Azarov to stop limiting religious freedom in the country. “We condemn the attack on the legitimate rights of believers of the Ukrainian Orthodox Church of Kyiv Patriarchate, numerous cases of violent and fraudulent seizure of churches of this denomination in favor of the Moscow Patriarchate, which occur at silent connivance and informal support of the authorities”, reads the statement. According to “Our Ukraine”, the Attorney General’s Office kept itself aloof from the facts of seizure of churches, particularly in the Village of Kamyanka, Telmanivsky Region, and Village Rozdolne, Starobeshivsky Region, Donetsk Oblast, misinforming the parliamentarians that such action contained no crime¹⁸.

On February 15, 2011 the Donetsk District Administrative Court made a decision to take away the building of the church in the Village Kamyanka, Telmanivsky Region, Donetsk Oblast, from the community of UOC-KP, which had spent over 15 years restoring it. In the administrative proceedings the court declared invalid the order of the Donetsk Oblast State Administration of 09.02.1996 No. 64 on the transfer of the temple in the village of Kamyanka to the religious community of Ascension, UOC-KP¹⁹. The decision proceeded from the property suit of Ms. Varvara K., who said that only a few months ago she heard that in 1996 the church was transferred to the parish of the Kyiv Patriarchate. In fact, in 1996 the community received an unfinished project (the community members maintain that there was nothing but walls there), which the congregation has finished building at their own expense. She stated that her rights were violated because she lived in the Village of Kamyanka and was a parishioner of UOC-MP. The UOC-KP community members considered this ruling illegal and unjustified and appealed against the decision of the court. In their opinion, the court had no authority to conduct a hearing because the fact of fifteen-year lapse of action had been ignored. The court also balked at many significant facts of the case. For example, the UOC (MP) community with the same name was founded only in late December 2010 and therefore there were no reason to believe that in 1996 the decision violated any rights of the plaintiff. Earlier, in December 2010, unknown people tried to raid this church²⁰. On December 6, 2010 the unknown people called a meeting in the Village Kamyanka “to put the church under omophor of Moscow Patriarch-

¹⁸ *The Nasha Ukrayina condemns the limitation of religious freedom in the country*, February 14, 2011, <http://www.razom.org.ua/news/10971/>.

¹⁹ You may find this decision in the Integrated Register of Court Rulings: <http://reyestr.court.gov.ua/Review/14106001>.

²⁰ *The UOC KP in Donetsk Oblast Appeal Court defend its right to the church in Kamyanka Village*, Institute of Religious Freedom, 04.04.2011, http://www.irs.in.ua/index.php?option=com_content&view=article&id=839%3A1&catid=34%3Aua&Itemid=61&lang=uk.

ate.” In 2011 there were numerous cases of termination of religious organizations in court for claims of tax authorities under the Law on State Registration. Archbishop Sergei stressed that meeting was guarded by strong young men, who used force to prevent the participation of representatives of the Kyiv Patriarchate. Nevertheless, the Court of Appeal denied the community’s appeal²¹.

In February 2011 the Simferopol City Rada allocated the site area to the Spiritual Directorate of Muslims of Crimea for construction of the Cathedral mosque on 22 Yaltynska Street, where the Crimean Muslims had been long asking to obtain a lot. Back in 2004, the Simferopol City Rada approved the location of the Cathedral mosque on 22 Yaltynska Street. The site area was allocated to the Spiritual Directorate of Muslims of Crimea. However, this decision was later revoked by Simferopol deputies of new convocation. The illegality of the decisions the City Rada forbidding the Crimean Muslims to build the Cathedral mosque on a site previously approved by local authorities was confirmed by court rulings. Since January 2008, the Crimean Muslims initiated a peaceful protest in the form of informational picket on 22 Yaltynska Street objecting to the actions of city deputies and requiring a site area for the mosque. At this place they put up tents and banners demanding to allocate site area. In the Crimea they launched the campaign “Each inhabitant of the Crimea brings one wall stone for the construction of Cathedral mosque in Simferopol.” Not only Muslims but other believers living in Crimea also supported this action. They collected about 173,000 stones²².

In September 2011 the Sevastopol members again refused to restitute to Catholics the former Church of St. Clement, the centenary of which was marked this past November. For a long time these municipal premises accommodated the children’s movie theater Druzhba. Today the empty building is falling into decay. This conflict has been raging for 20 years now. “There is no reason to restitute the downtown historic building to Catholics in Sevastopol, because Catholicism always was a weapon against Orthodoxy,” opined Artem Maltsev, member of Sevastopol Communists faction, during the session of the Sevastopol City Rada. “During the Cold War Vatican inspired arms race and opposed the Soviet Union and Orthodoxy in particular. Following the collapse of the USSR, the Vatican and the Catholic Church started pressurizing in order to exclude Orthodoxy from independent Ukraine. In Western Ukraine the Catholic and Greek Catholic communities were used for the same purpose. In Sevastopol, there are no such opportunities. The local Catholic community is small. They say about 300 members, but only seven Catholics frequent the City Rada with their appeals. And this small Catholic community is trying to expand in Sevastopol. What for should the city indulge this minority community? Catholicism has always been a weapon against Orthodoxy. I remind you that about 80% of residents of the city-hero were baptized in the Orthodox Church,” concluded Artem Maltsev, deputy of the Sevastopol City Rada. The Roman Catholic community informed that they had been offered to buy it out or build new premises²³.

4. RECOMMENDATIONS

1. It is necessary to adjust Ukrainian legislation in accordance with the requirements of Articles 9 and 11 of the European Convention on Human Rights and Fundamental Freedoms in the light of the jurisprudence of the European Court of Human Rights. It is advisable to use the Guide-

²¹ See the appellate award in the Integrated Register of Court Decisions: <http://reyestr.court.gov.ua/Review/15944840>.

²² *After many time-consuming appeals the Crimean Muslims were allotted a site area for construction of cathedral mosque in Simferopol*, February 15, 2011, RISU, http://risu.org.ua/ua/index/all_news/other_confessions/islam/40741/.

²³ *Once again the Sevastopol deputies refused to restitute the former Catholic church to Catholics*, September 19, 2011, RISU, http://risu.org.ua/ua/index/all_news/community/land_and_property_problems/44434/.

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lines for Review of Legislation Pertaining to Religion or Belief adopted by the OSCE Parliamentary Assembly and the Venice Commission in 2004²⁴.

2. In order to eliminate discriminatory administrative practices and conflicts between churches it is necessary to adopt clear legal provisions on the grounds, procedure and terms of returning church property. Also, it is necessary to develop a detailed plan for the scheduled restitution of religious property. If such property cannot be restotuted, it is necessary to allow for compensations, i. e. for erecting of the new places of worship or allocation of site areas.

3. The local authorities should review their enactments establishing discriminatory provisions, as well as additional illegal restrictions of freedom of religion concerning peaceful assemblies, rental of premises, site allocation and restitution of places of worship. The general principles of site area allocation for building houses of worship should be clearly outlined.

²⁴ Freedom of thought, conscience and religion in Ukraine in the context of European standards observation. The Center for Law and Political Research "SiM". — Kharkiv: Folio, 2005. The Internet address on the site of UHHRU: <http://www.helsinki.org.ua/index.php?id=1137518398>.

VIII. THE RIGHT OF ACCESS TO INFORMATION¹

1. GENERAL OVERVIEW

The Law of Ukraine “On Access to Public Information” (hereinafter in this section — the Law on Access), adopted on January 13, 2011, as well as the new wording of the Law of Ukraine “On Information”, despite certain drawbacks (see the section on access to information in the previous report 2009–2010) should have become the first step towards the reforms in the area of access to information about activity of the authorities in Ukraine. At the same time, research concerning implementation of the Law on Access conducted by several non-governmental organizations as well as the experts’ conclusions state that there are no significant shifts towards more openness of the Ukrainian authorities. For instance, according to the data of the Ukrainian Independent Center for Political Research, the central bodies of executive power fulfill the requirements of the Law on Access to Public Information only at a level of 50%². As says M. Latsyba, “Citizens can obtain information mostly through an information enquiry, but cannot normally do this through the agency’s official website or through a register of public information”³. Although, the analysis of how access to information through an information enquiry is provided gives enough reasons to state that in 2011, in Ukraine, despite all innovations stipulated by the Law on Access to Public Information that aimed to simplify this procedure and establish strict limitations concerning possible classification of information about activity of the authorities as restricted, violations of the right of access to information through information enquiry were, as before, systemic.

In practice, while the authorities reported on implementation of all provisions of the Law on Access, and to prove their statements informed that official websites started special sections on access to public information, and reported on adoption of numerous instructions and regulations concerning enforcement of the right of access to public information, actual provision of requested information and official documents in full scope and within the time period stipulated by the Law would happen seldom, if ever.

Nothing changed, in particular, with access to Ukrainian towns and cities’ general construction plans, the majority of which are still classified as *For Official Use Only*, and are beyond the reach of the public⁴.

Besides, after the new laws on information were adopted it was expected that the Cabinet of Ministers of Ukraine would annul the Resolution of the Cabinet of Ministers of Ukraine as of November 27, 1998, No. 1893 “On approval of the Instruction on procedure of recording, storage

¹ Prepared by Oksana Nesterenko, Kharkiv Human Rights Protection Group expert on issues of freedom of opinion and expression.

² Law on access to public information is fulfilled on 50% — expert. <http://nbnews.com.ua/news/27350>

³ Ibid.

⁴ See research of the East-Ukrainian Center of Public Initiatives “Through access to general construction plans to corruption-free urban development”// <http://www.totalaction.org.ua/node/924>

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and use of documents, cases, editions and other material media of information that are classified as containing confidential information owned by the state”, as this enactment contradicts the Law on Access in both letter and intent. In particular, the abovementioned Resolution entitles the bodies of state authority and local self-government to classify any official document as “For Official Use Only” as they deem appropriate, but the Law on Access, in its turn, firstly, establishes that it is access to information that is restricted, not access to the document; secondly, only two categories of information may be classified as confidential and only in exceptional instances, after a three-part test is applied (and namely, in compliance with the Law, restricted access to information is enforced when the following three conditions are met: 1) exclusively in the best interests of the national security, territorial integrity or public order in order to prevent disturbances or crime, to protect public health, to protect reputation or rights of other people, to prevent disclosure of information obtained confidentially, or to uphold the authority and impartiality of justice; 2) disclosure of information can cause significant harm to these interests; 3) harm from disclosure of such information outweighs public interest in obtaining it — part 2 Article 6 of the Law on Access); thirdly, based on the systemic interpretation of Article 6, Article 9 of the Law, decisions of bodies of executive power and local self-government cannot be classified as confidential information: for instance, resolutions and orders of the Cabinet of Ministers of Ukraine, orders of the Tax Administration of Ukraine and so on cannot be labeled as “For Official Use Only”. Besides, the above-mentioned provisions of the Law created an obligation for Ministries, other central bodies of executive power, the Council of Ministers of the Autonomous Republic of Crimea, oblast state administrations, Kyiv and Sevastopol city state administrations to revise the documents that in compliance with the Resolution of the Cabinet of Ministers of Ukraine as of November 27, 1998, No. 1893 were classified as containing confidential information owned by the state and are labeled as “For Official Use Only”. Such revision should have resulted in one of the three following outcomes:

1. To remove the label “For Official Use Only” from the documents that in compliance with the Resolution of the Cabinet of Ministers of Ukraine as of November 27, 1998, No. 1893, were classified as containing confidential information owned by the state; and to label the information that, in compliance with part 2 Article 6, Article 9, can be classified as confidential, as “For Official Use Only”;

2. To classify the data contained in the document as confidential information:

- 2.1. if this information was collected in the process of operational-investigative activities, counterintelligence activities, in the area of country defense, and was not classified as a state secret, a disclosure of this information can cause significant harm to the interests of national security, territorial integrity or public order; in order to prevent disturbances or crime, to protect public health, to protect reputation or rights of other people, to prevent disclosure of information obtained confidentially, or to uphold the authority and impartiality of justice; and harm from disclosure of such information outweighs public interest in obtaining it;
- 2.2. if this is intradepartmental confidential correspondence, memorandum reports, recommendations, in case they are connected to development of the profile institution activity or performance of control and supervising functions by bodies of state authority, to the process of decision making and precede public discussion and/or adoption of decisions, and disclosure of this information can cause significant harm to interests of the national security, territorial integrity or public order; in order to prevent disturbances or crime, to protect public health, to protect reputation or rights of other people, to prevent disclosure of information obtained confidentially, or to uphold the authority and impartiality of justice; and harm from disclosure of such information outweighs public interest in obtaining it.

But instead of this, on September 7, 2011, the Cabinet of Ministers of Ukraine adopted the Resolution No. 938 “On making amendments to certain Resolutions of the Cabinet of Ministers of Ukraine in the issues of access to information”, according to which in the text of the Resolution No. 1893 the phrase “*confidential information owned by the state*” in all cases were replaced by the phrase “*confidential information*” in the corresponding cases. This step of the Cabinet of Ministers of Ukraine is a direct and outrageous violation of the Law on Access, as the term “*confidential*”

information owned by the state”, as defined in the Law of Ukraine “On information” of 1992, and, correspondingly, in the Resolution of the Cabinet of Ministers of Ukraine No. 1893, and the term “*confidential information*” as understood in the Law on Access, are different categories, first of all, not in letter, but in their legal nature. In particular, as we have already emphasized, while the Resolution of the Cabinet of Ministers of Ukraine No. 1893 entitles bodies of state authority and local self-government to label any official document as “For Official Use Only” as they deem necessary, the Law on Access, in its turn, firstly, establishes that it is access to information that is restricted, not access to the document; secondly, only two categories of information can be labeled as confidential information (Article 9) and even then it can be done only in exceptional cases, after the three-part test is applied. Moreover, based on the interpretation of Article 9 of the Law of Ukraine, except for information collected in the process of operational-investigative activities, counterintelligence activity, in the area of the country defense, public information cannot be labeled as confidential if this information is contained in a decision of the corresponding agency, including acts of separate action (decree, order, decision, regulation, resolution and so on). In other words, decisions of bodies of executive power and local self-government cannot be labeled as confidential information.

So, the year 2011 became a year of broad statements and declarations made by the authorities and of no actual efforts to improve the condition of how the right of access to information is ensured in Ukraine. In particular, when on May 9, 2011, the Law on Access became effective it meant enabling its major assumption that all information on activity of the authorities is publicly available, and the authorities are entitled to restrict the access to information on their activity only in exceptional cases⁵, that is, the concept of maximum informational transparency of the authorities. But to implement this paradigm it is necessary that provisions of the Law of Ukraine “On access to public information” are reflected in other legislative acts in this sphere; in particular, after its adoption those legal provisions that contradict the concept of maximal transparency of the authorities had to be either annulled or harmonized with the Law. In other words, after the first step, that is the adoption of the Law on Access, the second and the third steps were to be made, namely, harmonization with the Law on Access of other laws in this area, and repeal of the subordinate regulatory acts that contradict the provisions of the Law on Access, in particular, stipulate additional restrictions for enforcement of the right of access to information.

But this did not happen, and instead of actions aimed at implementation of the principles of the Law on Access, the bodies of state authority and local self-government started to take steps that utterly violate of the Law. In particular:

1. they adopt lists of information that is not public, what contradicts and violates the Law on Access (for instance, the executive committee of Lviv City Council by its decision No. 737 approved a list of data that contain no features of public information⁶);
2. they classify as confidential information:
 - 1) public information that is directly prohibited to be classified as restricted access information, in particular, as confidential information (according to part 5 Article 6 of the Law on Access and part 4 Article 21 of the Law of Ukraine “On Information”);
 - 2) public information without compliance with the requirements of part 2 Article 6 and Article 9 of the Law of Ukraine “On access to public information”;
 - 3) bodies of executive power continue the practice of issuing Regulations, Resolutions, Decrees and other decisions with the label “For Official Use Only”. But one of the major ideas of the Law on Access was to overcome the excessive secretiveness of the state, in particular,

⁵ Which requires that data, access to which is restricted, have to be clear, to be described specifically and comply with the three-part test. And namely: information has to concern a legitimate goal stipulated by the law; disclosure of information to public may cause significant harm to the named legitimate goal; the harm that can be caused to the mentioned goal has to outweigh the public interest in obtaining this information (currently the only draft law that follows this standard is the draft law “On Access To Public Information”, submitted to Verkhovna Rada by People’s Deputy A.V. Shevchenko).

⁶ [http://www8.city-adm.lviv.ua/Pool/Info/doclmr_1.NSF/\(SearchForWeb\)/D6398E15C8405162C22578E800507382?OpenDocument](http://www8.city-adm.lviv.ua/Pool/Info/doclmr_1.NSF/(SearchForWeb)/D6398E15C8405162C22578E800507382?OpenDocument).

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through establishing the strict limitations as to whether public information can be classified as restricted access information. Nevertheless, the Cabinet of Ministers of Ukraine still adopts Resolutions with the label “For Official Use Only”. And this is a direct violation of Article 6 of the Law on Access. According to the above mentioned article, “it is information the access is restricted to, not the document. If a document contains restricted access information, information, to which access is not restricted, has to be provided for familiarization”. Still, even after the Law on Access became effective, it is not uncommon when access to a document is denied exactly on the grounds that this document contains restricted access information. One of the last examples is the refusal of the State Department of Affairs to provide justification why the helicopter for Victor Yanukovich was leased without a tender. As the head of the State Department of Affairs Andriy Kravets answered in his official reply to the request from *Ukrayinska Pravda*, “The requested document contains data concerning organization and procurement of airborne transportation of persons, concerning whom state protection is conducted, as well as concerning flight safety”;

4. The provision of part 5 Article 6 of the Law on Access is being outrageously violated; in compliance with it, “access cannot be restricted to information concerning disposal of the budgetary funds, possession, use or disposal of state and municipal property, including copies of corresponding documents, conditions of obtaining of these funds or property, surnames, names, patronymics of individuals and names of legal entities that obtained these funds or property”. But, with no regard to this article, as well as the provision of the Law that all administrators of information, no matter what regulatory document they act upon, when resolving the issues concerning access to information should be governed by this Law, that is, the provisions of the Law on Access are special related to other laws, the Cabinet of Ministers of Ukraine refused to provide information about the level of salaries of officials by alluding to the fact that this information is confidential. In the Apparatus of Verkhovna Rada of Ukraine, in their turn, refused to disclose the names of the people’s deputies who received the governmental housing during the last parliamentary cadence.

2. RIGHT OF ACCESS TO INFORMATION AND JUDICIAL PRACTICE

Analysis of the judicial practice during 2011 showed the following tendencies:

1. The courts are reluctant to reverse decisions of the governmental agencies concerning legality of classifying information as restricted access information, in particular, the status of documents labeled “For Official Use Only”. These are, in particular, cases related to the demand to provide access for familiarization with General construction plans with the corresponding annexes and graphic materials. That is, what happened was a blunt disregard for Article 6 of the Law on Access as such. A rather illustrative example of this was the ruling of Moskovsky rayon court of the city of Kharkiv to dismiss the claim, which, among other things, demanded to oblige the urban development and architecture department of the executive committee of Kharkiv city council to provide a copy of the complete General construction plan of the city of Kharkiv till the year of 2026 with the corresponding annexes and graphic materials, approved by the decision of the session of Kharkiv city council as of June 23, 2004, No. 89/04. The court used the defendant’s argument that the textual and graphic materials requested are labeled “For Official Use Only” and this means that familiarization and work with the documents bearing this label is not prohibited, it is to be conducted following the corresponding procedure. In other words, the court failed to check the legality of the label “For Official Use Only” and when deciding on the ruling, instead of applying the direct norm of the Law Article 5, Article 9 of the Law on Access, it applied a series of subordinate regulatory acts, in particular, the Resolution of the Cabinet of Ministers of Ukraine No. 1893, what contradicts the Law of Ukraine “On access to public information”.

2. Ignoring provision of part 2 of Article 22 of the Law on Access, according to which “the response of the information administrator that the requester can obtain information from open

sources, or the response irrelevant to the request is considered an unjustified refusal to provide information”.

3. Ignoring provision of part 5 of Article 6 of the Law on Access, according to which “access cannot be restricted to information concerning disposal of the budgetary funds, possession, use or disposal of state and municipal property, including copies of corresponding documents, conditions of obtaining of these funds or property, surnames, names, patronymics of individuals and names of legal entities that obtained these funds or property. Observance of the requirements stipulated in part 2 of this Article, this provision does not cover cases when disclosure of or providing such information can cause harm to interests of the national security, defense, investigation or prevention of a crime.” For instance, the court rejected the claim to Vyshgorod rayon state administration of Kyiv oblast that requested to hold illegal the defendant’s refusal to provide information concerning the contract of sale and purchase of a land lot between Vyshgorod rayon state administration and V.F.Yanukovych concluded in 2010, as the court concluded, this information is classified as restricted access information, and, namely, information about a person. In such a way, the court ignored the provision of part 5 Article 6 of the Law on Access, which prohibits to classify the corresponding information as a restricted access information, that is, it is that case of exception when information about a person cannot be considered restricted access information. According to Article 32 of the Constitution of Ukraine, such cases can be stipulated in the Law.

4. Court decisions to reject claims ignore provisions of the Law on Access, and instead they rely on other provisions stipulated in the Ukrainian legislation, which indirectly contradict the Law on Access.

3. RECOMMENDATIONS

1. To develop an educational course and to conduct training for judges in all 27 regions of Ukraine, officials and functionaries, who are responsible for providing information in the bodies of state authority and local self-government, concerning new laws on information, international standards of access to information and practices of their application in Ukraine.

2. To amend the Laws “On information”, “On access to public information” and “On protection of personal data” to harmonize them with the international treaties on human rights, to which Ukraine is a member state.

3. To adopt the Law on access of public to sessions of the subjects of powers of authority and their bodies.

4. In order to implement Article 11, “Protection of a person that publishes information” of the Law on Access, to make amendments in the Criminal Code of Ukraine. In particular, to provide an article concerning relief of disclosers (that is, persons mentioned in Article 11 of the Law on Access) from criminal responsibility for disclosure of restricted access information. Besides, to adopt the Law on protection of disclosers in order to implement provisions of Article 11 of the Law on Access.

5. To repeal the Resolution of the Cabinet of Ministers of Ukraine as of November 27, 1998, No. 1893 “On approval of the Instruction on procedure of recording, storage and use of documents, cases, editions and other material media of information that are classified as containing confidential information”.

6. To disclose all legislative acts labeled as “Do Not Publish” and to analyze documents labeled “For Official Use Only” to check for the grounds of their labeling as confidential.

7. To revise the norms of Article 15 of the Law of Ukraine “On State Secret” and stipulate classifying only the fragments that contain state secret, not documents at large.

8. To analyze “Corpus of data that constitute state secret” from the point of view of justification of information’s sensitivity, using both the three-part test to find, whether there is “harm” or influence on “public interests”, and Article 6 of the Law “On access to public information”.

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9. To repeal the Decree of the President of Ukraine No. 493 as of May 21, 1998, “On amendments to some decrees of the President of Ukraine in the issues of state registration of regulatory acts.”

10. To establish an open register of all regulatory acts of the prosecutor’s office and an open database on enactments concerning rights and obligations of citizens.

11. To create conditions for members of territorial communities to familiarize themselves with all decisions of the bodies of local self-government (in the most efficient way depending on the circumstances). Where possible, to create websites of bodies of local self-government with obligatory placing of the complete register and texts of all adopted decisions.

12. To secure publishing and open and unrestricted access to all decisions of local administrations (at the level of oblasts and the cities of Kyiv and Sevastopol).

13. Representatives of mass media, advocacy and other non-governmental organizations should research effectiveness of active and passive access to information at the central and local levels and more actively appeal by judicial procedure against officials’ inaction as to providing information and their refusals to provide information.

14. Representatives of advocacy and other non-governmental organizations should appeal by judicial procedure against “lists of data that contain no features of public information”, and lists of “confidential information of bodies of local self-government”.

IX. FREEDOM OF EXPRESSION¹

1. GENERAL OVERVIEW

The freedom of expression, free speech and access to information left much to be desired over past year. The year 2011 manifested the tendencies towards further restrictions of the said freedoms, namely:

- 1) restrictions of free speech in audiovisual and printed mass media led to further spreading of Internet publications and blogs as alternative space free from restrictions;
- 2) putting up obstacles for the journalists performing their professional duties;
- 3) increase in free speech restrictions in regional mass media and termination of operation of several independent local TV channels;
- 4) Supreme Rada's consideration of the draft projects, which, if adopted, will lead to deterioration of situation with regards to the freedom of speech and mass media in Ukraine;
- 5) lack of consistent legislative reform aimed at safeguarding freedom of speech and access to information and journalists' operation in Ukraine;
- 6) increase in the cases of violations of public freedom of expression and speech;
- 7) conflicts around redistribution of broadcasting market, instigated mainly by the National council for TV and radio broadcasting of Ukraine;
- 8) further spreading of self-censorship.

Analysis of the reasons, which lead to the restrictions of freedom of expression and mass media freedom, allowed identifying the following major reasons:

- 1) imperfect legislation with respect to freedom of speech and information and legal regulations of mass media status in Ukraine;
- 2) lack of transparency in the operation of the National council for TV and radio broadcasting of Ukraine, and, in particular, in the procedure and criteria of the competition, under which the channels and broadcasting frequencies are distributed;
- 3) spreading of practices, when politicians and bureaucrats approach independent mass media trying to persuade their staff to cover certain materials 'correctly';
- 4) administrative and economic levers of influence.

It is noteworthy that the past year demonstrated that freedom of speech is nothing but a phantom without governmental guarantees of economic freedoms, independent system of justice and private property. In particular, economic monopolies and entities dominating in the market, on the one hand, and dependence of the business on power bodies and local authorities, on the other, create a favorable ambience to suppress speech and information freedom. For example, it is due to the providers (telecommunications' operators), who supplied the signal for TV channels, that the stopping of broadcasting on several channels in various regions in Ukraine (Kharkiv, Odessa, Cherkassy) became possible. Why due to them (i.e. telecommunications' operators)? Because the size of

¹ Prepared by Oxana Nesterenko, KhHRG on freedom of expression

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their market depends significantly on local authorities, as their main income comes from the cable TV and Internet services they grant to the residents of multi-apartment buildings. The majority of the said buildings are managed by the city; therefore, it is easy to imagine that lack of loyalty among providers towards local self-governing bodies can lead to losses or some portions of the market. Naturally, the telecommunications' operators themselves negate any pressure by the local authorities, in particular, the request of the local high officials to stop providing signal to the independent broadcasters. Besides, the telecommunications' operators became aware that everything amounts to a dispute between the agents of economic operation. Meanwhile, this scenario is hard to believe, as in all three cases it was all about independent local mass media which criticized the operation of local authorities; besides, in Kharkiv three TV companies were cut off the air at once — all of them being in opposition to the local power.

The aforementioned facts show that constitutional and legislative guarantees are not enough to safeguard the freedom of speech. It is most important also to provide guarantees of economic freedom, right to private property and business independence from state power bodies and local self-governments.

The content of TV programs does not offer any grounds for optimism either. It also confirms further restrictions of freedom of speech in audiovisual mass media. The results of the research on the national TV channels broadcasts, carried out by “Telekrytyka”, showed that, if in July 2010 the channels ignored **56 important topics of the month**, in September 2011 **this figure increased up to 456²**. The First National Channel ranked first in the number of hushed up topics.³ Says Natalia Lygachova, “Telekrytyka” editor-in-chief:

“The quality of news, information and analytical weeklie, substantially deteriorated.⁴ Monitoring held out by the Academy of Ukrainian Press⁵, as well as “Telekrytyka” monitoring confirm this conclusion⁶. Another tendency, i. e. withdrawal from political and social topics for the sake of the social ones, with prevalence of “hot topics”, i. e. crime-related plots — is observed. And it is not about systematic felonies, but rather about everyday infringements and hooliganism. Let's say, a case of corruption is covered only when law enforcement bodies (National Security Service or Ministry of Interior) are willing to share their “exclusive” materials...”

Natalia Lygachova argues that the main culprits of the situation described above, are: first, political pressure of power, both at national and local levels on mass media, whose owners and managers try to stay as far as possible from political and economic topics, just to be on the safe side; second, impossibility to broadcast the news as such, i. e. information needed for understanding of what is going on in the country and in the whole world — our mass media can do the ratings only by “yellow journalism” and gruesome stories.

2. RIGHTS OF JOURNALISTS AND MASS MEDIA

In 2011 the journalists' rights were frequently violated. According to the data compiled by the Institute of mass information, in 2011 all the violations fell under the following categories: economic, political, indirect pressure (36% of all violations), obstructing the performance of professional

² “Stop censorship” UMA and NMPU: 2011 became the year of further deterioration in freedom of speech <http://www.telekritika.ua//2011-12-22/68285>

³ “Stop censorship” UMA and NMPU: 2011 became the year of further deterioration in freedom of speech //<http://www.telekritika.ua//2011-12-22/68285>

⁴ “Telenews present an alternative reality” //<http://www.telekritika.ua/expert/2012-01-03/68491>

⁵ <http://www.aup.com.ua>

⁶ <http://www.mediaosvita.com.ua/monitoring>

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duties (33%)⁷. IMI also states that 20% of violations included beatings, assaults and harassments, while claims, filed in court against media or journalists, constituted only 4%; court claims, filed by journalists to protect themselves, amounted to 5%. The smallest share (2%) this year related to journalists' detention or arrest⁸. At the same time, according to the experts interviewed by "Telekrytyka", "the journalists' rights unquestionably were violated more in 2011 In practical operation journalists were more often hindered in the performance of their professional duties⁹. Representative of "Reporters without Boundaries" in Ukraine Oxana Romanyuk in her interview, given to "Telekrytyka", stated "if in 2010 they registered 20 cases of beatings, in 2011 this figure grew up to 25 cases, in which at least 35 journalists were injured. This statistics does not take into account mass confrontation in Pechersk court, were more than 30 media professionals were injured"¹⁰. Beating of journalists by militia in the course of protest action in front of Supreme Rada building on November 3 is also worth mentioning¹¹.

The obstacles which prevented reporters from performing their professional duties last year included:

- actions of law enforcement entities and national guard, aimed at obstructing journalists' operation;
- prohibition of film-shooting;
- numerous instances of confiscating and destroying journalists' equipment;
- presence of high officials at the meetings.

Data concerning media professionals — victims of crimes¹²

	Victims of crimes					
	2006	2007	2008	2009	2010	2011
Media professionals	92	46	47	60	159	125

2.1. ASSASSINATIONS, DISAPPEARANCE, ASSAULTS, THREATS AND OTHER TYPES OF VIOLENCE USED AGAINST JOURNALISTS

The disappearance of Kharkiv journalist Vasyl Klymentyev, reporter of "Novyi styl" newspaper, still remains unresolved¹³. While killed journalist Gongadze's case and events, which accompanied the case in 2011, in particular, court hearings and Kyiv Appellation Court resolution, which validated the ruling of Pechersk district court, nullifying the General Prosecutor's Office resolution

⁷ Barometer of violations of journalists' rights for December 2011 // http://imi.org.ua/files/Bar12_11.pdf

⁸ Ibid.

⁹ Quoted from *Jakubets N.* Beaten but not consolidated <http://www.telekritika.ua/expert/2012-01-06/68492>

¹⁰ Ibid.

¹¹ Militia has beaten journalists in front of Supreme Rada // <http://www.telekritika.ua/news/2011-11-03/66944>

¹² Under Ministry of Interior Statistics for the years 2009–2010: <http://mvs.gov.ua/mvs/control/main/uk/publish/article/374130>

Under Ministry of Interior Statistics for the years 2010–2011: <http://mvs.gov.ua/mvs/control/main/uk/publish/article/717134>

¹³ On August 11, 2010 Kharkiv reporter from "Novyi stil" Vasyl Klymentyev disappeared. Militia started investigation immediately, and on August 15 a criminal case with charges of "premeditated assassination" was filed. Nevertheless, numerous experts in the case confirmed that no objective or efficient investigation has been carried out. Till now, a lot of circumstances of the journalist's disappearance remain unknown while no progress has been achieved in the case. (see Human rights report— 2009–2010)

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on filing the claim against ex-President of Ukraine Leonid Kuchma, allow classifying the judicial process as farcical.

2.2. ACTIONS OF LAW ENFORCEMENT ENTITIES AND NATIONAL GUARD, AIMED AT OBSTRUCTING JOURNALISTS' OPERATION AND PROHIBITION OF FILM-SHOOTING

On May 31 in Mykolayiv three journalists were assaulted by tax-militia officers, who tried to take away their cameras by force¹⁴.

According to UNIAN information, the editor-in-chief of the "Novosti-N" site Anatoliy Onufriychuk reported that two reporters from his office came to a municipal department of tax militia, where, according to their information, several Mykolayiv businessmen have been taken for a "conversation" with the staff of Chief Directorate of the tax militia of Ukraine.¹⁵

According to the journalists, the businessmen were locked on the 7th floor of the premises and not allowed to talk to their lawyers, family or even paramedics, who arrived with an ambulance when one of the businessmen felt sick.¹⁶

When "Novosti-N" reporters started to shoot on camera an attorney's efforts to break through the guard to get to his client, the tax militia officer, who guarded the entrance, twisted reporter's arms, roughly tore his camera off his neck and took it to the closed part of the premises. Three hours later the camera was returned, but all the pictures were destroyed. After information on reporters' assault became public, a "Prestupnosti.NET" site correspondent arrived. He also started to shoot the developments taking place in the tax militia premises. The journalist told UNIAN that after he proceeded to shoot the negotiations between an officer from Zavodsky raion militia department and tax militia officers guarding the entrance to the building, these latter tried to take his camera away from him. When the reporter offered resistance, four tax militia officers attacked him, dragged him into the closed part of the building, threw him on the floor and started to beat, demanding that he hands in his camera. To protect the camera, the journalist covered it with his body and fastened the camera belt to his wrist. After another tax militia officer appeared at the scene, the reporter was set free¹⁷.

For several times motorcades of the President of Ukraine V. Yanukovych and other high officials became the cause of conflicts, as the journalists were forbidden to shoot events on their cameras. 1) On June 22 the journalists from "Vechniye vesti" were forbidden by a national guard officer to take photos of Yanukovich's motorcade, which was moving along Havan'sky bridge which is under construction, and Podil.¹⁸ 2) On August 18 militia officers detained three journalists, from "Kordon", "Agenciya zhurnalistykh rozsliduvan" and Non-political news portal NGO.donetsk.ua, respectively, who were shooting on video President of Ukraine V.Yanukovych and a cortege of high officials, accompanying him at the funeral ceremony for the head of ARC Council of Ministers Vasyl Dzharta¹⁹; 3) On January 16 National Guard Department officers prohibited the journalists from TVi channel from shooting V.Yanukovych's motorcade leaving presidential residence "Mizhyhirya"²⁰.

¹⁴ Have Mykolayiv journalists been assaulted by "visiting" tax inspectors from Kyiv?//<http://www.unian.net/ukr/news/news-438887.html>

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Journalists were forbidden to take pictures of Yanukovych's motorcade//<http://tsn.ua/ukrayina/zhurnalistam-zaboronili-fotografuvati-kortezh-yanukovicha.html>

¹⁹ Militia detained three journalists for taking pictures of Yanukovych's motorcade://ua.politics.comments.ua/2011/08/18/158081/militsiya-zatrimali-troh.html

²⁰ Yanukovych's guards covered cameras with their coats// <http://www.telekritika.ua/news/2012-01-16/68771>

Especially disconcerting is the fact these actions, despite all the evidence (video and audio tapes, witnesses) were not given adequate assessment by the bodies of justice, and the culprits were not held legally responsible. For example, the Appellation administrative court of Kyiv, responding to the claim, filed by STB journalist Serhiy Andrushko against National Guard Department, in which he asked the court to invalidate the Administrative court ruling, because he qualified the actions of NGD official as obstructing the performance of professional duties, left the first instance court ruling in force, thus denying the claimant the satisfaction of his claim.²¹

Appeals to journalists, like the one made by the Minister of Interior Mohylyov — “We ask the journalists: if you learn something about illegal doings — share this information with us...If a journalist fails to get in touch with law-enforcement bodies, these latter have a right to take journalist’s equipment away”- do not contribute either to the protection of journalists’ rights and, in particular, sources, in Ukraine²².

Another obstacle to normal journalists’ operation despite new guarantees, spelled out in the new version of Ukrainian Law “On Information”, is created by lack of free access to and coverage of the official meetings. It is common knowledge that the meetings of collegiate subjects of authority, in particular, local self-government bodies, ARC Supreme Council et al., have always been important source of information for reporters.

Traditionally, i.e. before 2011, the accreditation system served as main justification for prohibiting independent mass media from attending these meetings. Specifically, denial of accreditation to the independent mass media made reporters “personae non grata” at the meetings.

That’s why it seemed expedient to include into the new version of Ukrainian Law “On Information” a provision, under which “Absence of accreditation cannot be the reason for preventing journalists and other media professionals from attending open events, held by the subjects of authority.”(p. 1 art. 26 of Ukrainian Law “On Information”). For example, the journalists do not require accreditation to be present at the local self-government’s meeting, court hearings etc.

Meanwhile the analysis of the accessibility of the open events, held by the officials last year no changes for the better. The main reasons for denial remain the same, i.e.

- 1) absence of any formal grounds, but pure physical obstruction of journalists’ attempts to attend respective meetings;
- 2) denial based on absence of journalists’ accreditation;
- 3) accusing journalists of spreading biased and incorrect information concerning the operation of authorities.

2.3. EXAMPLES

1. On February 15, 2011 a group of reporters from TV channel 5 was denied entrance to the court, where an open hearing of the appellation court of the “Road Control” organization activist’s Oleksiy Kyryenko was taking place.²³

2. February, 2011 — a journalist from “Kakhovsky novyny” newspaper was driven out from raion executive committee meeting in Kakhovka.²⁴

3. On July, 7 militia officers prevented mass media representatives from entering the premises of Pechersk raion court, where hearing of Tymoshenko case was held.²⁵

²¹ STB journalist lost yet another case // <http://imi.org.ua/news/журналіст-стб-програв-ще-одну-справу>

²² Mohylyov is for journalists’ computers removal if journalists remain silent // http://news.dt.ua/SOCIETY/mogilov_za_viluchennya_kompyuteriv_u_zhurnalistiv,_yakscho_ti_movchat-81476.html

²³ Reporters were denied entrance to the court, where “Road control” activist’s case was being heard —<http://5.ua/news-line/184/0/73421>

²⁴ Executive committee of strict regime — access regime — http://www.kn.kh.ua/index.php?option=com_content&view=article&id=414:-asmodey&catid=69:2011-03-19-23-16-47&Itemid=126

²⁵ “Reporters without boundaries”: Journalists’ rights are violated in Pechersk court// <http://tyzhden.ua/News/26019>

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6. On July, 14, 2011 a journalist was not allowed to be present at the meeting of Kyiv City council due to lack of accreditation.²⁶

7. On July 14, 2011 militia officers restricted journalists' free access to the meeting of Odessa City council.²⁷

8. On July, 28 2011 the reporters' team from TRC "Primorye" was prohibited from attending the meeting of Kotovsk City council on the grounds that journalists should seek mayor's permission and due registration 24 hours before the meeting.²⁸

9. On August 26, 2011 Severodonetsk City council approved "Resolution on the accreditation procedure for mass media representatives"²⁹. The resolution does not clearly specify that absence of accreditation cannot be the reason for denial of access to open events, held by the city council, to journalists and other mass media professionals. The journalists argue that this omission allows for obstructing non-accredited journalists' operation³⁰.

10. On September 9 mayor of Khakhovka A.Karasevich ordered "Kakhovsky novyny" reporter to leave the premises where meeting of the city council was held.³¹

11. On September 22, 2011 militia officers prevented journalists from TV and radio broadcasting company "Nova Odessa" from entering city council building. The general producer of the company Pavlo Ivashkevich in his letter made this information public.³²

12. Journalists from "Krym Segodnya" newspaper were removed from the open meetings of Saki city council several times.³³

Besides, despite definite prohibition of denying journalists' and mass media professionals' attendance at the open events, held by the authorities, due to the absence of accreditation (p. 1 art. 26 of Ukrainian Law "On Information"), the local self-governments fail to introduce respective amendments to the normative acts regulating the procedure for local self-governments' meetings; and, moreover, adopt the new acts, which do not reflect this provision or directly contradicts art. 26 of Ukrainian Law "On Information".

The normative acts adopted in Odessa, Severodonetsk, Kyiv and Kharkov are vivid manifestations of neglect of respective provision of Ukrainian Law "On Information". In particular, Odessa mayor, after the new version of Ukrainian Law "On Information" has come in force, passed an Order No. 579-01p of 23.05.2011 "On approving the regulations for controlled entrance to the administrative building of Odessa city council",³⁴ which bans non-accredited journalists from entering the city council building. Evidently, in compliance with this order, "On working days, between 9.00 and 18.00 the representatives of printed and electronic mass media in possession of accreditation

²⁶ Zemlyanska M. journalist appeals non-admission to Kyiv Council — access regime . — http://www.svidomo.org/defend_article/5829

²⁷ Odessa reporters win their way to city council through prosecutor's office. — access regime — <http://www.unian.net/ukr/news/news-447511.html>

²⁸ Kotovsk city council denies its prohibiting journalists from attending the meetings. . — access regime — <http://www.telekritika.ua/news/2011-08-03/64810>

²⁹ See decision of Severodonetsk city council No. 791 "Resolution on the accreditation procedure for mass media representatives — access regime:

<http://www.sed-rada.gov.ua/organi-vladi/rada-info/archive/dvadcyata-cherгова-ses456ya-m456sko-radi-vi-sklikannya-v456d-26-08-2011-r/r456shennya-No791/?searchterm=Положення%20про%20порядок%20акредитації%20засобів%20масової%20інформації>

³⁰ Journalists in Severodonetsk non-accredited journalists cannot attend the open meetings of city power. — access regime — <http://www.telekritika.ua/news/2011-09-09/65612>

³¹ Executive committee of strict regime — <http://stop-x-files-ua.org/?p=6187>

³² Freedom of speech barometer. September 2011. — access regime. — <http://imi.org.ua/content/>

³³ "Krym segodnya" editorial board informs about local authorities' pressure— access regime — <http://www.telekritika.ua/news/2011-08-30/65327>

³⁴ Order No. 579-01p of 23.05.2011 "On approving the regulations for controlled entrance to the administrative building of Odessa city council", <http://www.odessa.ua/acts/mayor/34574>

cards, issued by the information and public relations department of Odessa city council can freely enter the building through militia check-point” .

On August 26, 2011 Severodonetsk city council, in its turn, passed Resolution No. 791 “On approving provisions for mass media accreditation procedure” which does not spell out a norm, under which absence of accreditation cannot be the reason for denying journalists’ and mass media professionals’ attendance at the open events, held by the authorities³⁵.

Kyiv city council has not yet introduced respective changes into the “Provisions for mass media accreditation procedure”, which is an addendum to the decision of the Kyiv city council of November 26, 1998, No. 66/167. This decision still is used as grounds for denying non-accredited journalists presence at the open events, held by the subjects of authority.³⁶

Kharkiv city council provides another example of this norm’s neglect. It also failed to introduce the necessary changes into the regulations. In response to information request “*Can non-accredited journalists and mass media professionals be present at the city council meetings and Kharkiv city council executive committee meetings?*” the authorities advised that “in fact, under article 26 of Ukrainian Law “On Information” lack of accreditation cannot be the cause for denying journalists’ presence at such events”.

On the other hand, the next paragraph reads: “*Please be reminded that under art.3 of the Regulations of Kharkiv city council of 6th convocation, accredited journalists, performing TV or film shooting, in due order, defined by the regulations, can be present at the open meetings of city council...Any journalist or mass media professional can be present at the meetings of the Kharkiv city council executive committee. To that end journalist, cameraman or press photographer can get temporary registration.*”

Summing up, we have to recognize the fact of local officials’ disregard of art. 26 of Ukrainian Law “On Information”, as in many cases the accreditation or its lack can be a decisive factor in granting/denying journalists the right to be present at the respective meetings.

3. FREEDOM OF SPEECH IN REGIONAL AND LOCAL MASS MEDIA

In 2011 we received a lot of notifications, concerning restrictions of independent journalists and mass media in different regions of Ukraine. In particular, the author of an article “Kids in the orphanage starve to death” Olena Dovzhenko who revealed the abuses, committed by Torez orphanage administration, had to quit her job in the editorial office of “Zhyttya” newspaper (which belongs to Donetsk oblast’ state administration) as a result of psychological and administrative pressure. The journalist stated that most negative attitude reigns among the editorial staff, journalists are insulted by the bosses, management behaves inappropriately³⁷.

In 2011 journalists from different regions of Ukraine provided information on pressure and abuses. Thus, the managers of a number of publications and journalists from Chernivtsy oblast’ revealed “outrageous facts of free speech suppression” by Chernivtsy mayor.³⁸ Editors’-in-chief of several communal local newspapers in Kherson oblast’ made public the facts of indirect pressure on journalists on behalf of local authorities. In particular, it was made known that leadership of the cities and raions of Kherson oblast’ forbade any publications containing critical evaluation of local authorities’ operation or written by the opposition members. Otherwise, they were threatened with

³⁵ Journalists in Severodonetsk non-accredited journalists cannot attend the open meetings of city power. <http://www.telekritika.ua/news/2011-09-09/65612>

³⁶ http://kmr.ligazakon.ua/SITE2/1_docki2.nsf/alldocWWW/95B040C158F18209C22573C0004CA3F9?OpenDocument

³⁷ O. Dovzhenko. Confession of a reporter allegedly fired for the article on Torez orphanage. // <http://helsinki.org.ua/index.php?id=1298452704>

³⁸ Journalists claim that Chernyvstsy mayor hinders their professional activity // <http://www.pravda.com.ua/news/2011/03/13/6009600/>

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dismissal.³⁹ Ukrainian magazine “Tyzhden” informed that on October 21 Cherkassy TV channel “Ros” (Cherkassy oblast’ national broadcasting company) failed to broadcast the planned news block of Cherkassy news service. According to the journalists who preferred to stay anonymous, the program was cancelled because TV journalists were ordered to include material on incredible increase of Party of Regions’ rating in the oblast’ into the news.⁴⁰ However, public movement “Donbas without censorship” in response to systematic attempts to exert pressure on journalists, to audit illegally independent mass media by tax inspection, to interfere with publishing policies, started in Donetsk only.⁴¹

However, the events which transpired in fall 2011 were the most outrageous.

On September 13, 2011 three Kharkiv TV companies (ATN, “Fora” and “A/TVK” were illegally prevented from broadcasting all at once. All the said companies adhered to independent policies. Human rights activists classified these actions as violation of basic right of freedom of expression, spelled out in the art. 34 of the Constitution of Ukraine and article 10 of European Convention for protection of human rights and basic freedoms. In their open letter UHHRU and KhHRG stated that “various formal pretexts for cutting off TV channels, for example, “absence of sanitary passport” in ATN, alleged systematic non-payment for provider’s services in the case of TRCh “Fora” and alleged absence of contractual provisions for transmitting in the case of TRCh “A/TVK”, are nothing but instruments of political pressure”⁴².

Overall, the grounds for cutting off the channels were illegal, as under p.1, article 64 of the Constitution of Ukraine rights can be restricted only in cases stipulated by the Constitution of Ukraine. Also, according to article 92 of the Constitution rights’ restrictions are regulated by the law only, and not by regulatory, normative-legal acts. Besides, the lawlessness of these actions is confirmed by the rulings of the European Court for Human Rights, which are the source of rights in the national legal system in compliance with p.1, article 17, of the Law of Ukraine “On enforcement and practical implementation of the rulings of the European Court for Human Rights”. In particular, the ruling on the case “*Autronic AG vs. Switzerland*” the Court found that “article 10 of European Convention on Human Rights is applied to any person, physical or legal and refers not only to the information content, but also to the means of transmission and reception, based on the fact that any restriction imposed on media, violates the right to receive and disseminate information”. It means, subsequently, that right to free dissemination of information can be violated not only by censorship of broadcasted information content, but also by creating technical obstacles to its transmission.⁴³

Due to numerous appeals of human rights organizations and journalists, the situation in Kharkiv became the focus of attention not only of the Supreme Rada and the President, but also of OSCE.⁴⁴ On September, 21 four members of the parliamentary Committee for freedom of speech and information of the Supreme Rada of Ukraine decided to approach President of Ukraine and Prosecutor’s General Office of Ukraine protesting against ban on broadcasting imposed on three Kharkiv TV channels (ATN, ATV and “Fora”)⁴⁵. Besides, people’s deputies approached Anti-monopoly Committee of Ukraine with the request to check whether the subjects of economic activity

³⁹ In Kherson oblast’ editors-in-chief of the communal newspapers cannot criticize authorities. //http://www.telekritika.ua/news/2011-12-13/68013

⁴⁰ Pressure on media increases in the regions//http://tyzhden.ua/News/34920

⁴¹ Public movement “Donbas without censorship” is set up in Donetsk//http://ngo-ua.org/donbas-bez-cenzuri/104-stvoreno-ruh-donbas-bez-zensury

⁴² On brutal violation of freedom of expression in Kharkiv //http://www.khpg.org/index.php?id=1316257366

⁴³ Ibid.

⁴⁴ OSCE calls upon Ukraine to rectify the situation with Kharkiv transmission channels //http://helsinki.org.ua/index.php?id=1316771097

⁴⁵ Committee for freedom of speech will approach the president and Prosecutor General office with regard to stopping of Kharkiv transmission channels //http://www.telekritika.ua/news/2011-09-21/65920

are not conspired against and discriminated by telecommunications operators. The Committee also decided to send an appeal to the Ministry of Health and Chief Sanitary Doctor of Kharkiv; to the Ministry of Infrastructure (concerning the operation of Kharkiv OBTC) and to the Ministry of Justice (concerning delayed registrations).⁴⁶

Moreover, an interagency work group was set up with a task of analyzing compliance with legislation on freedom of speech and protection of journalists' rights. However, this group managed only to provide "*joint recommendations elaborated on the basis of the results of the third meeting of the interagency work group with a task of analyzing compliance with legislation on freedom of speech and protection of journalists' rights*", which had no consequences. Interagency group, in particular, offered the following recommendations to all the conflicting parties and Kharkiv and oblast' officials:

1. Promotion of freedom of mass media operation in Kharkiv oblast'.

2. For the owners and share-holders of TV channels: resolution of disputes concerning TV property rights and management in compliance with the law; inadmissibility of restrictions of freedom of speech and information activity; use of measures leading to constructive dialogue with local authorities' representatives.

3. Reporting to IWG on problems resolution in the informational space of Kharkiv oblast'.⁴⁷

Unfortunately, campaign on restoring independent broadcasting in Kharkiv brought no tangible results, therefore, ATN and TRCh have not been on the air till now (February 2012). The situation with TRCh "For a" remains even more complicated, as this latter started broadcasting again right when director general of "Multimedia centre" LTD filed a claim with militia complaining about illegal attempts of former TRCh "Fora" share-holders "to get hold of the TV company" As of February 2012, the pre-trial investigation is under control of Kharkiv oblast' prosecutor's office⁴⁸.

Another provider's attempt to cut off the broadcasting occurred in Odessa, where on October 25 TRCh "Kruh" was cut off the air. However, on November 8, TRCh representative informed that signal transmission was restored without using the networks of "CTV Odessa" LTD. According to TRCh representative "reinstalling the signal without using the networks of "CTV Odessa" LTD cost a lot of money"⁴⁹.

The scenario implemented in Kharkiv, and later, in Odessa, was used for the first time in Cherkassy. There on May 18, 2011 at 9:00 am the cable provider, who holds monopoly at the local market of cable networks, cut off TRCh "Antena-plus" without any prior notification.⁵⁰ It was done contrary to "Antena-plus" license for broadcasting HP No. 0064-M of April 03, 2006, valid till 03.04.2016. Under the license provisions TRCh "Antena-plus" has to transmit its programs through Cherkassy city cable networks, which belong to the companies "Commercial TV-company "TGS" and "KETSik" LTD, on channels SK-24 and SK-23 respectively for 24 hours a day. According to TRCh "Antena-plus" corporative rights of the aforementioned providers were eventually bought out by a foreign investment company "Volya", which set up a subsequent proprietor in monopoly possession of all the cable networks in Cherkassy — "Cherkassy telecommunication systems (ChTS). At that point TRCh "Antena-plus" also approached the people's deputies, but, similar to Kharkiv scenario, their transmissions were not restored.

Independent association of TV and radio broadcasters believes that presently telecommunication operators largely depend on power bodies, as *a) the functioning of telecommunication operator*

⁴⁶ Committee for freedom of speech will approach the president and Prosecutor General office with regard to stopping of Kharkiv transmission channels //http://www.telekritika.ua/news/2011-09-21/65920

⁴⁷ Joint recommendations developed at the third meeting of Interagency working group for analyzing compliance with legislation on freedom of speech and protection of journalists' rights. //http://www.president.gov.ua/content/rekomendacii_harkiv.html

⁴⁸ Criminal case was filed on raider's CAPTURE OF "Fora". //http://atn.ua/newsread.php?id=72189

⁴⁹ Opposition TV company resumed broadcasting without using TV networks subordinate to Odessa authorities //http://tyzhden.ua/News/34878

⁵⁰ TRCh "Antena-Plus" asked people's deputies of Ukraine for help //http://antenna.com.ua

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*totally depends on acquiring licenses for the use of communal property units (i.e. land plots, buildings and premises, cable channels etc.), which are allotted by the local administration and self-governance bodies; b) denial of the local authorities to grant the licenses can hardly be appealed in court, as such appeal entails a lot of expert assessments (technical, environmental etc.) Besides, the results of the expertise are evaluated by a judge, who is not a specialist in the matter, at his/her discretion. Therefore, is there is a number of contradictory expert conclusions, the first instance court (i. e., local court) usually rules in favor of expertise results complying with local authorities' interests; c) protection of telecommunication operators' right is outside the terms of reference of numerous national and international public and human rights organizations, as opposed to mass media rights protection; d) a significant number of cases was registered, when broadcasters were cut off the air or cable networks under various pretexts, (e. g. technical failures, official regulations etc).*⁵¹

Independent association of TV and radio broadcasters submitted proposal to introduce respective amendments into the law, banning the pressure of local authorities on operators, which in this case become most probable source of pressure on TV companies, to the Supreme Rada committee for freedom of speech and information⁵².

4. RESTRICTIONS OF FREEDOM OF EXPRESSION UNDER THE PRETEXT OF PUBLIC MORALITY PROTECTION

For many people the issue of “public morality” has remained one of the most sensitive in Ukraine. In our previous reports we stressed more than once, that the Law of Ukraine “On public morality protection” and the operation of the National expert board (NEB) violate article 15 and article 34 of the Constitution of Ukraine. In early 2011 it looked as if the Supreme Rada of Ukraine would finally nullify this law, and, respectively, terminate the activity of the said board. However, the second reading of the draft law “On introducing changes to some laws of Ukraine (with regard to public morality)” No. 6532 of 16.06.2010, which envisaged invalidation of the Law of Ukraine “On public morality protection”, was never approved. In its stead, a draft law No. 7132 was eventually proposed and passed on October 18 in the first reading. This draft law is in fact a new version of the Law of Ukraine “On public morality protection”. Constitutional and legal analysis of the draft law provisions allows arriving at the conclusion that they violate such fundamental constitutional principles as:

- Right to free expression of opinion;
- Freedom of writing, creative and scientific activity;
- Academic freedom,
- Freedom of information,
- Principle of official non-interference into society operation.

But, first of all, the draft law violates the principle of supremacy of law, declared in the Constitution of Ukraine. In particular, according to the legal statement of the Constitutional Court of Ukraine “the principle of legal determination, under which restrictions of basic human and civil rights and implementation of these restrictions is acceptable in practice only under condition of existence of legal norms, entailed by such restrictions, is one of the supremacy of law components. In other words, any right restriction should be based on criteria which allow distinguishing lawful behavior from illegal and foreseeing the consequences of such behaviors. (Ruling of the Constitutional Court of Ukraine on duration of administrative detention) 10-rp/2011). However, the law provisions and definitions do not provide for distinguishing lawful behavior from illegal and foresee-

⁵¹ Independent association asks the Committee for freedom of speech to ban the pressure of local authorities on telecommunications' operators, <http://www.telekritika.ua/news/2011-09-21/65917>

⁵² Ibid.

ing the consequences of such behaviors. For example, the definition of such legal constructions as “products harmful for public morality”, “disrespect of national and religious values”, “public morality”, “monitoring in the area of public morality protection”, “pornography”, “use of indecent, depreciative and brutal words” etc, do not provide any clue as to the criteria, which allow classifying certain expressions or works of art as harmful for public morality or disrespectful of national and religious values etc. Respectively, any person, exercising his/her right to freedom of speech, creative or scientific activity in a given moment can be classified as violator of the Law of Ukraine “On public morality protection” with subsequent negative consequences, without even being aware of the fact. It means, by definition, introduction of auto-censorship and violation of right to freedom of opinion, speech and expression of one’s beliefs and views.

Besides, the law provisions violated p. 2 of the article 19 of the Constitution of Ukraine under which the “the state power bodies and local self-governments, their officials shall act only on the basis, within the competences and in the mode prescribed by the Constitution and Ukrainian Laws”, as the goal of p. 2 of the article 19 of the Constitution of Ukraine alongside with spelling out the principle of ideological diversity (article 15 of Constitution of Ukraine) and fundamental human rights defend in chapter 2 of the Constitution of Ukraine — is establishing strictly defined boundaries (frames) of official interference into the private life of a person. In particular, under the Law of Ukraine “On public morality protection”, the official bodies are granted the competences allowing them to establish total control over the freedom of free information exchange, which is contradictory to the concept of free information and, in general, uncharacteristic of democratic countries. It means that the draft law, if passed, can lead to the violations of the Constitution of Ukraine by the state, specifically, the violation of the right to express one’s opinions freely, without danger of being penalized for the criticism of the official policy.

Moreover, the draft law contains a norm which is a brutal breach of the fundamental principle of freedom of information, declared at the first session of UN General Assembly in its Resolution 59 (I) “Convocation of international conference on freedom of information”; eventually this concept found its reflection in the General declaration on human rights, International pact on civil and political rights etc. It is well known that the freedom of information concept grants the freedom to seek, obtain and disseminate information by any means and independently of state borders. The norms, violating, and, actually, invalidating the principle of freedom of information in the legal constructions and provisions of the draft law, include, among others, the following:

“In compliance with court ruling the content, harmful for public morality, including children pornography, should be removed by appropriate technical means from the Internet national segment; and, if posted outside Ukraine, access to it from the Internet national segment should be safely blocked”;

“Right to information space free from materials, harmful for physical, intellectual, moral and psychological condition of a person” etc.

It is also noteworthy that defining the legal procedures stipulated by the law, in particular “implementation of monitoring in the area of public morality protection”, “setting up Unified specialized information- telecommunication system” means that the state is violating the provisions of its own Constitution, trying to replace a democratic law-abiding state (article 1 of the Constitution of Ukraine) with authoritarian state. Moreover, the authors of the proposed amendments openly speak about the possibility of introducing “measures...of propaganda for public morality protection”, which means that they break the prohibition spelled out in the article 15 of the Constitution of Ukraine — “no ideology shall be recognized by the state as obligatory”.

Into the bargain, the law itself is full of contradictions. For example, it says that the supremacy of law and ban on censorship is one of its underlying principles; meanwhile the norms of the draft law are formulated in a way which violates the principles quoted above.

Taking into account the fact that the draft law “On introducing amendments to the Law of Ukraine “On public morality protection” contradicts articles 1, 8, 15, 19, 21, 22, 34, 54 and 64 of the Constitution of Ukraine, international obligations with respect to the freedom of information,

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in particular, Resolution 59 (I) of UN General Assembly “Convocation of international conference on freedom of information”; article 19 the General declaration on human rights, article 19 of the International pact on civil and political rights, article 10 of the European Convention on human rights and basic freedoms etc, the said draft law should be revoked.

5. RECOMMENDATIONS

1. Article 34 of the Constitution of Ukraine should read as follows:⁵³
 1. *Everyone has the right to freedom of expressing one’s views. This right includes the freedom to adhere to one’s views, obtain and disseminate information and ideas without any interference from the state power authorities and independently of state borders. This article does not preclude the state from exercising licensing of TV and radio broadcasting companies or movies enterprises.*
 2. *Exercising of these freedoms is related to duties and obligations; therefore it can be subject to formalities, conditions and restrictions or sanctions, stipulated by law and necessary in a democratic society for the benefit of national security, territorial integrity or public safety, in preventing crime and unrest, safeguarding public health, protection of rights and reputation of individuals, preventing the divulging of classified information or for supporting objectivity of the court.*
 3. *Freedom of expression in the works of literature, art and scientific research shall be completely unrestricted.*
 4. *Freedom and pluralism of mass media shall be guaranteed.*
2. The term “information security” shall be taken out of the part 1, article e 17 of the Constitution of Ukraine.
3. The actions enumerated in the articles 301 and 338 of the Criminal Code of Ukraine, i. e. the articles which stipulate criminal responsibility for “ defilement of national symbols of Ukraine” (article 301) and “dissemination of materials, images and works of pornographic nature” (article 338), shall be de-criminalized.
4. Amendments to the Law of Ukraine “On TV and radio broadcasting”, under which open competitions for obtaining broadcasting licenses, related to the use of frequency resource and free channels of multi-channel networks shall be replaced with open auctions, should be introduced.
5. The Law of Ukraine “On public morality protection” should be banned. National expert board for public morality protection shall be disbanded.
6. The Law “On de-nationalization of mass media in Ukraine”, containing the program for reforming national and communal mass media through the changes in their management and funding in compliance with EU and OSCE recommendations, should be passed.
7. The Laws “On mass media coverage of the operation of public authorities and local self-governments in Ukraine” and “On state support of mass media and social protection of journalists” should be nullified; privileges of national media journalists shall be cancelled, and they will have the same status as non-governmental media reporters.
8. Draft law on journalists’ rights, based on concepts, developed by Derzhteleradio and draft law No. 9175 of February 27, 2006 “On protection of the journalists’ professional operation”, should be devised. This is a most crucial practical issue as the rights of TVRBO journalists, for example, are not defined by the law at all.
9. The registration procedure for the printed mass media shall be simplified in compliance with the requirements of the article 10 of the European Convention on Human Rights Protection.

⁵³ This version was proposed in the draft Constitution by V.V. Rechytsky (constitutional expert of KHHRG, associate professor of Yaroslav the Wise National Legal Academy of Ukraine).

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10. The law on personal information protection should be harmonized with the international standards.

11. The legislation related to defining the real owner of media, in particular, of TV channels and radio broadcasting, and cross-ownership of printed, electronic and other media should be amended, so that it would allow efficient control over media concentration in the hands of one owner or his family, use of antimonopoly restrictions in the information market in accordance with EC recommendations (in particular, recommendation No. R (94) 13), OSCE and European Union, as well as implementation of due procedures for penalizing the violators of the said legislation.

12. Rapid and transparent consideration of all claims with regards to violence towards journalists and their assassination, and complaints concerning obstruction of the journalists' professional operation should be guaranteed.

13. Control over the use of funds by the State committee of TV and radio broadcasting should be strengthened to put an end to their abuse of power. In particular, the system of order TV and radio programs, books publication and other services covered from public funds, should be made more transparent. This body of power should be liquidated. As a part of amendments to the Constitution of Ukraine, the competences of this body should be transferred to the National Council on TV and radio broadcasting to allow for further liquidation of the said body.

14. Changes should be introduced to the Law on TV and radio broadcasting, ensuring its compliance with EC, OSCE and European Union standards, as well as with the provisions of the European Convention on trans-boundary TV, recently ratified by the Parliament.

X. FREEDOM OF PEACEFUL ASSEMBLY¹

1. INTRODUCTION

The Constitution of Ukraine guarantees the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government. Restrictions on the exercise of this right may be established by a court in accordance with the law and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons. The Constitutional Court of Ukraine in its decree as of April 19, 2001, stipulated that the right for peaceful assembly is “an inalienable and inviolable” right of citizens, and gave the official interpretation of Article 39 of the Constitution, in particular, concerning the conditions for notification of the governmental agencies about conducting of a public event. The Constitutional Court also determined that separate provisions of Article 39 of the Constitution are to be detailed in a separate law, which has not been adopted yet.

The documents concerning freedom of peaceful assembly that are obligatory for implementation include the International Covenant on Civil and Political rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE 1990. Also, the practice of the United Nations Commission for Human Rights and of the European Court of Human Rights is an integral component of the international law in this sphere. Besides, of great importance are the ODIHR OSCE Guidelines on Freedom of Peaceful Assembly.

In Ukraine, the national level documents, which regulate organization and conducting of peaceful assembly and responsibility for violation, are the Constitution, the Code on Administrative Offenses, the Criminal Code, a separate section of the Code on Administrative Legal Proceedings and the above-mentioned decree of the Constitutional Court. Ukraine still has not adopted a specific law that would regulate organization and conducting of peaceful assembly, although both the Council of Europe and the European Union have been long recommending its adoption. Because of absence of such a law, administrative courts groundlessly prohibit peaceful gatherings, their participants are brought to administrative responsibility, law-enforcement agencies are violating human rights in various ways, bodies of local self-government establish various constraints on peaceful assembly concerning the site of conducting or terms of preliminary notification, etc.

Taking into account the course for European integration declared by the state highest authorities, the governmental agencies and bodies of local self-government must create all necessary conditions to guarantee observance of human rights, including the right to exercise the freedom of

¹ Prepared by Yevhen Zakharov, KHPG on the base of research of the administrative courts practice on cases concerning restriction of right to peaceful assembly, provided by the Center of Policy and Law Reforms (Roman Kuybida, Maksim Sereda), and monitoring freedom of peaceful assembly, provided by the Association of Ukrainian Monitors of Observance of Human Rights by Law-Enforcing Organs (Vadym Pivovarov and others).

peaceful assembly. But as the analysis of the data obtained during the monitoring of observance and guaranteeing of the right for peaceful assembly in 2011 shows, the international standards in the area of observance of the right for the freedom of peaceful assembly in Ukraine are barely observed, if ever. These standards oblige the state not only to respect the freedom of peaceful assembly (by not intervening with the right to exercise it), but also place the state under a positive duty to guarantee it and facilitate exercising of this right.

In 2011, according to the Ministry of Internal Affairs data, 160 thousand of peaceful gatherings took place; this is somewhat less than in 2010. But the number of court injunctions that prohibited peaceful gatherings in 2011 was larger than in 2010, and in 2010 it was twice as large as in 2009.² Compared to 2010, the law-enforcement agencies engaged in large-scale and systemic violations of the freedom for peaceful assembly even more often: intervening with the purpose of prevention from participation in peaceful gatherings, favoring of one of the opposing sides during an event, groundless cessation of peaceful gatherings and detaining of its participants, police officers' illegal ignoring of and failure to respond to clashes that emerge between opponents, excessive use of force and special means against participants of peaceful actions and others.

One of the reasons of such violations is the absence of a specialized law. But certain steps forward are being taken. For instance, the Commission for Strengthening Democracy and the Rule of Law, which is a consultative and advisory body under the President of Ukraine, developed a new draft law "On freedom of peaceful assembly". This enactment was reviewed positively by the European Commission for Democracy through Law (Venice Commission), and it is being currently publicly discussed.

2. COURT PROHIBITIONS OF PEACEFUL GATHERINGS

2.1. DATA FROM THE UNIFIED REGISTER OF JUDICIAL DECISIONS³

In 2011, according to the data of the Unified state register of judicial decisions, district administrative courts approved 227 orders in cases concerning prohibition of peaceful gatherings.

In 203 cases (89.4%) the courts prohibited peaceful gatherings (in 2010 — in 83% cases). Only in 24 cases (10.6%) courts declined to satisfy claims from the governmental agencies. At the same time, 11 rulings on dismissal of claims (4.8%) were issued by Sevastopol district administrative court, which means, in the entire country (besides Sevastopol), the number of dismissed claims by the governmental agencies to prohibit peaceful gatherings is only 5 per cent.

The top regions with the most cases concerning prohibition of peaceful gatherings in 2011 were: the Autonomous Republic of Crimea, Odeska oblast, Sevastopol, Dnipropetrovska and Kharkivska oblasts. In Donetska, Zaporizka, Kyivska, Lvivska, Odeska, Poltavska, Sumska, Ternopil'ska, Kharkivska and Cherkaska oblasts, the courts satisfied all claims of the governmental agencies that demanded prohibition of peaceful gatherings.

In Mykolayiv'ska oblast, all judicial decisions were in favor of organizers of peaceful gatherings, in Chernihiv'ska oblast one half of them, in Sevastopol — the largest number of such decisions — 11, what constituted 48% of the total number of judicial decisions.

At the same time, in seven regions, according to the data of the register of judicial decisions, there were no such cases at all — that is, in Vinnytska, Zhytomyrska, Zakarpatska, Ivano-Frankiv'ska, Kirovograd'ska, Rivnenska and Khmelnytska oblasts. Very few such cases were in Volyn and Chernihiv oblasts.

The practice of courts of appeal of the corresponding levels shows that these courts predominantly leave the courts' decisions standing, both concerning prohibition of peaceful gatherings and

² Roman Kuybida. Prohibiting meetings, courts used the Edict of the soviet times. *Gazeta.ua*, December 6, 2011.

³ Maksim Sereda, <http://www.pravo.org.ua/index.php/2010-03-07-18-06-07/adminyust/488-2011->

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dismissal of such claims. Only two decisions of courts of appeal dismissed prohibition but in both cases it happened already after the dates the peaceful gatherings were supposed to take place.

In 2011, the Supreme Administrative Court of Ukraine approved no decision in favor of organizers of peaceful gatherings.

As the Unified state register of judicial decisions includes not all judicial decisions, this data cannot be considered a valid judicial statistics.

2.2. TERRITORIAL ASPECT⁴

The researchers failed to establish a direct dependence between the number of cases on constraints on peaceful gatherings and public activity of the population in the regions. There are many regions where the number of peaceful gatherings is rather high, and prohibitions are comparatively few (for instance, Lvivska and Odesa oblasts). And Kyiv and Crimea are the most active, but at the same time the number of judicial decisions on prohibition of peaceful gatherings is the highest here.

What is found instead is another dependence: the number of judicial interferences in the freedom of peaceful assembly is higher where the bodies of local self-government adopted local acts that specify the “procedure” of exercising the right for peaceful assembly, in fact abridging the constitutional freedom of peaceful assembly. For instance, they establish the timeframe for notification of the governmental agencies about conducting of a peaceful gathering, limit the events to specific locations (for instance, in Poltava — a location near the stadium, far from the governmental agencies), etc.

Violations of conditions stipulated in these enactments are often being used to file a lawsuit in court for prohibition of peaceful gatherings. In the regions where these provisions were adopted, the number of cases when the local authorities go to court with a demand to constraint the right for peaceful assembly is significantly larger compared to a rather small number of peaceful gatherings. The examples of this are such cities as Dnipropetrovsk, Zaporizhzhia, Kherson.

It should be mentioned that in 2011 the similar provisions in Chernivtsi and Simferopol were contested and repealed by judicial procedure as they were adopted with exceeding of the limits of authority and violated the freedom of peaceful assembly. But the negative influence of such provisions over exercise of the freedom of peaceful assembly is persistent.

2.3. GROUNDS OF JUDICIAL PROHIBITIONS OF PEACEFUL GATHERINGS

None of the grounds used by the administrative courts for prohibition of peaceful gatherings follows from the constitutional norms and international standards. Here are the motifs that are most often used as the ground for a judicial decision⁵:

- the notification about the gathering was provided too late;
- there are not enough police officers to protect public order;
- there are foreign delegations in the city;
- another request on conducting a gathering at the same time and at the same place was already submitted (“counter-gathering”).

In such cases the reason for prohibition of peaceful gatherings is nothing more but a groundless assumption about possible violation of public order in the course of the event. Following this logic, one can prohibit any sports competitions as they pose a risk of a trauma and thus are a threat to participants’ health.

Such motifs — a health threat — are also traditionally used by the courts, especially for prohibiting gatherings that coincide with holidays. For instance, Volyn district administrative court

⁴ Roman Kuybida, Maksim Sereda. Peaceful gatherings: year of prohibitions // Juridical review of Ukraine. — 2012. — No. 1–2 (862–863). — C. 18–19, <http://www.pravo.org.ua/index.php/2010-03-07-18-06-07/adminyust/465-2012-01-16-16-55-52>.

⁵ Roman Kuybida. Prohibiting meetings, courts used the Edict of the soviet times. *Gazeta.ua*, December 6, 2011.

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prohibited a gathering because it “*will take place in the location and at the same time as the Easter and May holidays, in connection with what in the central part of the city there will be significant numbers of people what can lead to violations of public order and create a real threat to citizens’ health*” (decree No. 14873408 as of April 12, 2011). Kherson district administrative court used similar arguments when it prohibited celebration of the Independence Day:

“The public holiday will involve increase in concentration of the population in the city, including on Svoboda Square, that is why if the mentioned action were to be conducted the city authorities would be unable to properly secure protection of law and order, as well as organize proper medical assistance, because in case of conducting of the action a significant number of officers of the law-enforcement agencies and staff of health care institutions would be engaged in conducting the public holiday. Besides, concentration of the population on the public holiday obliges the bodies of local self-government to secure free movement and leisure of citizens” (decree No. 18140626 as of August 23, 2011).

Reduction of social guarantees, significant cuts in pensions for separate categories of the population led to numerous social protests. To stop them, the authorities were in all possible ways employing courts, which were very accommodating and, as a rule, would prohibit peaceful protest actions based on varied feeble reasons. In Donetsk for the first time in judicial practice the court prohibited a peaceful action on the ground of a threat of a terrorist attack, which had nothing to do with reality. The decision of the court was approved on November 23, but it was executed only on November 27: if it were a real threat of a terrorist attack it had to be executed immediately. Besides, a football match in Donetsk was not canceled although the number of fans there was significantly larger than the number of the picketing participants. The judicial decision resulted in a death of Gennadiy Konopliov, 74, a former miner, while the police were destroying the picketers’ tents.

3. MONITORING VIOLATIONS OF FREEDOM OF PEACEFUL ASSEMBLY BY AGENCIES OF THE MINISTRY OF INTERNAL AFFAIRS

3.1. PREVENTING PEOPLE FROM TAKING PART IN PEACEFUL GATHERINGS

During 2011, obstructions for those willing to participate in peaceful gatherings, as the case was in 2010, were taking place on a large scale. This gives the reason to believe that police officers received the corresponding centralized instructions at the level of the Ministry of Internal Affairs and/or from local authorities at the level of district and oblast state administrations.

This idea is supported by the MIA instruction as of January 10, 2011, No. 266/Pr signed by Victor Ratushniak, vice Minister of Internal Affairs, which demands from the heads of territorial branches, MIA Departments and Chief MIA Departments, to tighten control in connection with public actions that are planned for January 17 and 22, 2011, and to collect information about their participants. For instance, Part 2. of the mentioned instruction obliges police officers to take measures to prevent trips of technically defective motor transport carrying participants of events, and Part 6 demands to submit to the Department of Public Safety information on organized trips (that specifies the surnames of seniors, contact phone numbers, departure time, arrival time, type of transportation, number of persons) and mass events planned on the local territory.

Similar provisions are listed in the instruction of Sergiy Popkov, first vice Minister, as of October 10, 2011, No. 14336/Пп on deployment of operational HQs in connection with the fact that some parties and non-governmental organizations from various areas of the political spectrum are planning to conduct mass and other events. According to this instruction, the heads of MIA Departments and Chief MIA Departments are obliged to secure constant collection, analysis and exchange with other law-enforcement agencies of information with the purpose of prevention of violations

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of public order, timely influence on a course of events, prevention of their escalation during mass events in the capital and in the regions of the country.

To implement such instructions of the MIA of Ukraine, in the oblasts usually a corresponding order of the head of a MIA Department/Chief MIA Departments is prepared. It informs the personnel about the demands of the superiors, as well vests in them the responsibility to secure collection and aggregation of information on mass events, to severely warn organizers, and in case of a corresponding unofficial instruction — to prevent citizens leaving for Kyiv to participate in mass actions. Here is a quote of one of such instructions:

“On May 14, 2011, in the city of Kyiv near the administrative building of Verkhovna Rada of Ukraine the All-Ukrainian action “Day of Wrath” starts at 11 am. To participate in this event significant number of citizens are planning to go to the capital of the state, also in support of this action mass events are planned on the territory of the oblast.

DEMAND:

1.2. Taking into account the current situation, to secure constant control over timely obtaining of information about intentions of departure of the organized groups of citizens or separate persons to the capital of the state or to the oblast center for participation in mass events or alternative actions of protests. ***Additionally, to conduct with the organizers preventative work on non-admission of administrative offenses, to secure immediate submission of this data to the Department of Public Safety with the specified time of departure, time of arrival, type of transport, number of persons, surnames of seniors and their contact phone numbers.***

1.3. During the work meetings with initiators and organizers of such events, to demand from them strict observance of law and order and warn them about the responsibility in case of its violation; if any wrongful are committed, to record them and take response measures.

2. The road police department is to organize ***a thorough maintenance inspection of motor transport the citizens are taking to the location of the action.*** To take actions to prohibit departure of technically defective motor transport. To conduct with drivers the briefings on strict observance of the road traffic regulations.”

Obviously, in this way the top officials of the Ministry of Internal Affairs in fact “planned” the violation of human rights — prevention of buses taking people to mass gatherings, collection of information about those going there. Following these instructions, departures of protesters to different cities of Ukraine were prohibited, for instance, on the ground of their buses being in a poor technical state.

According to the police officers, their actions are legal as “preventative influence” is conducted with the purpose of “prevention of offenses” and is one of the tasks of the police, in accordance with Article 2 of the Law of Ukraine “On Police”. Besides, the police are obliged to participate in legal education of the population, and so at conducting such conversations, to give grounds to their actions, police officers refer to necessity to remind about the effective legislative norms and responsibility for their violation.

But we believe that preventative work should be directed at guaranteeing of the right of citizens to conduct peaceful assembly. Instead, under the guise of explaining the legislation and responsibility for its violation, pressure is exercised over citizens, first of all, to force them to give up on participation in mass events. Taking into account the fact that the reason for this kind of work is the intention of people to conduct a public event, any interference of police officers can be qualified as directed at constraining the rights of citizens for participation in peaceful gatherings. And collection of information about participants or organizers of a public event is nothing if not a brutal violation of their right to privacy.

Here there are several examples of interference with participation in peaceful gatherings.

1. According to the message from Mykhailo Volynets, head of the Independent Miners’ trade union of Ukraine, the law-enforcement agencies were using all possible means to disturb the par-

ticipants of the protest action “Take Ukraine from tycoons, give it back to citizens!” According to him, when the Coalition of representatives of Orange Revolution was campaigning for support of the “car protest” in the city of Kyiv, their car with leaflets was stopped several times by road police officers who tried to arrest the car⁶.

2. A similar message came also from Andriy Panayotov, coordinator of preparation for the nation-wide protest march within the framework of the All-Ukrainian public action “Vpered!”, who informed that the local authorities keep pressuring transport operators to refuse to carry citizens to Kyiv for the action protest planned for May 19. Similar messages also came from Khmelnytsk, Chernihiv and other cities.⁷

3. In Crimea, the police officers warned the organizers and participants of a satirical flash-mob “Good afternoon, Vasyl Georgiyovych!” about administrative responsibility for conducting this action. The Republic’s police believe that such events can be conducted only with the permission from Simferopol city council. “Organization, conducting and participation in this action will be considered as a violation of the effective legislation in the sphere of challenging the established management procedure”, — stated the chief department of the Ministry of Internal Affairs of Ukraine in the Autonomous Republic of Crimea and warned that the penalty following this article carries punishment in the form of either a fine starting from UAH 170 or administrative arrest for the term of up to 15 days.⁸⁶

4. On September 8, the representatives of Dnipropetrovsk city organization “Batkivshchyna” released a statement that the oblast department of road police refused to give a permission to transport operators to leave for Kyiv. According to Maksym Kuriachy, leader of Dnipropetrovsk city organization of the “Batkivshchyna” Party, about 20 transport operators they contacted with the request to organize a trip to Kyiv failed to obtain the permit for leaving from the officers of the oblast road police administration.⁹⁷

3.2. GIVING PREFERENCE TO ONE PARTY OF A MASS ACTION

Similar violations often take place when demonstrations and counter-demonstrations, as well as pickets and other actions of civil disobedience are being conducted, when it is possible that at the same place and time several actions are conducted by people with different or opposing ideological views. Rather often this is used by representatives of the political forces supporting the ruling party to make it impossible to conduct their actions for representatives of the opposition and other participants that want to voice criticism of the authorities’ actions or failures to act. The demands of the national legislation and the international practice in such cases limit the coercive actions of officers the law-enforcement agencies to dividing or separating the opposing parties. But officers of the law-enforcement agencies of Ukraine, as a rule, ignore this limitation and often give preference to the political forces that support the ruling party, and at that violate rights of other participants of peaceful events. This has been manifested in a series of events that happened in 2011.

For instance, on May 25, during the student protest action with a demand to dismiss the Ministry draft law “On Higher Education” the police allowed the “supporters” of the draft law “On Higher Education” to stand closer to the Presidential Administration, what pushed the students towards Instytutska Street.¹⁰⁸

⁶ <http://umdbl.info/index.php?id=1301039762>

⁷ <http://umdbl.info/index.php?id=1305659268>

⁸ <http://www.umdbl.info/index.php?id=1313152982>

⁹ <http://www.umdbl.info/index.php?id=1312788317>

¹⁰ <http://dyvensvit.org/osvita/217-osvita-statti/3752-studentskyj-ruh-dvi-akciji-dva-sposoby-zhyttja>

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3.3. UNWARRANTED STOPPING OF PEACEFUL GATHERINGS AND DETENTION OF THEIR PARTICIPANTS

This kind of violations committed by police officers has been happening more and more often in the recent time. They are actively restoring the negative practice of drawing up of “template” protocols on detained participants of peaceful gatherings to bring them to administrative responsibility following Article 185 of the Code of Ukraine on Administrative Offenses (blatant disobedience to a lawful demand of a police officer). For a long time this article was very convenient in application as in the judicial practice the guilt can be easily proved through giving preference to the statements of police officers.

But on October 11, 2011, the Constitutional Court of Ukraine ruled unconstitutional the provision of the Law “On Police”, which entitled the police to detain persons who failed to obey the police officers’ lawful demands until the trial. The corresponding decision¹¹⁹ was published on October 13 at the court’s official website. At the same time it happens really seldom that civil servants are brought to responsibility for illegal preventing on their behalf to conducting of meetings, rallies, marches and demonstrations (Article 340 of the Criminal Code of Ukraine) and for violation of the procedure of organization and conducting of meetings, rallies, street marches and demonstrations (Article 185-1 of the Code of Ukraine on Administrative Offenses).

Here are several examples of illegal detentions of gatherings’ participants.

1. Detention of Inna Shevchenko, activist of the women’s movement “FEMEN”, in the central street of Kyiv — Khreshchatyk, where she together with other participants was conducting a peaceful action on the occasion of the International Hugging Day, during which the participants were hugging everybody willing.¹²¹⁰

2. On September 15, several dozens of fighters of the Tactical Assault Group “Berkut” disrupted the trade-fair “Thanks to people of Donbass” organized by the company *Prostoprint* in 5 minutes after it started on Maidan Nezalezhnosti in Kyiv. The organizers of the action submitted to Kyiv City State Administration a request for conducting the event and were granted the corresponding permission. But in 5 minutes after the fair opened with about 200 persons around, several dozens of “Berkut” fighters surrounded the action organizers. At that Denys Oleynykov, organizer of the fair and owner of the company, found himself outside the ring, in the crowd of the “audience” of this happening, and all the employees of his company together with the products they brought for the fair were surrounded.¹³¹¹

3. In Donetsk oblast, the police detained a group of retired women who were standing on the road President Victor Yanukovych was taking from Donetsk airport to Makiyivka and who intended to draw his attention to their problems with their hand-made poster. The press office of Donetsk city department of the police confirmed: “Yes, they are detained and are staying in Kyivsky rayon department. The posters they prepared are offensive to the President and thus were seized. Now a protocol is being drawn up following Article 185-1 of the Code of Ukraine on Administrative Offenses.” What can you say — the police is rather original in their interpretation of some women appearing in the street as a violation of the procedure of organization and conducting of meetings, rallies, street marches and demonstrations.¹⁴¹²

4. On September 17, in downtown Donetsk the police and anonymous uninformed people were detaining participants of the action conducted by the organization “Patriot Ukrainy” / ‘Patriot of Ukraine’ / together with fans of football clubs. After the action participants walked for about 500 meters, the police officers came up to them and claimed that this political action “was not declared” and that it had to be stopped, and then detained about 10 persons. They were kept for a couple of hours in Voroshylovsky district department of internal affairs and then were allowed to go.

¹¹ <http://www.ccu.gov.ua/uk/publish/of Article/158601>

¹² http://www.vpg.org.ua/2011/01/blog-post_16.html

¹³ <http://www.umdpl.info/index.php?id=1316165543>

¹⁴ <http://umdpl.info/index.php?id=1313742357>

For the seven most active participants of the action, protocols were drawn up following Article 185-1 of the Code of Ukraine on Administrative Offenses: “violation of the procedure of organization and conducting of meetings, rallies, street marches and demonstrations”.¹⁵¹³

5. On October 12, 2010, in Lviv, on 11.30 till 12.40 the non-governmental organization “*Vartovi Zakonu*” was picketing in front of the prosecutor’s office with the demand to investigate the malversations in the sphere of housing maintenance and utilities under the motto “Get rid of corruption in the prosecutor’s office!”. On October 13, the court prohibited the non-governmental organization “*Vartovi Zakonu*” to conduct picketing of the prosecutor’s office every Tuesday, starting from October 19, 2010. During the peaceful gatherings, no violations of public order were registered, what was confirmed by the numerous videos made at the event.

Despite this, police officers demanded to stop the picketing and to send the organizers over to the rayon police department. They explained their demands by the fact that the organizers failed to obtain the permission for conducting a peaceful gathering. On October 14, two organizers of the picketing, Oleksiy Verentsov and Igor Taniachkevych, were detained by the police, taken to the court, which sentenced them to three days of administrative arrest for blatant disobedience to the lawful demand of the police and violation of the procedure of organization of peaceful gatherings (Articles 185 and 185-1 of the Code on Administrative Offenses).¹⁶¹⁴ The lawyers of the Ukrainian Helsinki Human Rights Union prepared and filed a petition to the European Court on violation of Articles 5 and 11 of the European Convention. This petition is being considered by the Court as a matter of priority and already by the middle of 2011 it went through communication. We can expect a positive court decision for the applicants as early as in 2012.

3.4. UNLAWFUL FAILURE BY THE POLICE TO RESPOND TO SCUFFLES BETWEEN OPPONENTS

As a very illustrative case of this we can mention total inaction of the police on May 9, 2011, after the official events near the hill of Glory and Mars Field, when scuffles took place between representatives of the electoral association “*Svoboda*” / ‘Freedom’ / and representatives of “*Russki Mir*” / ‘Russian Unity’ / and “*Rodina*” / ‘Motherland’ /. According to the data of “*Svoboda*”, two members of this organization were hospitalized. One of them, born in 1983, was shot in a leg, the other, born in 1988, was wounded in the head, he was diagnosed with a concussion.¹⁷¹⁵

During the rally of the Communist Party of Ukraine, which was held on Maidan Nezalezhnosti on November 7, representatives of the electoral association “*Svoboda*”, despite the prohibition issued by Kyiv district administrative court, tore a red flag. This caused a fight between “*Svoboda*” men and Communists. When the column was marching towards Maidan Nezalezhnosti, representatives of “*Svoboda*” tried to stop them several times. They were throwing various things, eggs in the direction of the Communists’ column.¹⁸¹⁶ The police failed to respond in any way to these actions committed by representatives of “*Svoboda*”.

3.5. EXCESSIVE USE OF FORCE AND SPECIAL MEANS AGAINST PARTICIPANTS OF PEACEFUL GATHERINGS

Analysis of the police’s actions gives reasons to believe that use of force and special means against participants of peaceful gatherings by officers of the law-enforcement agencies is not common. Mostly, the police are trying to keep to the strategy of protection of public order and adequate tactics of responding to manifestations of aggression.

At the same time, there were several cases of police officers’ inappropriate use of special means. For instance, during the events that took place on August 24 in downtown Kyiv, dozens of partici-

¹⁵ <http://www.umdpl.info/index.php?id=1316420953>

¹⁶ <http://pravotoday.in.ua/ua/press-centre/publications/pub-349/>

¹⁷ <http://galinfo.com.ua/news/87455.html>

¹⁸ <http://ukr.obozrevatel.com/news/svobodivtsi-na-hreschatiku-pobilisya-z-komunistami.htm>

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pants of the march of the opposition supporters got hurt because the fighters of the police Tactical Assault Group “Berkut” fired tear gas. On the next day, on August 25, the capital city police confirmed the fact that when the opposition supporters tried to break through the police cordon some of the “Berkut” fighters fired some kind of spray. But, as the representative of the main department of Ministry of Internal Affairs worded it, it was unknown what gas exactly was fired.

On September 22, during the action of protest against the policy promoted by Dmytro Tabachnyck, Minister of Education on Sofiyska Square in Kyiv several insignificant scuffles happened between the fighters of the Tactical Assault Group “Berkut” and participants of the peaceful assembly. As a result, four of the most active protesters were detained. Before this, the police surrounded the equipment brought by the action organizers and prevented them from taking it back.¹⁹¹⁸

This topic is especially urgent in connection with the next European football championship “Euro-2012”, which is to be held in Ukraine, as it demonstrates the law-enforcement agencies’ ability to secure safety of citizens during the championship without violation of their rights.

As it is known, on the Internet the information about the event, in the course of which the Tactical Assault Group “Berkut” conducted detention of fans of the football club “Tavria”, got spread together with the photos. As the fans themselves recounted, it was not enough that after the match they were not allowed to leave the stadium for an hour with no reason whatsoever: they were groundlessly manhandled. At the sector exit they were surrounded by “Berkut” fighters who closed the ring and did not let anyone out of it. After that, they used rubber truncheons to force the fans to go towards the stadium gate. About 50 persons were body-searched and sent to the police.

3.6. PERSECUTION OF PARTICIPANTS OF PEACEFUL GATHERINGS AFTER THE EVENT WAS CONDUCTED

With the purpose of reducing citizens’ involvement and activity concerning participation in mass actions, rather often the authorities are looking for an occasion to take revenge against participants of actions and protests after they are over.

For instance, on May 19, in Kyiv the All-Ukrainian civil action of protest “*Vpered*” took place. After the event, the Coordination council of the mentioned action issued a statement that the authorities were increasing the pressure on the action activists. As it was emphasized in the statement, in Alchevsk the controlling agencies increased the pressure on M.Oleksiuk, coordinator of the All-Ukrainian civil action “*Vpered*” and trade union activist²⁰¹⁹. “Oleksiuk himself on numerous occasions appealed to both the city and oblast prosecutor’s offices with complaints for illegitimate actions of the controlling agencies. But there was no response from the law-enforcement agencies”, — informed UNIAN²¹².

In Chernihiv, O.Varnakova, head of the trade union of enterprisers of Chernihiv oblast and member of the coordination council “*Vpered*”, was threatened that she would be charged with criminal charges. In Kryvyi Rih, immediately after the Spring protest march the administration of the local sanitary and epidemiological agency organized an unscheduled inspection at the market, enterprisers at which were actively supporting the action of “*Vpered*”, and made an attempt to close down 10 stores owned by people who “by chance” turned out to be trade union activists.

Similar cases happened also after the march of the opposition during celebration of the Independence Day in the city of Kyiv. After the peaceful event was over, the investigation department of the MIA department in the city of Kyiv detained two participants of the action (Article 115, the Criminal Code of Practice — detention by the criminal investigator of the person suspected of committing a crime) and initiated against them criminal cases according to Part 3, Article 296 of the Criminal Code of Ukraine (hooliganism).

¹⁹ <http://www.umdpl.info/index.php?id=1316718183>

²⁰ <http://www.govpered.org.ua/index.php/news/109-tisknaativistivpered>

²¹ <http://ukrainianweek.com.ua/News/23480>

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The office of liaison issued the following statement in this regard:

“Taking into account the fact that blatant violation of public order was taking place based on the motifs of sheer disrespect to the society (inappropriate mottoes, calls to disregard demands of the court and so on) and was connected to resistance to the representatives of the authorities who were on duty protecting public order, in accordance with the above-mentioned Article, these activists may serve a term from two to five years.”²²

4. 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 Fundamental 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.

²² <http://ura-inform.com/uk/politics/2011/08/30/protest>

XI. FREEDOM OF ASSOCIATION¹

1. OVERVIEW

The situation with freedom of association is gradually getting worse as compared with previous years. This is a result of overall deterioration of environment for civil society organizations, such as increasing pressure from the bodies of power and lesser possibilities of cooperation with authorities.

In general, Ukrainian legislation does not meet international standards and largely unreasonably restricts freedom of association. The situation was partly smoothed over by positive administrative practice, which forbore from using legal restrictions to the fullest. However, it was down the hill recently, including increased inspections by licensing bodies and higher requirements for registration or re-registration of NGOs, which are extralegal.

The civil society is awaiting new legislation for community and charitable organizations. Two bills were kept under adoption during the year².

On November 1, 2010, the People's Deputies Yuri Miroschnychenko MPs (Party of Regions), Serhiy Podhorny (BYuT), Andriy Shevchenko (BYuT), Yuriy Lytvyn (Lytvyn's Bloc), Olesia Orobets (Bloc "Our Ukraine — People's Self-Defense"), Andriy Pinchuk (Party of Regions) submitted the bill "On Public Associations" #7262-1 developed by the civil experts to the Verkhovna Rada of Ukraine³. As a result of the public support campaign the Bill was adopted on the first reading on May 17, 2011⁴. This Bill:

- widens the range of NGOs' objectives;
- increases the number of participants of NGOs;
- simplifies registration and introduction of changes to the statutes of public organizations;
- gives the right to determine the territory of their activity on their own;
- removes restrictions on the types of activities of NGOs.

However, they constantly delayed the preparation of the bill for the second reading. And responsibility lies on the working group of the Committee on State Building and Local Self-Government, whose work on the bill failed to produce results. It is noteworthy that during six weeks the working group managed to consider only five out of the 18 articles of the Bill, while completely changing their wording⁵.

¹ Prepared by Volodymyr Yavorsky, Member of the Board of UHHRA. The section also makes use of materials and commentaries by Tetiana Yatskiv, Social Bar Center (Lviv).

² On Bill adoption campaign see: www.gromzakon.org.ua/

³ See the Bill: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=38911

⁴ For more details see: Litmus Papers of European Integration: the new law on NGOs, "Dzerkalo tyzhnia. Ukraina" No. 17, May 13, 2011, http://dt.ua/POLITICS/lakmusovi_papirts_i_evropeyskoyi_integratsiyi_noviy_zakon_pro_gromadski_organizatsiyi-80950.html.

⁵ "The adoption of the Bill "On NGOs" may be frustrated this year", www.gromzakon.org.ua/

Obviously, there remains a possibility to distort the text of the bill and adopt it in the version that does not answer the interests of civil society⁶. However, there is a possibility of positive scenario.

2. CREATING ASSOCIATIONS

There are many obstacles to the establishment of associations, including NGOs. The situation worsens not only due to some laws on public associations that violate international standards, but also due to the lack of clear definition of grounds for refusal of registration. In general, the registration procedure is not clear, allowing the legalization body not to register a public association or delay such registration for many months without any reason.

There is no official statistics on the refusal of registration. According to different experts, there are a lot of refusals. In practice, most often they will return you the documents for revision without refusal, which reduces the number of refusals to register, though it is at variance with legislation.

The only statistics available relates to the activities of the State Registration Service (these functions were formerly performed by the Ministry of Justice). According to the Service data for 2011⁷, there were:

- registered: 81 NGOs (62 All-Ukrainian NGOs, 19 international NGOs), 11 political parties, 28 charity organizations (12 All-Ukrainian charity organizations, 16 international charities), 3 structural branches of public (non-governmental) organizations of foreign countries in Ukraine; and 15 symbols of public associations;
- legalized by notification on the establishment of 20 public associations;
- canceled records of registration of five public associations;
- registered (noted) changes to statutory documents of 164 organizations;
- denied: 42 organizations in the legalization / registration; 39 in recording changes.

This very statistics shows that the official denial of registration or legalization takes place in more than 40% of cases; however, if we add the unofficial denial like “return documents for revision”, the figure will be much higher. Also, it is logical to assume that the data of the central legalization body are much better than the local data where the registration percentage is much higher.

The All-Ukrainian NGO “Women’s Movement “FEMEN” informed the State Registration Service on its establishment by a written notice. On September 12, 2011 the State Registration Service refused to register, although the legislation did not provide grounds and even the theoretical possibility of refusing registration of the NGO registering by notice. By law, they had to be registered even in case if there were reasons to go to court to ban their activities. But equally amazing was the justification for this decision. Quoting the first paragraph of Article 36 and part three of Article 24 of the Constitution of Ukraine, the state registrar noted that “... the purpose of the association in terms of integration of women in protecting their rights and against discrimination of women in society may be treated as one calling to commit breach of the peace or the rights and freedoms of others.” Such denial is absurd enough to be commented upon, but it shows the sort of illegal demands a person can meet while registering a NGO. However, this was the official response of the central authority of legalization, which generally formed the administrative practice on this issue.

Here is another rather typical example of the registration of Poltava youth public organization “Youth Public Association “Nash Shliakh”. On July 22, 2011, the Main Department of Justice in Poltava Oblast refused to carry out registration, because the organization had failed to notarize the

⁶ Public appeals to the top authorities not to distort the Bill on NGOs, 24-09-2011, Telekrytyka, <http://www.telekritika.ua/news/2011-09-24/65991>

⁷ See: The net result of the activities of the State Registration Service of Ukraine for 2011, <http://www.drso.gov.ua/show/1625>

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registration papers, and the provisions of its Statute allegedly failed to comply with the law. In particular, it was stated that:

- The Statute contains provisions that the organization is a legal entity, although such status becomes valid upon registration (only insignificant textual difference);
- The purpose of charitable and scientific activities was not consistent with the laws on charity and charitable organizations and scientific and scientific-technical activity (i. e., in the opinion of the registrar, the NGO has no right to engage in these activities, which is more than controversial);
- The requirements of Part 2 and Part 4 of Article 98 of the Civil Code about calling together the general meeting and liquidation of association were not taken into account (in general, it is rather a strange requirement that certain legislation should be duplicated in the statute because the statute does not contradict these rules).

On October 4, 2011, the organization got the mitten again together with the thrice as long list of new defects of the same constituent documents. Thus, the registrar believed that the organization had no right to participate in the protection of monuments of history, archeology, culture, as it was against the law. But the most amazing was the following grounds for refusal:

“item 2.4.4. on organization of exhibitions and fairs does not match section “Subjects of exhibition business” of the Concept of development of exhibition and fair activity approved by the regulation of the Cabinet of Ministers of Ukraine of 22.08.2007, No. 1065, as the organizers of exhibitions and fairs are the central and local executive bodies, and subjects of economical activity of all forms of property, whose main activity is connected with the organization and holding of exhibitions.”

Obviously, all listed reasons for the refusal of the registration are contrary to international standards and do not fully comply with national legislation. However, such unjustified refusals are a mass phenomenon.

There are many problems created on the stage of amending the NGO’s statute documents or a simple change of manager. In fact, during this procedure the Ministry of Justice conducts a full scan of the organization, which is against the law. Here’s one such example⁸.

On September 3, 2010, the All-Ukrainian Youth NGO “Ukrainian Association of Students’ Self-Government” filed an application to the legalization agency of the Ministry of Justice to amend the information about the central management of statutory bodies of the organization. On October 25, 2010, the Ministry of Justice issued an Order No. 2615/5 refusing to take into account these changes.

The procedure of “taking into account of changes in the boards of public associations” and fulfillment of these obligation by NGOs is regulated by the Order of the Ministry of Justice. The same Order instructs to carry out “experts’ report” on submitted documents. The appeal to the Ministry is a prerequisite for appeal to the state registrar on registration of such changes in the unified state register of legal entities and individual entrepreneurs⁹. Although neither the Law “On public associations” nor the Law “On State Registration of Legal Entities and Individual Entrepreneurs” as well as the Enactment of the CMU No. 140 from 26.02.1993 “On Approval of Regulation on Legalization of Public Associations” require previous appeals to the legalization agencies in order to enter into the registry the info on their manager. Notably, the procedure for business organizations is much simpler.

Although such procedure is illegal, let us go on analyzing the case. The legal opinion of the Ministry of Justice states that the legal examination has revealed that the documents submitted by the Association do not meet legal requirements, e. g., the extract from the minutes of the General

⁸ The information and its analysis were submitted by Tetiana Yatskiv, Social Bar Center (Lviv).

⁹ According to the Order of the State Committee of Ukraine for regulation of policy and entrepreneurship, Order of the Ministry of Justice of Ukraine from 27.02.2007 No. 23/74/5 “On approval of Regulations concerning data transfer on legal entities by the Ministry of Justice and its territorial bodies”.

Assembly of the Association of 03.09.2010 submitted to the Ministry of Justice does not meet the requirements of Article 19 of the Law “On state registration of legal entities and individual entrepreneurs.” As report reads, the applicants had to submit an original or a notarized copy of the decision of the authorized body of the department of the legal entity about the replacement of the above individuals and/or duly certified copy of the order document about their appointment. It also indicates that the documents were certified by S., as Head of the Secretariat of the Association, but as far as no info was received by the Ministry on the change of the Head of the Secretariat, it was against the law. Next, according to the materials of registration file of the Association, following the decision of the Board of 17.01.2009, the Secretariat is headed by M. Another reason for refusal in taking note of the replacement of the manager was the fact that “the documents confirming the compliance with the statute of the Association, including minutes of the meeting of the Board of Association, at which decisions were made in accordance with paragraph 5.2.3.1. of the Statute of the Association, were not submitted to the Ministry of Justice of Ukraine”; moreover, it “prevents under Article 25 of the Law “On public associations” compliance with the statute of the Association.”

The disclaimer illustrates that when taking note of the change in the governing bodies or registration of changes to the statutory documents the legalization bodies are authorized to request any documents concerning the organization, and actually demand submitting “complete package for registration.” Obviously, the legalization body is not generally entitled to determine the legality or illegality of making the association.

The Law “On public associations”, Enactment of the CMU “On Approval of Regulations on the Legalization of Associations” do not include into the list of obligatory registration documents the info on the new head, mandatory documents on inside statutory activities, such as minutes of meetings of managerial bodies (except for reports of general meetings (conferences, congress), when it comes to changing the statute or replacement of the head) that record the changes of certain members of management. Also, the legalization bodies are not authorized, while taking note of the change of the head, to require decisions of other bodies of public organizations’ management, additional documents, except for those provided for registration of the replacement of manager.

According to Article 25 of the Law “On public associations”, which is referred to in the legal opinion by bodies legalizing public associations and monitoring their compliance with their statute, their representatives may be present at events held by the associations of citizens, require necessary documents and get explanations. The article of the Law does not specify that the legalizing authorities may or must perform such control during the submission of documents about the change of the manager; especially as such procedure is not fixed by this Law “On public associations”. The same is not specified in other legislative acts; they do not require that in the meantime the authorities control the organization or may ask for additional documents.

In fact, the practice is such that while taking note of the replacement of the manager, there exists the right to request additional documents on the activities of the NGO which are not legally mandatory, or perform an inspection of the organization. However, such administrative practice means interference in the internal affairs of social organization, which is a violation of the European Convention on Human Rights. Not to mention that this practice is in principle contrary to the laws of Ukraine.

3. THE PRESSURE ON ORGANIZATIONS, THEIR LEADERS AND MEMBERS

Since 2010, the incidence of pressure or harassment of NGOs or their managers has increased significantly. As far as we know, the info on such actions of the authorities was received in the Foundation of Regional Initiatives, Ukrainian Association of Students’ Self-Government, All-Ukrainian Youth NGO “Democratic Alliance”, Centre for Legal Protection of Odesa, NGO “Class”, Inde-

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pendent Students' Union "Priama Diya", All-Ukrainian Association "Tryzub", All-Ukrainian Association "Svoboda", Crimean Tatar Mejlis and others¹⁰.

In September 2011 the heads of city district administrations, town and village heads received letters from the oblast state administrations with "instructions" to immediately begin monitoring of the social activities of NGOs. The instructions read as follows:

"Taking into account the growing social and political activity in the region, emergence of social, political organizations aiming at provocative political activity, please, pay particular attention to the rapid information about planned and carried out social and political measures in the regions and oblast towns.

You should urgently boost the monitoring by local authorities of applications (notifications) to organize protests, rallies, public meetings, and distribution of printed matter submitted by socio-political associations and individuals.

You should intensify tracking statutory activity of political parties and public organizations that have a political bias (meetings, conferences).

Please, promptly inform the management about the planned implementation, progress and results of these measures.

The information should be free of descriptive generalizations and contain detailed background of the progress and results of the event: names and positions of the organizers, number and categories of participants, slogans, banners, list of speakers and the main theses of speeches, evaluation of the response of local authorities (which local executives met demonstrators, what did they decide), results (resolution of participants, letters sent to the leaders of the state, oblast), further actions, involvement of people's deputies, leaders of oblast level.

All distributable printed propaganda should be scanned and immediately transferred to the Department in electronic format."

Such attention from the authorities may be regarded, of course, in different ways, but "tracking statutory activities" in practice often leads to quelling the activity of NGO disliked by the authority. In fact, it is about data collection about anti-government organizations and activists. Later such activists and organizations often run into problems with law enforcement or legalizing bodies, company management or higher school administration, etc.

Below we cite examples of pressure and persecution.

3.1. "CASE OF THE DEMOCRATIC ALLIANCE"

On June 12, 2010, the SSU officer, who introduced himself as Senior Lieutenant Yuriy Skryl, without prior official invitation met with Head of Mykolaiv Oblast Branch of All-Ukrainian Youth NGO "Democratic Alliance" Yuliya Hrechka and made inquiries about the activities of the organization and direct action "Exit from Democracy: Password 2450" and kept finding out the possibility of further cooperation.

On June 15, 2010, the officers of the SSU (introduced himself as Olexandr Rybalka) and Ministry of Internal Affairs met with the organizer of the action "Exit from Democracy: Password 2450" in Cherkasy, Head of Cherkasy Regional Branch of the organization Taisiya Plakhuta. The law enforcers gave a call and asked the activist of Democratic Alliance to come down into the yard, where they met her.

At the end of July 2010 the Head of Chernihiv Oblast Branch Igor Andriychenko received a phone call from the SSU officer asking for a meeting. The activist of the Democratic Alliance asked

¹⁰ See in more details: The interim statement of the UHHRU "Persecution of civil society in Ukraine in 2011", <http://www.helsinki.org.ua/index.php?id=1321888005>.

him to send him formal invitation. Then the alleged SSU officer asked several questions about the activities of the Branch, including the number of registered members.

On September 21, 2010, the SSU officer, who introduced himself as Yevhen Volodymyrovych, called the home phone of the previous leader of Cherkasy Oblast Branch of Democratic Alliance and had an informal meeting with Vitaliy Lutsyk, who had been a member of the previous Board of the local organization of Democratic Alliance in Cherkasy. It was his home address that had been previously referred to as legal registration data of the Branch. During the meeting the representative of the SSU tried to get info on funding sources at both local and central levels.

On November 5, in Kharkiv, the SSU officer held an informal meeting with the activist of “Democratic Alliance”. The Security Service officer took interest in the activities of the oblast branch of the organization and labored the question of leadership. Another meeting of this sort was held on March 6, 2011.

The SSU informed NGO “Democratic Alliance” that the meetings with its activists were held “solely on the basis of and within the authority and in the manner envisaged by the Constitution and Legislation of Ukraine.”

3.2. “THE CASE OF ANDRIY FEDOSOV”

In 2009-2010, the Crimean republican organization of the All-Ukrainian organization of disabled persons and consumers of mental health care “User” managed by Andriy Fedosov monitored the fulfillment of rights of disabled persons and mental health care consumers in six state mental hospitals in the Crimea. This monitoring brought out serious violations of human rights. In April 2010, on his Facebook page, Andriy Fedosov published information about his intention to file an application to the prosecutor about the living conditions of three patients at psychiatric facilities, which he had visited the previous week. Then he began answering threatening phone calls.

According to the human rights activist, on April 25, 2010 he received two phone calls. The man, who introduced himself as Nikolai Vasilyevich (w/o his last name), warned him against his submitting an application. Otherwise, he said, Andriy Fedosov’s health may be at risk. For the reason of this fact, the human rights activist informed the prosecutor about these threats and left the Crimea for safety reasons.

In May 2010 he was assaulted and beaten by unknown persons. The police refused to register the application and took no measures to investigate the crime.

In July 2010 he was detained for a day in connection with an offense allegedly committed 10 years ago. Thus, at the time of the registered offence Andriy Fedosov was 15 years old. On September 20, 2010 he was exculpated in connection with the fact that at the time of execution of crime he underwent treatment at the closed children’s hospital.

On October 8, 2010, Chief of Eupatorian Municipal Department of the MIA of Ukraine in the AR of Crimea O. Osadchiy sent the request to the Chairman of the All-Ukrainian public organization of disabled users of psychiatric support “User” Ruslan Imereli to submit copies of the financial and accounting documents of the organization and documentation of the project, implemented by this organization. The request was made to verify the intended use of funds for the project of monitoring of human rights violations in psychiatric facilities in the Crimea.

In November 2010, Andriy Fedosov’s health deteriorated. His official diagnosis was “myelopathy and flaccid paresis of the lower extremities.” Andriy Fedosov could not feel his feet and was bedridden.

In the fall of 2011 Andriy Fedosov was once more assaulted and beaten. No investigation of this case ensued and the police refused to initiate criminal proceedings.

Forced to hide from his attackers, he went abroad, where in January 2012 he received a refugee status.

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3.3. "THE CASE OF YURIY KOSAREV"

In the evening of May 22, 2011, in the Volnukhino Village, the Kosarevs with their friends Serhiy Ignatiev and his wife Iryna grilled their shashlyks in the backyard of the house belonging to Yuriy Kosarev, member of the NGO "Luhansk Human Rights Group."

Earlier, in his line of duty, on May 5, 2011, Yuriy Kosarev lodged complaints to various instances against violation of labor and environmental laws by the Uspensky Karyer JSC.

The black jeep (number BB BX 1122) drew up to the house and three men hopped off. After talking with them Yuriy Kosarev said that those were CEOs of the Uspensky Karyer JSC, which required termination of his activities ("stir up trouble") and threatened him with problems.

Soon two cars drew up to the house: the said jeep and white "Lada", three men in police uniform hopped off. Yuriy's wife, Iryna Kosarev maintains that one of them, approaching them, held a pistol in his outstretched arm.

"They wanted to apprehend Yuriy, but he disagreed, required to be served a notice, because the next day, on May 23, in the morning, there had to be an investigation at the Lutuhino public prosecutor's office into the materials of illegal activity of the Uspensky Karyer. Yuriy offered to meet them in the morning and find out everything in Lutuhin. Then one of the militiamen said on the phone: "I'd rather fix the fucker," said Iryna Kosareva. This scene was videotaped and uploaded to the site "Luhansk. Media style."

Then the militiamen knocked Yu. Kosarev down, handcuffed him and started kicking him. The assailants were men from the jeep (Haponenko Olexandr Olexandrovych and his bodyguard Andrievsky N.V.). S.Ihnatov stuck up for Yu. Kosarev.

From the application of Yu. Kosarev to the European Court of Human Rights: "They refused to show their documents, I told them that in case of refusal to show documents proving that they were militia officers and appropriate court order I had the right under existing legislation to turn them away from my estate and defend myself in case of illegal entry. Instead, they invaded my estate, knocked me down, handcuffed and began beating black and blue."

Yuriy Kosarev, Serhiy Ignatov and his wife Iryna were arrested and taken to Lutuhino public prosecutor's office; Iryna Kosarev managed to escape. Back in Luhansk, she lodged an application to Luhansk Oblast Prosecutor's Office.

From the complaint of witness Iryna Bimbat to the public prosecution office: "They brought me to Lutuhino public prosecution office. Then they drove me, Kosarev, Ignatov, militiaman Melnikov and two more officers for medical checkup to Lutuhino hospital. There I saw Yuriy Kosarev. His face bore traces of injuries: bruises and bumps. He complained of pain in the ribs. I saw no visible injuries or damage in men in militia uniforms. I overheard one of the militiamen criticizing his friend: the blood test showed the presence of alcohol. Then this militiaman was excluded from the list of victims allegedly beaten by Ignatov and Kosarev."

From the appeal of Serhiy Ignatov to the European Court of Human Rights: "I was taken to Lutuhino Regional Department of the Ministry of Internal Affairs of Ukraine in Luhansk Oblast without my consent. Kosarev Yuriy several times called for an ambulance. He had visible traces of beating; he complained that he had a headache and broken ribs." Yuriy Kosarev maintains that the docs were not let to examine him. He said the militia feared that his body still bore traces of injuries.

On May 22, 2011, the Lutuhino District Militia Department of MIA of Ukraine received three phone calls complaining of bullying on the part of Yuriy Kosarev. Two criminal proceedings were instituted against him under Article 342 (resistance to a law enforcer) and Article 345 (threat or violence against law enforcer).

Head of the Public Relations of the Department of MIA of Ukraine in Luhansk Oblast Tetiana Pohukay officially announced that Yuriy Kosarev intentionally uploaded that self-serving video. "Why did this video not show how he and his friends assailed the militiamen and beat them?" Also, Tetiana Pohukay suggested that Yuriy Kosarev attacked the militia because he was drunk. "He provoked the conflict. Even his video shows where he stands with his shovel," she said.

On June 21, 2011, Yu. S. Kazan, Deputy Head of Personnel Department of the Ministry of Internal Affairs of Ukraine signed the formal response #6/6-2984 to the appeal of D.Snehiriov, President of the Charity Foundation “Support of Ukrainian Initiatives”, which read: “The info on the website “Luhansk. Media style” in the article “I can fix the fucker” charges Luhansk militia of carrying out the bumpman’s order which has been partially substantiated with the fact of rough and tactless behavior of some law enforcers of Lutuhino Regional Department during their conversation with Kosarev Yu. M., for which they have been brought to disciplinary liability. The materials of the check-up have been sent to the Public Prosecutor Office of Lutuhino Region for consideration in accordance with the laws of Ukraine.” However, the response stated that the checkup revealed that Yuriy Kosarev threatened N.V. Andrievsky with violence. According to the document, Yu.Kosarev and S.Ihnatov “obstructed the militia and inflicted light and severe injuries” to law enforcers. The response names not three, but two militia officers: Potapin O.G. and Melnykov O.S.”

Iryna Imbat reported pressure on her as a witness. “I was questioned by the investigating prosecutor Melnyk S.V. He said that the owner of the quarry gave him three thousand dollars to jail Kosarev. And if I don’t witness that Kosarev attacked the militiamen, he will jail me as well for five years for assaulting militiamen.”

On June 9, in Lutuhino court, the preliminary hearings in the case of Yuri Kosarev and Serhiy Ignatov were held, which led to a guilty verdict. At the time of preliminary hearing both defendants were in the hospital of the investigative isolation ward (Yu. Kosarev after depletion by starvation, S. Ihnatov underwent surgery). The official observers from “Luhansk human rights group” Andriy Vasylenko, Aide of the Deputy Anatoly Yahoferov, and human rights activist Iryna Oleynikov were not allowed to be present during the hearing.

According to Iryna Kosarev, officers of Lutuhino District Department of the MIA of Ukraine O.Melnykov and O.Potapin entered the office of the judge. Then they were joined by the representative of Lutuhino Public Prosecution Office. The official observers kept waiting for the start of the trial for several hours. Subsequently, Judge Vasyl Shpychko informed them that the hearing had been held already and the sentence had been handed out.

During the hearing the defendants expected to submit an application to change the preventive measure and engage new witnesses, but they had no such opportunity because the hearings were conducted in their absence. Iryna Kosarev filed a complaint against the judge.

The Luhansk Oblast Prosecutor’s Office in its response to a request for information states that on the basis of the results of investigation the public prosecutor confirmed the conviction of Yu. Kosarev and S. Ihnatov and the case has been sent to court for consideration on the merits. At the same time the response states that after consideration of the application of Yu. Kosarev about injuries inflicted by militia officers the Lutuhino Department of the Ministry of Internal Affairs and Prosecutor’s Office denied him in criminal proceedings against militiamen.

Yu. Kosarev and S. Ihnatyev submitted applications to the European Court of Human Rights.

4. TEMPORARY PROHIBITION OF ACTIVITIES AND LIQUIDATION OF ASSOCIATIONS

The Ministry of Justice continued filing lawsuits to liquidate political parties.

On November 24, the Ministry of Justice announced the cancellation of certificates of registration of the Party of Radical Breakthrough, political party “Pragmatic Choice”, Party of Muslims of Ukraine, Green Party of Ukraine and Party of Development, Party of human rights protection. This was done by the decision of the Okrug Administrative Court of Kyiv. The certificates were canceled due to the fact that these parties did not nominate their candidates for the Presidency in 2004 and 2010, listed no deputy nominees during regular elections to the Verkhovna Rada of Ukraine in 2002, 2006, and a snap election in 2007. Article 24 of the Law “On Political Parties in Ukraine” stipulates that in case of failure by a political party to nominate their candidates in the presidential election in Ukraine and people’s deputies of Ukraine in the course of ten years, the authority that

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registered this political party must apply to court to annul the registration certificate¹¹. However, such grounds for liquidation are quite dubious in terms of international standards and Article 11 of the European Convention on Human Rights.

Also in 2011, they continued examination of, maybe, the only case on the prohibition of public organization.

On November 9, the Supreme Administrative Court of Ukraine granted the appeal of the prosecutor's office of Kharkiv Oblast about the forced liquidation of the public organization "Eurasian Union of Youth". You may remember that on November 6, 2008 the Kharkiv District Administrative Court decided to liquidate the NGO "EUUY". The organization filed the appeal. On July 6, 2009, the Kharkiv Appellate Administrative Court overturned the decision on liquidation and decided to dismiss the claim. The decision is still not available in the registry, but earlier this process was initiated by formal matter, in particular, absence at the official place of registration of the organization, as well as violation of the territorial status of the organization. In particular, the organization was accused of being registered in the Kharkiv Oblast, she picketed the Security Service of Ukraine and during the temporary ban it actually carried out some of its actions¹². All these grounds for dissolution of the organization do not comply with the European Convention on Human Rights.

5. RECOMMENDATIONS

1. To change the current Law "On Associations of Citizens" by passing the Law "On public Associations", which shall comply with the European Convention on Human Rights, International Covenant on Civil and Political Rights and the recommendations of the Committee of Ministers of the Council of Europe "On the legal status of NGOs in Europe" (CM / Rec (2007) 14).

2. To eliminate Article 186-5 of the Code of Administrative Offences introducing the responsibility for directing or participating in unregistered associations of citizens.

3. To amend the law on publishing activities in order to allow nonprofit organizations, not just businesses, to establish publishing houses and carry out publishing activities.

4. To adjust administrative practice of the Registration Service of Ukraine and other authorities legalizing public associations in accordance with European standards.

5. To thoroughly investigate cases of persecution of civil activists and public associations.

¹¹ The certificates of five parties were annulled. The Press Service of the Ministry of Justice of Ukraine, 24.11.2011, <http://www.minjust.gov.ua/0/news/37660>.

¹² See more in the reports "Human Rights in Ukraine: 2009-2010" and "Human Rights in Ukraine: 2008."

XII. FREEDOM OF MOVEMENT AND FREEDOM OF CHOICE OF RESIDENCE¹

1. OVERVIEW

Despite the fact that there exist the freedoms to travel and of choice of residence, the situation with observance of it turned for the worse in 2011.

The local self-government organs went on imposing negative trend of en-masse curfew for minors.

There remains a considerable problem of prolonged investigation of criminal cases which in the case of such preventive measure as “recognizance not to leave” often means a violation of the freedom to travel. Ukraine failed to fulfill general measures determined by the decisions of European Court of Human Rights in the cases of *Nikiforenko vs. Ukraine* (application No. 14613/03), *Pohalchuk vs. Ukraine* (application No. 7193/02) and *Merit vs. Ukraine*. These decisions caused no amendments to the legislation and had no impact on the investigative practice.

The new problem showed up in the decision of the European Court of Human Rights in the case *Dzhaksyberhenov vs. Ukraine* (application No. 12343/10) of June 20, 2011. The Court found a violation by Ukraine of the freedom to travel, which includes the right to leave any country at any time (Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights). In this case, the applicant was detained for extradition based on Article 98-2 CCP, but actually no proceedings were initiated against him in Ukraine. He was picked up for criminal charge instituted in Kazakhstan. According to the Prosecutor General’s Office he was not allowed to leave Ukraine on February 15, 2010; however, such actions of prosecution were not required by law, and therefore interference with the right was “unlawful.” Only on June 17, 2010 the legislation was amended, which allowed detaining a person in connection with criminal proceedings in another country.

There is a separate problem of unreasonable restrictions on the freedom of travel of persons released from prison and which were placed under administrative surveillance. We treated this issue in detail in our last report for 2009–2010.

There are problems with the issue of both internal and foreign passports, which restricts the freedom to travel.

The practice of issuing foreign passports remains unsatisfactory: it is too time-consuming, requires overcoming many bureaucratic procedures and is expensive and inaccessible to many citizens. The procedure of issuing passports remains uncoordinated, which generates a lot of abuse and corruption in this area. For example, there are numerous instances of solicitation of documents which are not required by law (for example, insurance policies) or paying for services which are not required by law (for example, the fee for a certificate of clean record).

¹ Prepared by Volodymyr Yavorsky, Executive Director of the Ukrainian Helsinki Human Rights Union.

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There is also a problem of internal passports. The terms of issue of passports are often violated, which limits the rights of citizens, because without passports they cannot obtain registration and perform many other actions associated with this process. In part the militia explains this with the lack of passport forms. But quite often the problem lies elsewhere. There still exists the system of passport offices in the housing offices that have recently transformed into conventional businesses. By using this, these passport offices often refuse to issue a passport, replace a passport, to carry out residential registration or remove registration or issue various certificates because of arrears in utility payments to housing offices. Obviously, this practice is illegal, but this is a result of poor control of the passport offices by the MIA.

On September 23, 2011 the Parliament adopted the Law “On the documents that prove identity and citizenship of Ukraine.” The bill had been proposed by a group of people’s deputies in June and took two months to be approved. The Law provided for the introduction of 12 types of biometric documents.

However, on October 21 the President vetoed it and returned with his comments². According to the President, the law could not be signed because:

- It contains risks of violations of constitutional rights of the citizens and guarantees of these rights, universally recognized human rights, fundamental pillars of the democratic legal state, which is Ukraine;
- Violates international commitments undertaken by Ukraine, is a step back on the way to the implementation of European and international standards on human rights, realization of the Action Plan for liberalization of the EU visa regime for Ukraine;
- Does not ensure the security of citizens;
- Leads to unjustified substantial increase of budget expenditures and is likely to affect the budget of each family;
- The number of innovations proposed by the law does not meet the urgent needs of the present, is groundless and unacceptable.

In early November, Prime Minister Mykola Azarov said that “the Cabinet of Ministers is developing a bill. It is our obligation under the visa-free regime, and this bill will be adopted soon.”

It is worth noting the continuation of the 2010 practice of restriction of the freedom to travel by the militia, so that people could not participate in peaceful assemblies in Kyiv. There were no such restrictions since 2004. Without explanations or formal causes militia blocked vehicles (buses and minibuses), carrying members of peaceful assemblies from other cities. In such cases they often threatened carriers to take away their licenses. Militia in all cases denied the illegality of their actions. This is because according to the MIA Order of May 11, 2010 No. 170 such actions were legalized:

“2.7. If the requirements of citizens cannot be satisfied at the regional level, it is necessary to offer the event organizers to limit the trip (to the district center, regional center, the capital) of initiative group only to a specific executive body which is competent to meet the stated requirements.

To ensure immediate provision to the Interior Ministry, Central Office of Interior Ministry, Oblast Departments of the Ministry of Internal Affairs in oblasts whereto the travel is planned the information on:

- date, time and place of departure;
- route and destination place of arrival;
- kind of transport;
- basic requirements, the purpose of travel;
- initiator (organizer) of the event;

² See: http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=40391.

- declared (expected) number of people participating in the action;
- whether the executive authorities (local self-governments) were informed about this.

To organize convoy and safety of transportation of the participants of mass events within relevant territorial jurisdictions. In case of violation of public order, to take legal precautionary measures and immediately inform the Ministry of Internal Affairs.”

This Order was not registered in the Ministry of Justice and the latter appealed to the Interior Ministry demanding to annul the order. However, it explains why Public Traffic Militia officers put columns of demonstrators to a stop and delay their departure collecting all necessary data and limiting the trip with initiative groups only.

There also remains the problem of incomplete transition from a system of “residence permit for a specific address” to registration: many procedures remain outstanding limiting the free choice of residence.

At the end of the year the *Ukrzaliznytsia* informed about a significant reduction in train traffic, which, in the view of human rights activists, seriously restricted the freedom to travel³.

There are continuously emerging periodic conflicts because of the nonadmission of foreigners on the territory of Ukraine. In general, for nine months in 2011 the border guards denied entry into the country to 4,916 persons which is several times less than in the previous years and which may be noted as a positive trend (2008: 24,760 persons; 2009: over 17,000; 2010: over 15,000)⁴.

2. FREEDOM TO TRAVEL: CURFEW FOR MINORS

Since early 2009, the local self-government organs began to massively take decisions that prohibited children to stay unaccompanied on the streets and public places. In 2011, the trend of increasing local regulations on imposing curfew continued to go up.

In March 2011 the Executive Council of Izmail City Rada (Odesa Oblast) imposed restrictions for children under 16 years of age to stay in entertainment establishments, computer clubs and on the streets in the evening. According to the decision, during the school year the children under 14 are permitted to appear in public places without parents up to 21.00, children from 14 to 16 years — up to 22.00, and during summer holidays — up to 22.00 and 23.00 respectively. However, in April this decision was reviewed and the ban on children in the street annulled.

In November, militia proposed to introduce a curfew in Ivano-Frankivsk⁵.

In the Crimea this practice is the most widespread. In May, in Yalta, they decided that children under 16 can stay outside of their house from 22.00 to 06.00 only accompanied by adults. Earlier, the curfew had been introduced in Simferopol, Sevastopol and other cities.

According to these decisions, if the child is outside, s/he may be picked up by militia, which would bring her/him to the militia station, call their parents and make them accountable under Article 184 of the Code of Administrative Offences (failure of parents or persons substituting them to carry out responsibilities of parenting, which leads to imposing a penalty of three to five non-taxable minimal wages). The application of this article is quite controversial, because the duties of parents are determined by the Family Code and the latter does not describe the question of unattended children at night on the street. In fact, the new responsibility has been introduced into practice

³ “The Ukrainian Helsinki Human Rights Union: the Ukrzaliznytsia is getting rid of socially-significant train routes”, 05.12.2011, <http://www.helsinki.org.ua/index.php?id=1323091938>.

⁴ The results of the operational activities of the State Border Service // The official site of the State Border Service, http://www.pvu.gov.ua/control/uk/publish/article?art_id=48708&cat_id=78111.

⁵ The hour of curfew for minors will come in Ivano-Frankivsk, “Правда.if.ua”, <http://pravda.if.ua/print.php?id=13949>.

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without amending the Code of Administrative Offences, which raises the question of clarity of the law establishing administrative responsibility.

On the whole, there are no problems to prohibit minors to stay at night without adults at the entertainment establishments. However, when limiting the stay on the street they interfere with the freedom to travel, which is protected by the European Convention on Human Rights and the Constitution.

Such intervention should be in accordance with law. That is, the intervention in human rights may be regulated by laws only, and not the decisions of local self-government.

In addition, such decision of the authority is a disproportionate restriction on freedom to travel, since it is not limited in time and do not necessarily lead to child protection, i. e., it is not a *necessary limitation in a democratic society*.

The restrictions on the freedom to travel are allowed only in the manner specified by law on the legal state of emergency. This law stipulates that such restriction may be introduced under certain conditions in a particular area and for a clearly defined period of time.

Therefore, the establishment of permanent limits without exception on minors' stay on the streets is a violation of freedom to travel.

2.1. APPEAL OF THE DECISION IN CHERNIHIV

According to the Helsinki Human Rights Union, the local bodies have no authority to deprive children of the freedom to travel. Based on this belief, the UHHRU helped one person to appeal the decision of the Chernihiv Oblast Rada of December 24, 2009, which limited the minors' freedom to travel.

On June 10, 2010 the Desniansky District Court of Chernihiv partly redressed this administrative claim; namely, it annulled items 1–3 of this decision, which had limited the freedom to travel. However, the decision on another part dealing with preventive measures remained in force. The UHHRU did not object to it. In July the Chernihiv Oblast Rada has lodged an appeal against this decision, which was not considered as of the end of 2011.

2.2. APPEAL OF DECISION IN SIMFEROPOL

On March 31, 2010 Simferopol City Rada adopted a decision "On the implementation of legal and other acts of the Cabinet of Ministers of Ukraine, Verkhovna Rada and Council of Ministers of the Autonomous Republic of Crimea, Simferopol City Rada and its Executive Committee on the prevention of crimes, offenses and neglect among children and adolescents in Simferopol," which established a curfew for minors. The UHHRU helped to lodge a complaint against this decision in court.

On May 16, 2011 the Zaliznychny District Court of Simferopol denied the satisfaction of this claim. The court did not respond to any argument of the plaintiff, and referred to the interests of the child. In general, the process seemed strange since it looked like the case of performance of parental duties by parents–plaintiffs, and not the legality of the defendant's decision. Moreover, the judge instructed the third party — "Child care service of the Simferopol City Rada" (a branch of the defendant) — to check the living conditions of the child. The officers of this department also visited the school and plaintiff's neighbors and collected information about her son, mostly negative, and, as it may be seen in the decision, used it in court. Such pressure on the plaintiff failed to stop him, and he filed an appeal.

On October 24 the Sevastopol Appellate Administrative Court refused the plaintiff's appeal. In this case the plaintiff was not even notified of the time and place of the consideration of the appeal; he learned of the decision by chance and was able to get it only on November 22. The Court of Appeal again gave no answer to any argument of the plaintiff. The plaintiff took the appeal to a higher court.

3. RECOMMENDATIONS

1. According to the conclusions of the Parliamentary Assembly of the Council of Europe No. 190 on Ukraine's accession to the Council of Europe it is necessary to transfer the functions of registering citizens, foreigners and stateless persons on the territory of the state from the Ministry of Internal Affairs to the Ministry of Justice of Ukraine.

2. Complete the reform of legislation on registration of persons taking into account positive international experience and the Law of Ukraine on freedom to travel and free choice of residence.

3. With regard to registration of physical persons:

- To annul the procedure of registration of temporary location (such procedure is prescribed by law, but it is not used in practice) specified by the law on freedom to travel and free choice of residence;
- To finalize the automated system of registration of citizens using the best foreign experience and in compliance with international human rights standards. Such a system should be autonomous and should not include other personal data collected by other authorities;
- To consider the expansion of the grounds for registration (for example, as it is done in the law on the register of voters), and revise legislation to eliminate the dependence of the rights on the place of registration. The provisions of legislation stipulating that registration gives right to the possession or use of residential premises should be annulled. It is necessary to simplify the procedure for cancellation of registration in private homes as well as eliminate the interdependence of the fact of registration and the right of residence in concrete home in public and municipal housing funds. The realistic system of registration without these measures is impossible.

4. The Ministry of Internal Affairs should ensure the timely issuance of internal passports.

5. The Ministry of Internal Affairs should enforce laws in the "passport offices" in housing offices.

6. The local authorities shall revoke the decision on the curfew for minors, as being contrary to the Constitution and international legislation.

7. It is necessary to amend the Criminal Procedure Code to limit the maximum term for the use of such preventive measure as "recognizance not to leave."

8. It is necessary to amend the law "On administrative supervision" on the possible restriction of freedom to travel of deinstitutionalized persons.

9. The Ministry of Internal Affairs should stop obstructing the travel by bus and other vehicles carrying the participants of peaceful assemblies, and thus stop the illegal practice of limiting their freedom to travel. To annul the Order of the Ministry of Internal Affairs from May 11, 2010 No. 170 "On Approval of Instruction on the actions of organs and units of internal affairs concerning the organization and maintenance of public order."

XIII. PROTECTION FROM DISCRIMINATION, RACISM AND XENOPHOBIA¹

1. GENERAL OVERVIEW

Despite the fact that inter-ethnic problems are not so far the most acute for the Ukrainian society, the experts are concerned with rapid increase in various negative tendencies related to this issue. In their report, published in January 2011, Human Rights Watch experts pointed out the slackening of fight against hate crimes. In particular, they underlined the presence of race-related problems, prejudiced treatment of individuals of non-Slavic appearance and migration policy issues.²

Human rights organizations and associations state that intolerance towards “the other” in Ukrainian society is increasing on yearly basis, and its manifestations in Ukraine have become more numerous and regular.

The official institutions, on the contrary, in their judgment use exclusively the data, obtained from the law enforcement bodies, which, in their turn, are well aware of the authorities’ expectations and obediently supply the desired statistics. These manipulations with figures is an easy task, as the law enforcement bodies’ statistics is limited to registering the most outrageous assaults against foreigners and the number of criminal lawsuits under the article 161 of the Criminal Code of Ukraine (violation of person’s equality on the basis of race, ethnicity or religion).

Indeed, a number of officially registered cases of violence against foreigners seems to be decreasing since 2009, while the cases, filed by the prosecutor’s office and brought to court under the article 161 of the Criminal Code of Ukraine remains insignificant. However, this statistics obtained from the law enforcement bodies can hardly be considered reliable and objective criterion in evaluating the general situation in the country.

First of all, it is not only foreigners or even people with “non-Caucasian” appearance that fall victims to the “hate crimes” in Ukraine. Oddly enough, rather often the persecution in our country is aimed at its own citizens, including ethnic Ukrainians. Such occurrences usually are not reflected in the law enforcement bodies’ statistics and are not registered as “hate crimes”. Second, law enforcement structures, for the unspecified reason assume that only the cases of physical violence against “the aliens” reflect the level of ethnic tension, ignoring other manifestations of aggressive xenophobia and failing to qualify them appropriately. We are talking about vandalism at grave sites and religious buildings, “war of monuments”, unleashed in Ukraine, intentional damage of certain groups’ property etc.

¹ Prepared by Volodymyr Batchayev, Association of Ukrainian Monitors of Human Rights observance in the operation of law enforcement bodies.

² <http://obozrevatel.com/technology/litvin-initsiuruet-sozdanie-reestra-prestuplenij-na-pochve-nenavisti.htm>

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The use of cases, filed under the article 161 of the Criminal Code of Ukraine, as an indicator of xenophobia increase in the country is wrong too. The said article is ironically referred to by the experts as ‘phantom article’, because, although present in the Criminal Code, it is used in real life so seldom, that the expediency of its existence at least, in its current version, is questioned.

The human rights organizations have more than once asked the representatives of law enforcement bodies, why the “phantom article is used so rarely and always received the traditional answer: “This is the prerogative of the prosecutor’s office”. This latter, however, complains that the courts reluctantly qualify offenses as “hate crimes”. The courts, in their turn, refer to difficulties in establishing motives and intent of the offenders. It is all true to a certain extent and one can agree that due to its vague language and specifics of use, the “anti-discriminatory” article 161 of the Criminal Code of Ukraine fails to guarantee thorough protection of equality of rights for all people.

This argument, however, does not justify an inert position of the law enforcement bodies, which ignores other available levers of handling the situation — e.g., article 67 of the Criminal Code of Ukraine, which defines an offense, committed on the ground of racial, ethnic or religious hatred or hostility as an aggravating circumstance. The use of the article 67 of the Criminal Code of Ukraine does not call for the transfer of the criminal case from militia to the prosecutor’s office, and, when hostility motives are obvious, gives investigator authority to additionally qualify any offense, envisaged by the Criminal Code — from hooliganism and causing serious bodily harm to demolition of property, desecration of religious shrines or defilement of graves. However, this practice is not popular with the militia officials. As a result one can note the mitigation of punishment for the offender, on the one hand, and reduction in the statistic data concerning the number of “hate crimes”, on the other.

Introduction of amendments to some articles of the CC of Ukraine with regards to establishing the so-called “hatred motive” as qualifying circumstance (articles 115, 121, 122, 126, 127, 129, 300) did not help to improve situation. Registering instances of crimes, committed against foreigners, the Ministry of Interior is in no hurry to qualify them as offenses, motivated by religious or ethnic hostility.

Thus, the study of statistic reports prepared between the years 2009-2011 (Form 1-ING) shows that at least 126 violent acts, including premeditated homicide, causing grave bodily harm, hooliganism, were committed against foreigners (excluding CIS citizens):

**Table 1. Number of violent crimes committed against foreigners
(excluding CIS citizens)**

Type of crime	2009	2010	9 months of 2011
Premeditated homicide (or attempted homicide) (Articles 115–118 CC)	8	8	3
Intended heavy bodily harm (article 121 CC)	6	7	0
Intended medium bodily harm (article 122 CC)	7	8	11
Hooliganism (article 296 CC)	28	21	19
Total:	49	44	33

Meanwhile, the rate of registration of so-called “hate crimes” by the law enforcement bodies and prosecutor’s office leaves much to be desired. The Ministry of Interior reports (form 1-RD) show that over three years only 11 criminal cases against 12 suspects have been filed (Table. 2). In other words, the law enforcement officials managed to qualify only 11 (i. e. 10%) out of 126 violent offenses as “hate crimes”.

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Table 2. Indicators of rate of crimes, based on racial, ethnic or religious intolerance

Article of the Criminal Code of Ukraine	Number of lawsuits	Against persons	Number of victims
<i>Year 2009</i>			
Article 161 (violation of person's equality on the basis of race, ethnicity or religion)	1	2	2
Article 180 (obstructing religious ceremonies' performance)	1	2	0
<i>Year 2010</i>			
Article 161 (violation of person's equality on the basis of race, ethnicity or religion)	5	4	7
<i>9 months of 2011</i>			
Article 161 (violation of person's equality on the basis of race, ethnicity or religion)	3	2	0
Article 129 (threat of murder)	1	2	1

Beyond any doubt, the appropriate use of the aforementioned articles of the Criminal Code of Ukraine is not easy, first of all, due to the absence of mechanisms for obtaining experts' opinion on presence of certain indications of hatred, humiliation, disrespect to ethnic pride and dignity, intent of unleashing inter-ethnic hostility in the actions or expressions. Even despite the latest expert research done by the specialists from the Institute of State and Law under Academy of Sciences of Ukraine, Institute of political and ethnic and national research under Academy of Sciences of Ukraine and other institutions, investigators and the prosecutor's office try to avoid qualifying offenses as "hate crimes", attempting to limit them to hooliganism (in cases of assaults) or to claim lack of evidence testifying to the intentional stirring of hostility in certain actions (in cases of xenophobic publications in mass media). A commentary of Kyiv militia with respect to an assault against Ukrainian citizen of Nigerian origin is most characteristic in this context³:

1.1. THE MILITIA OF THE CAPITAL FAILED TO SEE RACISM IN THE MUGGING OF A NIGERIAN

On Saturday night of April 2, in Kyiv subway three young men mugged 45-year-old Ukrainian citizen of Nigerian origin. Militia qualified the assault which took place between the subway stations "Kreshchatyk" and "Arsenalna" as hooliganism with no racist motive. The press-officer of subway militia unit Natalya Kernitskaya offered the following comment: "There are no grounds to qualify this incident as a case of racial discrimination. The victim is of Nigerian origin, but he has been Ukrainian citizen for a long time. The guys were just drunk, quarrelling, stepping on each other's feet. The crime was qualified as hooliganism and as such was filed for investigation".

As opposed to law enforcement bodies, the non-governmental organizations use different criteria and methods of research to deal with the problem, and, in the absence of the necessary amount of information, assess the situation by studying public opinion, taking into account the answers to the questionnaires offered to the citizens of Ukraine and representatives of the "stigmatized" groups and monitoring mass media. Doubtless, this method, combined with analysis of the figures offered by the official statistics data, gives the opportunity to evaluate the rate of xenophobia in the country more accurately and broadly. Besides, as opposed to law enforcement bodies, the non-governmental organizations apply the norms of international law with broader definitions of such concepts as "xenophobia", "discrimination" etc.

Wrapping up, one may arrive at the conclusion that the official statistics which would reflect objectively the xenophobia rate and the number of related law violations is unavailable in Ukraine.

³ <http://www.umdpdpl.info/index.php?id=1329078473>

It is also noteworthy that available statistics data should be regarded as indicators of the fact that the law enforcement system of Ukraine simply is not ready to prevent the “hate crimes” with legal methods.

2. LAW ENFORCEMENT BODIES AS THE SOURCE OF XENOPHOBIA

The main problem observed with respect to “hate crimes” is the fact that in many cases they are simply ignored by the law enforcement bodies. Why is it so? Possibly it happens due to the professional negligence of respective officials, or their inadequate professional level, or may be, due to psychological adaptation of the said officials to everyday manifestations of ethnic intolerance. Paradoxically as it is, very often the Ministry of Interior itself commits the violations, which demonstrate not only the spreading of ethnic profiling among militia professionals, but also bear characteristics of the crime, punishable under the article 161 of the Criminal Code of Ukraine.

Thus, paragraph 13 of the Ministry of Interior order No. 236 of 08.04.10 “On use of additional measures, aimed at enhancing safety of railroad passengers” unjustifiably broadened the competences of the Ukrainian militia officials, who were requested to ensure “permanent control over the foreigners using the railroad transport, thorough checks of the foreign nationals’ documents, paying special attention to their registration cards, issued by the border control officials”. Let’s remind that constant observation and check of the personal documents fall under the category of rigidly individualized procedures, clearly spelled out in the Ukrainian laws, and, therefore, cannot be applied, as general practice, with respect to either citizens of Ukraine or foreign nationals.

Provisions of paragraph 14 also deserve special attention. They request the use of measures directed at “identifying the persons who assist illegal migrants, criminals and other individuals, arousing special interest at the departments of interior, with residential facilities and transportation”. The use of the term “special interest” can lead to unforeseeable consequences, as currently it has neither legal definition nor normative justification. In fact a non-defined number of people fall under this category, which warrants an erroneous approach from the very beginning.

The order No. 136 of 09.02.11 “On operative measures with respect to the educational institutions admitting foreigners to study in Ukraine” contains the request of the Minister of Interior to carry out “preventive operational measures in the high school institutions jointly with the Ministry of Education, State Border Inspection, Security Service, local executive bodies. The goal of these measures was defined as “enhancing control over foreign students’ stay in the country”. The “operational measures” intended for 2 weeks (February 9 till 23) included:

- Checking the validity of the university invitations, issued to the nationals of the “risk migration countries”;
- Random verifications of the foreign students’ personal files to check whether they have all the documents required for the foreigners willing to be admitted to the higher educational institutions;
- Checking students’ dormitories, other places of foreign students’ residence and places of potential concentration (markets, entertainment facilities etc) of the foreign nationals who have come to Ukraine to study;
- Compiling reports based on the results of check-ups, signed by the persons who performed them and educational institutions representatives.

This document’s provisions bear potential threat of discriminatory treatment of foreigners due to several reasons. First of all, the check-up envisaged familiarization with personal files, places of residence/domicile of the students, leisure places, which is direct violation of the right to inviolability of private life. Second, the scope of the preventive measure envisaged involvement of substantial competent personnel resource and appropriate training for those involved. Unfortunately many experts agree that the Ministry of Interior does not currently possess such a resource. Third, the speed imposed by the Ministry of Interior for the implementation of the said measure

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enhanced the risk of discriminatory treatment of foreigners, due to the lack of time for proper training of the department of interior professionals and developing appropriate mechanisms for their operation.

Foreigners as potential object of unjustified militia operation were once again referred to in the Decision of the Ministry of Interior Collegium of 14.07.2011 “On the outcomes of departments of interior operation in the first half of 2011” (order of the Ministry of Interior of Ukraine No. 477 of 22.07.2011). In particular, in this document, the attention of the chief executives of the Chief Directorate of the Ministry of Interior, other departments of interior is drawn to the “lamentable fact” that “...in Vinnytsya, Dnipropetrovsk, Transcarpathian, Ivano-Frankivsk, Kyiv, Kirovohrad, Luhansk, Lviv, Poltava, Rivne, Sumy, Ternopil, Khmelnytsky, Chernyhyv oblast’s and the city of Kyiv the organized groups, set up on the ethnic principle, have not been registered”.

Under this severe order the militia officials from 15 regions were placed in the situation when they had to uncover at least one criminal “ethnic” group at any cost, even if they are virtually non-existent in a given region. It is obvious that the representatives of ethnic minorities, foreigners and stateless persons are the first candidates to pose as the suspects or figurants in the militia operations. This is direct characteristics of discriminatory policy.

2.1. HERE IS ONE OF THE TYPICAL EXAMPLES OF MILITIA’S ATTITUDE TOWARDS FOREIGNERS⁴

My phone rang. The caller introduced himself as B., a Guinean refugee and asylum seeker. He asked me for a meeting as he wanted to share the story of his “communications” with Kharkiv militia. At the meeting B. turned out to be young African who has been living in Ukraine for eight years, but still cannot get used to arbitrary treatment of foreigners by militia in Kharkiv.

B. told me that in late August of the current year militia arrived at the apartment which B. rented with a student friend (also a foreigner). “We opened the door immediately, — said B. — “because we learnt the hard way that we must always cooperate with militia”. After entering the premises, the “law-enforcers” busied themselves with thorough search of the rooms, literally going through everything with a toothcomb. They showed us no documents or warrants. Their only explanation was “we are looking for drugs, and all the foreigners are selling them”. B. and his roommate tried to argue, but were cursed, insulted and threatened. “We were called “niggers” and four-letter words and ordered to shut up” — recalls B. When he tried to call an NGO which offers legal assistance to the refugees and migrants, militia officers simply took away his cell phone. Naturally, the uninvited guests found no drugs, but came across and “confiscated” 200 UAH. (Obviously, the agents assumed that the country did not appreciate or reward their efforts sufficiently).

B. mentioned that militia officers are constantly bullying the foreigners under the pretext of checking their IDs and ALWAYS take their money, even when all the documents are in order. “When I came to Kharkiv, my friends advised me: beware of skinheads and militia! However, I saw skinheads only a couple of times near “Studentska” subway station, where they were attacking Arabs, while militia in Kharkiv occurs at every step” — B. was almost weeping relating that.

Reporting their successes, law enforcement bodies usually refer to the decrease in activity rate of radical “skinhead-oriented” groups with their traditional slogans of white supremacy and respective attributes — shaven heads, Nazi swastikas etc. Meanwhile the officials of said bodies obstinately ignore other outrageous manifestations of xenophobia and discrimination with regards to representatives of one race and one citizens of one country.

⁴ Yuriy Nuzhny. Beware of skinheads and militiamen 25.09.11, <http://www.khpg.org/index.php?id=1316906444>

3. CURRENT RATE OF XENOPHOBIA IN UKRAINE

“Language xenophobia” is a specific type of xenophobia characteristic of modern Ukraine. It is caused not by the language preferences of the citizens, i.e. their wish to use either Ukrainian or Russian language in their everyday communication, but by the politicians’ struggle for their electorate, when the “language issue” becomes almost most important political slogan in election campaign, substituting candidates’ economic programs for sustainable development. Currently the epidemics of “language segregation” in the Ukrainian society, which started last year, is gaining momentum and Ukraine’s division into two camps –i.e. the Russian-speaking and the Ukrainian-speaking is constantly enhanced by politicians, who offer ideological and cultural justification of this negative phenomenon. The choice of spoken language as means of communication eventually became for an average Ukrainian not only an indicator of favoring certain political force, but also a criterion in the dichotomy “our own-alien” and a signal for non-acceptance of, and sometimes aggression towards the said “alien”.

This open discrimination of the “other” language speakers and residents of the “hostile” regions is not limited to mutual insults, but eventually moves into the phase of the open aggression and violent actions.

On May 9, 2011 in Sebastopol an official from Ternopil oblast’ council 60-year old Anatoliy Dekin was attacked.⁵ Before the event he received a phone call from someone who introduced himself as Anatoliy’s compatriot from the Western Ukraine and suggested a meeting. When Anatoliy Dekin arrived at the agreed meeting place, he was attacked by three young men, who forcibly dragged him into the park, where he was severely beaten despite his advanced age and disability. As a result, Anatoliy Dekin ended up in a hospital, with broken ribs, injured foot and numerous bruises. The offenders were rather straightforward in explaining their motives to the victim: “Sebastopol is a Russian city. We’ll destroy all of you.” Later it was established that two of the assaulters belonged to a pro-Russian organization. Association “Svoboda” leader Oleh Tyahnybok is certain that Anatoliy Dekin was attacked due to his Ukrainian ethnicity, use of Ukrainian language and active stand in defending the Ukrainians’ rights. It is most indicative that “Svoboda” members expressed their serious doubts as to the local law enforcers’ willingness and capability to qualify the crime appropriately, stating that “Attempts to approach Crimean law enforcement agencies has become pointless long ago, as they themselves often serve as repressive tool against “Svoboda” in Crimea. This is confirmed, in particular, by the fact, that the offenders are still at large in Sebastopol, that’s why we appeal to the Ministry of Interior and Security Service of Ukraine demanding that the crime is investigated and the culprits duly penalized”.

On August 17, 2011 in Sebastopol minibus a local resident stabbed a tourist with the knife⁶. Conflict developed from a quarrel, as to who was the first in bus line. The witnesses testify that Sebastopol resident surmised from his opponent’s accent that this latter was not local resident, and started to insult him saying that “Moskal”[derogatory for “a Russian”] should “bugger off to his homeland”, then stabbed him with the knife, and, after the minibus had come to a stop, ran away. The criminal was quickly detained, which fact was made public on the Sebastopol Department of Interior site.⁷ The information, however, typically for militia, contained no mention of the conflict ethnic background; the offense was reduced to administrative tort and filed as criminal lawsuit under article 125 of the Criminal Code of Ukraine (light bodily harm).

So, currently there are grounds to conclude that new motives for xenophobia came into being in Ukraine, i.e. the language and territorial ones, when it is not race or ethnicity of the object of hostility, but his/her language of communication or region of residence within the same country.

⁵ <http://khpg.org/index.php?id=1316279164>

⁶ <http://khpg.org/index.php?id=1316280207>

⁷ <http://khpg.org/index.php?id=1316280481>

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Taking into account rapid spreading of this type of xenophobia it is obvious that it poses a serious threat as destabilizing factor in the country.

As mentioned above, the ethnicity-based xenophobia is not a real problem for the traditional ethnic minorities. It does not apply, however, to Roma people (Gypsies), who, of late, have become the object of defamation, discrimination or even “hate crimes” and assaults. Due to specific social, economic, cultural and historical reasons the majority in this ethnic group belongs to the poorest categories of society. Persistent negative stereotypes with regards to Roma have taken deep roots in the Ukrainian society. Mass media pretty often publish materials depicting the whole Roma community as drug dealers and criminals, while law enforcement bodies treat Roma in plainly discriminatory way.

Executive director of the European Center for the Gypsies Rights Desideriu Gergei appealed to the Prosecutor General of Ukraine Viktor Pshonka and Minister of Interior Anatorliy Mohylyov with respect to information that law enforcement officials in Lviv and Lviv oblast’ conduct “unwarranted discriminatory checks of papers and fingerprinting among Roma population of the area”⁸. The official site of the Institute of Human Rights and Prevention of Extremism and Xenophobia published, in particular, the data collected by NGOs, according to which over September-October 2011, Roma people residing in the area “were subjected to personal information collection campaign (i.e. documents checks, fingerprinting, photo taking)”, while target raids were organized at the markets and Roma’s houses.

The issue of inter-ethnic relations remains most crucial for the Crimea. Naturally, the problems of Crimean Tatars are predetermined, first and foremost, by social/ economic and not by ethno-political situation. Xenophobia with respect to Tatars, stirred up by political, informational and economic (mainly, in land property relations) confrontation, is manifested in insults, acts of vandalism against Tatar or Moslem cultural and religious centers, or even physical assaults.

The situation with respect to representatives of the “new minorities”, including guests of the country, refugees and re-settlers, is much worse. They are the most popular objects of xenophobic manifestations — from insults to violence. The racists’ victims include Africans, natives of Central and Southern-Eastern Asia, East and the region of Caucasus.

Violence against foreign students has become a most serious problem.

On November 1, 2011 in the city center of Luhansk, around 6 pm, a group of several dozens of young masked men (about 40–50 people, according to witnesses), armed with clubs and iron rods organized a pogrom with mugging. Probably, the young people got together intentionally in the center, marched down the main streets and stopped at a vendor’s stall in Oboronna street. The natural question immediately arises: “Where (if anywhere) have the regular militia street patrols been at the time? And isn’t it their duty to ensure law and order in the city?”⁹

The racist front in Ukraine, although less active than in Russia in terms of physical persecution of the “aliens”, eventually is gaining momentum and recruiting new activists, predominantly, among young people. As of today, a number of organizations and movements with various level of radicalism promoting the idea of white supremacy as a whole or the slogan “Ukraine for Ukrainians exclusively” are in place in Ukraine. If several years ago the radical racism with its typical international characteristics was virtually imported to Ukraine from abroad (mainly, from Russia), presently we witness the tendency of consolidating internal chauvinistic forces with the goal of strengthening the idea of exclusive role of the “title nation” in the social life of the country. Thus, such organizations as “Ukrainian nationalistic-labor party”, “Patriot Ukrainy”, “Slava I chest” [Glory and Honor-Ukr.], “Tryzub” [Trident-Ukr.] become more and more prominent in the social life of Ukraine. Their activists more than once participated in the actions aimed against the so-called “predominance of non-Ukrainians”.

⁸ <http://www.unian.net/ukr/news/news-464413.html>

⁹ <http://umdp1.info/index.php?id=1320216077>

In 2011 some chauvinistic and racist organizations have several times demonstrated their strength in the public actions, where openly racist and discriminatory slogans have been proclaimed to incite the public at large.

It would be wrong, however, to assume that xenophobia in Ukraine is of Ukrainian-nationalistic nature. The change of policy towards allegiance to Russian Federation actively implemented in 2010 by the new country leadership is assessed differently by population, and has sometimes led to cases of “reciprocal discrimination”, i. e. when pressure was exerted on ethnic Ukrainians.

Crimea is most demonstrative in this aspect, as there Ukrainians often suffer from Ukrainophobia of multiple Russian communities. In the eastern and southern parts of Ukraine significant number of movements and groups (“Russkoe sodruzhestvo”, “Pravoslavny vybir”, “Soyuz russkogo naroda”, “Evraziyska spilka molodi” et al.) distort the idea of “fraternal union with Russians” and express negative attitudes towards Ukrainian language, Ukrainians themselves, integrity of the state etc. The methods are similar to those, used by Ukrainian chauvinists, i.e. rallies, picketing, demonstrations and other public events, defiling the monuments etc.

On June 20 Simferopol Central District Court passed a ruling in which the leader of Cossack’s community “Sobol” Vitaliy Khramov was found guilty of criminal offense, i.e. stirring up inter-ethnic hostility, and fined with 23 thousand hryvnas. Events in Dnipropetrovsk provide another example.

Dnipropetrovsk militia, patrol units together with road inspection, “Berkut” special unit and even municipal guard are on the quest to find the authors of xenophobic graffiti which this week appeared in abundance all over the city. The first slogans “Death to Khokhly!” [derogatory for “Ukrainians”] appeared in the yards and alleys of multi-storied houses on the Left bank, where the Donetsk highway begins. In a couple of days, though, the authors of the anti-Ukrainian slogans — “Death to Khokhly!” and “Death to Ukrainians!” proceeded to decorate the facades of the houses in the downtown and then in the premises of the university campus on Gagrain prospect, near Dnipropetrovsk National and Transportation Universities. So far militia has been overwhelmed. —On the one hand, the fact of multiple graffiti is confirmed by the numerous pictures in the local Internet web; while, on the other, the communal services workers manage to paint them over before they can be documented by the law enforcement officials. “We registered two petitions, to which we responded immediately. Operational groups arrived at Donetsk highway, 1, and in the proximity of the block No1 of Dnipropetrovsk National University. Not a single fact has been confirmed — the communal services removed the “inscriptions” before militia had a chance to arrive at the site. We ask the communal services not to remove the graffiti before they can be documented by militia”, — informed deputy head of the city militia Vladimir Sedletsky. According to his statement, militia is actively looking for hooligans, although it is very probable, that they would not end up in court or be convicted for the phrase “Death to Ukrainians!” “One can hardly expect anything more serious than “administrative infringement”, i.e. damage to city property, verdict. The offenders will be just fined. If we detain these people and the prosecution finds premeditation and intention to incite inter-ethnic conflict, then the criminal lawsuit might be filed” — stated Sedletsky”.¹⁰

Permanent confrontation between certain categories of Ukrainian population on the basis of religious differences gives grounds for serious concern. Obviously, the conflicts between the believers are unavoidable in a country where citizens profess various religions; however, over the recent years one could register not only traditional conflicts between Christians and Moslems, Greek Catholics and Orthodox Christians, but also the spreading of intolerance among the adherents of different branches of Orthodox Christianity. To a certain extent, these conflicts are incited by unreasonable actions of the authorities, including public expressions of the officials’ preferences in religious matters, which lead to some elements of discrimination in the treatment of certain categories of the believers, with active participation of the Ministry of Interior in discriminatory actions. Here is a story of what happened to Krishna followers.

¹⁰ <http://www.segodnya.ua/news/14299230.html>

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On July 16, 2011 a group of young men, including their guest who was much interested in Ukrainian culture and came to visit Lutsk from St.Petersburg, decided to visit Horohiv. They were chanting in a street near a local gas station.

When they intended to resume their journey, they were approached by a woman who asked for their permit to chant in the city. The boys asked, whether she was Horohiv mayor, and that's the answer they got: "I am higher than mayor". It turned out that she was the head of Horohiv raion administration. The lady-bureaucrat was accompanied by a priest — father Roman. Arguing that his church was the only one registered officially, he called the Krishna followers "carolers", — writes the newspaper.

Next, a militia officer arrived. Said Yaroslav Hnatyuk : "A senior investigator came to the site and asked for our papers. As we did not have any pockets in our attire, we did not carry the papers. I went to fetch the driver's license. Then we were taken to rayon militia precinct"— and added —"as soon as we crossed the threshold, we heard obscenities and insults in lieu of greeting".

"Without as much as asking us, what the purpose of our visit was, he started to threaten us saying that we would be incarcerated, and he also mocked our attire. Each in our community is considered a priest — we were dressed in cassocks" — explained Hnatyuk. Despite such treatment, the men remained courteous, and subsequently were called "skirted clowns".¹¹

Despite the fact that under international treaties Ukraine should ban and condemn hostility and openly abusive attitudes towards people of other ethnicity, incited by mass media, these occurrences become more and more frequent in media. The Ministry of Interior of Ukraine, lacking specially developed informational policy in this area, also often allows publications of openly contemptuous nature and calls for discrimination of a particular ethnic community, namely the people of Roma on the official web-sites of their subdivisions. The main message sent by these publications to public at large is traditional militia warning "Beware of Gypsies!".

We'll cite only a few instance of militia "hate language", registered by public activists in the course of implementing the project "Monitoring of hate crimes in Ukraine, protection of victims and analysis of Ukrainian legislation and practices, pertaining to hate crime prevention", supported by "Memory, responsibility, and future" foundation.

On July 4, 2011 the official site of Yalta City Department of Interior in the ARC featured an article dedicated to Roma people, entitled "Don't let them into your homes under any pretext!" The publication states that:

"... law enforcement bodies possess the information to the effect that crimes have been committed by a gang of Gypsies looking like Slavs. To disguise themselves, present day Gypsy females dye their hair light, wear no colorful skirts or kerchiefs, and, moreover, do not go in bands, thus destroying time-tested distinct stereotype of "nomadic people".

On July 19, 2011, the same site published information "Swindle through hypnosis", in which the readers learn about a number of committed crimes:

"...On July 13, in Koreiz, near the "Ay-Petri" bus stop a woman with the girl approached a fruit stall and asked the vendor to weigh three kilograms of vegetables and fruits. Offering the vendor a 500 UAH bill for her purchase, the woman started a small talk with him. Presently, taking her purchase with change, as well as her own money, voluntarily returned to her by the vendor, she left the stall. Eventually the vendor discovered that 950 UAH were missing. A similar scenario recurred at another fruit stall with the second victim discovering the disappearance of 700 UAH. Neither of the victims could account for their actions and clarify what has happened. The both men felt as if hypnotized".

¹¹ http://www.volynnews.com/news/analytic/na_volyni_militsiya_vchynyla_byezpryedyel_nad_krishnayitamy/

Still another publication entitled “My house is my fortress” on Yalta militia site offers the public advice to:

“Reject the offers, made by strangers, especially of Gypsy origin, to tell fortune at your home, use it to change their babies’ diapers, have a drink of water, ask for medicine and the like. As a rule, such visits end in thefts”.

Similar “explanatory” work was carried out on Volyn oblast’ Department of Interior site in the publication “Until the thunderbolt strikes...or how people learn to distrust swindlers”:

“...Everybody is engaged in this criminal craft: women, children, men and elderly people. The female part of the band operates in groups, led by experienced she-thief. When going out to the “job”, each Gypsy woman performs her designated function. They ring the doorbell, and ask for a glass of water or to change their baby. As soon as an incautious victim opens the door, the Gypsy woman will show her a host of wondrous tricks. In no time all money and valuables will disappear from the apartment. The victim’s attention will be distracted while somebody will steal into the apartment unnoticed, confidently and unmistakably track the loot and dissolve into the thin air. That’s why thefts home and robberies, perpetrated by Gypsies, are hard to solve.

Recently the Gypsies have mastered still another “related trade” — money swindles in the vicinity of street vending kiosks, currency exchange booths, at the railway stations and market places.

The Gypsies mostly engage in fortune telling within large groups at the railway stations and market places. Naive and credulous persons, offered to have their fortune told or evil spell lifted, become their victims.

One can surmise that Gypsy women to a certain extent have a command of hypnotic techniques and suggestion. Otherwise, it is hard to explain why mentally sane and educated people would voluntarily give away substantial sums of money and valuables to swindlers. “I remember nothing...I acted as if in a dream...” — that’s how the victims explain their behavior to militia officials. But there were also cases when kids would give out the money even in parents’ presence at home.

The law enforcers have hard time counteracting Gypsy schemes. Besides, the investigators are totally unaware of Gypsy customs or language. Moreover, it is very difficult to bring criminal action against Gypsies. They are either sick, or pregnant, or minor, or simply vanish into the thin air. Militia and mass media are fed up with reminding credulous individuals to stay away from these deceitful people and not to have any dealings with them”.

On April 28 an article with eloquent title “Caution! Gypsies’ tricks!” was published on the official site of the Vinnytsya oblast’ Department of Interior. The Roma people were characterized in this article as follows:

“Gypsies have been residing in the territory of Ukraine for many centuries. Begging is one of their main traditional trades. It has been their heritage and never considered as something shameful. Women and children exclusively dealt in this trade. Gypsy children learn the anti-social mode of life at early age — they go a-begging together with their parents, speculating in trifles.

The relationships between the Gypsies and local population have always been complicated. Gypsies themselves are to a large extent responsible for the negative image of their people: “sticking”, bothersome with their fortune-telling or trying to sell something at the railroad stations or markets.

Now and then the information on crimes, committed by Gypsy-looking individuals, becomes public. The offenders, using any pretext (fortune-telling, lifting of evil spell, asking for a glass of water or a place to rest etc.) embezzle other people’s money and valuables.

They might use different scenarios, but the classic one remains unchanged — lifting of evil spell.

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The robberies and thefts, committed by the Gypsies are very difficult to solve. It is even more difficult for the militia officers to detain the perpetrators, due to the fact that the Gypsies are not settled at one place, but moving all the time within the territories of different oblast's.

Militia sends out a warning! Not to fall prey to the Gypsies do not start any negotiations with them. Disregard their requests. Be smarter than the swindlers and don't let them drag you in to an undesirable situation".

The official site of Kyiv Department of Interior in the article entitled "Fortune telling or plain robbery? Beware of street fortune tellers" warns Kyiv residents:

"...coming across Gypsies in the street many people try to avoid them, not to get in touch with them. However these loud women sometimes won't let people pass: they stop them with questions or bad news, offer to tell fortune and to lift the evil spell. Low spirits and lack of money in the wallet are the usual outcomes of these meetings.

Usually the "feeble sex" fall victims to the thievish fortune tellers, as women are more sentimental and trustful, more susceptible to "ill prophecies". To "buy" health and well-being of their loved ones they eagerly dispose of their costly jewelry...

Here are some pieces of advice to the public on how to protect oneself from troublesome fortune tellers. Learn to say "No" firmly to the Gypsies approaching you in the street! First of all, never make an eye contact with a fortune teller. Second, no conversations, even if she starts to profess all the evils for yourself and your family. Do not believe them; they are just trying to abuse your trust and love of your family".

Even the main militia bulletin — the site of the Ministry of Interior of Ukraine — could not avoid describing Roma people in negative terms. The article "Trust, but check!" reads:

"Usually the Gypsy women stop young people in the street and scare them by telling that an evil spell — leading to a grave disease or death — has been cast on their parents. They offer to quickly amend the situation and save the loved one. In order to "lift the spell" one should give them all the money and jewels immediately, or to bring valuables from home" — explain militia officers. Unfortunately, people tend to trust the thievish women and give out substantial sums of money, sometimes tens of thousands hryvnas".

It is an incomplete list of the dubious materials, published at the sites of regional departments of interior under the Ministry of Interior of Ukraine over the year 2011. One would be unwilling to believe that large scope use of "hate language" with respect to Roma people, creating a negative image of "Thieving Gypsy" in the public conscience, use of openly discriminatory warnings("don't let in", "don't communicate with", "avoid contacts with") are parts of intended and well-planned hatred campaign, unleashed with the help of militia Internet-resources.

Probably the employees of PR subdivisions responsible for informational policy of the Ministry of Interior of Ukraine intended only to warn Ukrainian citizens about cases of crimes and, thus, prevent their repetition. Meanwhile, they did it without proper consideration or professional approach, as the law does not stipulate the protection of rights of a particular group of people by means of restricting these rights for another group.

No doubt, the articles quoted above have openly anti-Roma orientation, contain negative generalization with respect to the whole Roma people and point to its criminal inclinations as typical of the given ethnic group. The content of the articles is detrimental to honor and dignity of the Roma and builds up the feeling of hostility and openly prejudiced and negative attitudes among their readers. Therefore, their publication can be regarded as intents of stirring up inter-ethnic hostility.

This kind of actions can be easily qualified as criminal under the article 161 of the Criminal Code of Ukraine "On violation of person's equality on the basis of race, ethnicity or religion", the commentary to which reads as follows: "...any actions the goal of which is substantial increase of the feelings of hostility and contempt among one group of population against other ethnic or race groups or religious associations, diminishing positive characteristics of a certain nation, be qualified

as actions, aimed at stirring up the interethnic clashes, at humiliating and hurting the feelings of national honor and dignity...”

The fact that such publications on militia Internet-resources constitutes plain disregard of the requirements of normative acts issued by the Ministry of Interior of Ukraine itself, is most amazing.

Wrapping up one might conclude that informational policy of the Ministry of Interior of Ukraine with regard to the Roma population is the policy of hidden, and sometimes, quite open inciting public to xenophobic manifestations and certain types of everyday discrimination of Roma people. It is a paradox, that at present the Ministry of Interior uses its Internet-resources to actively divulge two contradictory concepts: on the one hand, the first persons of the agencies demonstrate their will to ensure constituent counteraction against any manifestations of discrimination and strict adherence to respective international standards, while on the other hand the Interior Departments as consequently participate in the eventual developing of concept of possible discrimination of a particular group by the society.

This tactics provides fertile ground for disseminating xenophobia among the officials of Ministry of Interior of Ukraine, which leads to open discrimination of Roma people, mass violations of rights of these ethnic minorities. Here is a typical example:¹²

The Roma complain to oblast' deputies of the actions, performed by militia officers. This complaint was the topic of discussion at the today's meeting of the standing committee on deputies' operation, local-self-governance, protection of human rights, legitimacy, fight against crime, Internet-resource "Volyn'pravda" informs.

Following this information the head of "Terne Roma" association Serhiy Hryhorchenko wrote appeals to the head of Volyn' oblast' state administration Borys Klimchuk, to the head of oblast' council Volodymyr Voytovych, the head of oblast' department of interior Vyacheslav Khodyrev and oblast' prosecutor Andriy Hil.

On March 10 militia officers conducted a raid in Torchyn settlement (Lutsk oblast'). The essence of the raid was that since 8 am militiamen were entering private homes of Roma families without any permit; they checked the passports, wrote down the numbers of the cell phones, took pictures of the residents, and fingerprinted them.

Doing that militia officers refused to provide any reason for their visit, an order or warrant which would justify their actions. The majority, i.e. about 20 persons, refused either to show any IDs or to state their names and surnames. Some militiamen just informed that they represented criminal investigation division" — reads the appeal.

The appeal also specifies that in the course of the raid militiamen behaved rudely: threatened the residents with physical violence to be exerted on their minor children and with potential eviction from Torchyn. The head of "Terne Roma" also revealed that a tenth-grader from a Roma family was taken to militia precinct in Torchyn and beaten there. Another young man, who had a concussion, and, therefore, stayed in bed, was forced out of it, despite his mother's pleadings and ordered to testify to supply the information militia wanted. The victims testify that such raids occur two-three times a year. They are always accompanied with extortion disguised as fines and with threats of worse consequences for non-compliance — including physical punishment" — reads the appeal.

In his turn the deputy head Department of Interior for Volyn' oblast Taras Pazyn informed the deputies that crime situation in Lutsk rayon and in Torchyn, in particular, "is not a simple one". "We have filed citizens' complaints with regard to potential physical violence between the conflicting parties. They all have been registered and given appropriate legal qualification", — says bureaucrat. Taras Pazyn said that under the Lutsk militia resolution, an order concerning passport checks has been issued. The official also mentioned that similar raids were held in Tsuman', and Holoby within the framework of preventive campaign and improving legal situation.

Taras Pazyn informed those present that over 5 thousand ethnic Roma reside in Volyn' oblast'. The absence of their IDs makes it difficult to register the Roma children at school or the adults at

¹² <http://www.pravda.lutsk.ua/ukr/news/28489/>

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the workplaces. At present, under the passport office data, over 2 thousand 200 Roma live in the oblast' on legal documents.

The deputy Anatoliy Vytiv supported militia. "If one party claims that the militia officials acted illegally, their claim should be supported by respective evidence — signs of beatings, petitions, witnesses. Then the claim would be brought to court. As things stand right now, we can as well accuse militia of anything", — said Vytiv, adding that it is up to the court and the prosecutor's office to pass final ruling on the matter. "Someone has to establish law and order in the country", — stated Vytiv in support of militia.

By the way, the appeal of the head of "Terne Roma" association also points out that aforementioned actions of the law enforcers "provoke the ethnic minority to public sedition. For example, with regards to the threat to evict all the Roma from Torchyn the village head in Perespa (Rozhyschchyn rayon) S. Kurylovych is collecting signatures under the villagers' petition, inciting other village heads to do the same, to have the Roma forcibly evicted from the settlements.

Finally, the deputy committee recommended to send the appeal to the prosecutor's office for consideration and appropriate qualification of the matter with subsequent response to the petitioner.

4. CONCLUSIONS

The facts, described above, give grounds to conclude that Ukrainian society is contaminated with xenophobia virus. This disease does not set in "out of the blue" — in the situation of economic and social crisis xenophobia becomes more acute, aggressive and widely spread; manifests itself in most dangerous and threatening forms. The increase in xenophobia levels in Ukraine is an indicator of our society's crisis and its lack of trust towards power.

Unfortunately, we can't help pointing out that over the years 2010–2011 the bodies of authority have practically curtailed their proactive operation in this area, unleashed in 2008, replacing it with wait-and-see attitude, favored by some politicians, so that now they only passively register the on-going developments in the country.

The fact that manifestations of xenophobia and discrimination have become routine in the operation of the Departments of Interior officials in Ukraine is most disconcerting. Eventually spreading they become an inalienable component of the law enforcement bodies' dealings with particular groups of population. Obviously, militia officers constitute a part of our society with all its faults and shortcomings; nevertheless the increase of xenophobic tendencies among militia officials is especially dangerous, because their distorted vision might affect their actions and decisions in the course of performing their professional duties.

XIV. RIGHT TO PARTICIPATION IN FREE AND FAIR ELECTIONS AND REFERENDUMS IN 2011¹

1. GENERAL OVERVIEW

Citizens' right to participate in elections and referendums in 2011 was exercised in four areas.

First, by direct participation in the elections. About 1 500 extraordinary and mid-term elections to the local self-government bodies of various levels took place in 2011.

Second, through the attempts to initiate and carry out three All-Ukrainian and about 10 local referendums. It is noteworthy that in 2011 we registered only two local referendums. Other attempts to exercise the right to hold local referendums failed.

Third, by defending election rights and rights to participate in referendums in the courts of different instances. Last year over 200 court hearings dealing with the violations of human rights, which occurred during local elections of 2010, elections of 2011 and attempts to initiate a referendum.

Fourth, in the course of elaborating new law on people's deputies' elections.

According to State Registry of Voters², which provided election committees with the lists of voters for the elections in 2011, 1361 elections were held by mid-November and 135 more were scheduled till the end of the year.

In the majority of mid-term elections (1066), members of village and settlement councils were elected in 2011. Extraordinary elections of village and settlement heads ranked second in the total number of elections (178). Then, in decreasing order come mid-term elections of raion councils' members (3,9%), city councils' members (1,8%), members of the councils in the cities of raion significance (1,7%), extraordinary elections of city mayors (0,6%), mid-term elections of ARC Supreme Council members and oblast' councils' members (0,4%) and city districts' councils' members (0,2%) (See table 1). Most approximate estimates show that about 4–5 million voters could exercise their election right during these elections.

Table 1. Number of local elections to self-government bodies as of November 2011

Types of elections	Number	%
elections of ARC Supreme Council members and oblast' councils' members	6	0,4
elections of city heads	8	0,6
elections of members of the councils in the cities of state and oblast' significance	24	1,8
elections of city districts' councils' members	3	0,2
elections of raion councils' members	53	3,9
elections of members of the councils in the cities of raion significance	23	1,7

¹ Prepared by Demynty Bely, head of Kherson oblast' CVU ofrganisation.

² Information site re scheduled elections and referendums in Ukraine on the official site of State Voters' Registry http://www.drvgov.ua/portal/!cm_core.cm_index?option=ext_static_page&ppg_id=193&pmn_id=118

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elections of village and settlement heads	178	13,1
elections of village and settlement councils' members (single-seat electoral districts)	1 066	78,3
Total	1 361	100%

Source: Voters' registry dept www.dr.gov.ua

Note: 135 elections more were scheduled till the end of 2011

Based on independent observers' reports, mass-media data and elections-related court rulings, we can arrive at the following conclusions.

Number of election rights' violations at the local elections of 2011 was about ten times lesser than respective number in local elections of 2010.

Certain violations were characteristic of both current and last year local self-governments' election campaigns, i. e. issues with voters' lists, refusals to register candidates or their representatives, attempts, sometimes illegal, to remove candidates from registration, illegal campaigning, "buying" the voters', violations at the time of voting and ballots' counting. However, this violations were rather sporadic, than systematic, depending on political situation in a given territorial community and on economic factors (e. g. if a community owned valuable land plots, violations of voters' rights were registered during extraordinary elections of the head).

Predominant majority of elections took place quietly, without significant violations, ignored both by public at large and by administrative resource.

In total, we found 82 court files related to elections-related disputes in the 2011 elections (Unified State Registry of Court Rulings³) (See table 2).

Table 2. Local elections-related cases (2011) considered in courts

No.	Issue	Number	%
	Beginning of electoral process		
1.	Appeal against decision on holding elections	3	3,7
2.	Official refusal to fund mid-term and extraordinary elections	4	4,9
	Violation of elections' universality principle		
3.	Correcting and amending voters' lists	14	17,1
	Violation of the principle of free, fair and accessible elections		
4.	Refusal of election boards to register candidates or their representatives, removing candidates from registration by committees and courts' decisions	18	21,8
5.	Banks' delays in opening candidates' accounts needed for the election campaign	1	1,2
6.	Violations in campaigning procedure	10	12,2
7.	Bribing of voters	1	1,2
8.	Violations in ballots' counting	4	4,9
9.	Non-recognition of elections' results	1	1,2
	Violation of right to fail appeal and objectivity of the electoral process		
10.	Various formal obstacles in accessibility of justice	8	9,8
11.	Unsatisfactory level of operation in election committees, their failure to respond to complaints	4	4,9
12.	Election committees' refusal to register an elected official	1	1,2
13.	Difficulties in replacing the candidates elected by partisan lists in multi-seat electoral districts.	5	6,1
	Failure to implement the principle of deputies' accountability		
14.	Спроби виборців відкликати депутатів	8	9,8
Total		82	100%

The table was compiled on the basis of data from the Unified state Registry of Court Rulings as of December 2, 2011.

Notes: 1. Elections were counted as of start of December 2011.

2. Only court cases, (not all the elections) including appeals, were taken into account

³ Unified state Registry of Court Rulings <http://reyestr.court.gov.ua/>

Analysis of court rulings showed that violations of citizens' election rights occurred at all stages of the electoral process.

Voters' lists and refusals of election committees to register candidates or their removal from registration raised the largest number of problems (17,1% and 21,9% respectively), leading to the violation of elections' accessibility and universality principles.

We identified a whole set of court rulings, which based on formal criteria, refused to file cases of violations (9,8%), and court actions concerning inactivity of election committees, which refused to duly consider complaints related to violations of election law (6,1%).

We believe that these actions violated the principle of efficiency and fairness of the appeal system in the course of elections.

As opposed to election campaign of 2010, other registered violations were of minor significance.

2. RIGHT TO FREE AND FAIR ELECTIONS

2.1. VOTERS' LISTS STILL ARE THE SOURCE OF VIOLATIONS

Average voters' attendance at the mid-term and extraordinary elections as a rule does not exceed 20-30%, while at some mid-term elections it amounted to merely 3%⁴. Despite this fact, however, one of the most acute problems, addressed in court by the citizens in the course of elections, was their absence in the voters' lists (17,1%).

Voters submitted their complaints to court on the day of elections, when, due to contradictions in legal documents, they were unable to exercise their right to participate in the elections. Thus, p. 2 art.22 of the Law of Ukraine "On Elections of the members of the Autonomous Republic of Crimea Supreme Council, local councils and city, village and settlement heads" (hereinafter — Law of Ukraine "On Local Elections") reads that " on the day of elections changes and amendments into the amended voters' list can be introduced only by court ruling". Meanwhile, according to p. 3, art.173 of the Code of Administrative Legal Proceedings of Ukraine, claims concerning voters' list amendment can be submitted no later than 2 days before the elections day. Confusion arises from unclear terms: "voters' list", "preliminary voters' list" and "amended voters' list", all of which need legal clarification. Only then this crucial issue will be resolved and courts will be able to add voters to the list by their ruling on the elections day.

Voters' registry departments worked over the year to put an end to the confusion with voters' lists. As a member of CEC Olexandr Shelestov mentioned early in 2011, about one million of potential multiple inclusions of voters' names were discovered since automated system of voters' registration has been introduced (2009), and subsequently 930 598 multiple inclusions were destroyed.⁵

Over the year 2011, CEC passed 26 resolutions, entrusting the departments of voters' registration with the task of destroying multiple entries, after discovering multiple inclusions of voters' names into the lists. Only in October and early November about eight thousand entries were destroyed.⁶

Incidentally, the departments themselves faced serious financial constraints. In many regions administrative reform led to the downsizing of staff in the State Voters' Registry early in the year. Under the circumstances the All-Ukrainian NGO Voters' Committee of Ukraine on May 4 2011 had to make a public statement in support of the State Voters' Registry Department staff.

⁴ A Regional and a Communist won at the mid-term elections to Komsomolsky raion council, with voters' attendance 3% .— PIK— November 14, 2011.

http://pik.ua/news/url/na_promezhutochnyh_vyborah_v_komsomolskij_rajsovet_pobedili_regional_i_kommunist

⁵ Olexandr Shelestov State Voters' Registry — progress in compiling voters' lists //Visnyk Tsentralnoi Vyborchoi Komisii — 2011 — No. 1 — p. 35 — 38

⁶ According to the official site of State Voters' Registry <http://www.driv.gov.ua>

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This statement read, in particular: “Over the period between the elections Voters’ Committee of Ukraine noted improvement in the quality of voters’ lists, first of all, due to the commitment of the majority of registration bodies’ staff, who, more often than not, have to work in minimally required number. However, State Voters’ Registry still has a long way to go. That’s why any reduction of staff in this entity will surely deteriorate the quality of the voters’ database”.

Voters’ Committee of Ukraine appealed to oblast’ and raion state administrations, city councils, under which State Voters’ Registry bodies operate, to stick to the number of employees, defined by the Cabinet of Ministers and to reject any attempts to downsize the departments, as public observers argued that this action “will directly affect the voters’ lists, and, consequently, election rights of the public”.⁷

2.2. REFUSAL OF LOCAL ADMINISTRATION TO PROVIDE FUNDING FOR ELECTORAL PROCESS AS A NEW TYPE OF ELECTION RIGHTS’ VIOLATION

Changes in electoral law and return to the mixed system at the local level led to new types of violations of citizens’ election rights. Thus, under the Law of Ukraine “On Local Elections”, scheduled, extraordinary and first local elections are to be funded from the State Budget. Funding of mid-term elections in single-seat districts is the responsibility of local budgets. Election committees of different levels had to bring their pleas to court at least three times last year (in Slovyansk, Donetsk oblast’, Horodyshe, Cherkassy oblast’, Plesetske village council, Vasylkiv raion, Kyiv oblast’), requesting the ruling that would oblige local self-government bodies to pay for the electoral process. In all these cases courts supported the claims and defended election rights of the citizens.

2.3. ELECTION COMMITTEES ACTIVELY EXERCISED THEIR RIGHT TO REFUSE THE REGISTRATION AND TO REMOVE THE CANDIDATES FROM THE REGISTRATION

The abuse of authority in the committees remains a source of numerous violations of the election rights. Almost 22% of all disputes, brought to court in relation to local elections of 2011, dealt with election committees refusal to register candidates or their official representatives or removal of candidates from registration, if these latter had several notices for breach of the electoral law. The notices, though, were often given for minor breaches, or even violations committed by unknown person on behalf of a candidate. It happened in October 2011 to the member of the CPU, candidate to the Supreme Council of the ARC from a single-seat majority electoral district No. 13 at the mid-term elections.

The election committee discovered the fact of the repeated breach of electoral law by this candidate and removed him from registration by its decision of October 31. The decision was based on the fact that fliers promoting the said candidate were posted on a building which is considered a historical monument. Only a week later, on November 7, several days before the voting, circuit administrative court of the ARC, upon consideration of all the facts, took into account the fact that on the eve of the alleged violation the CPU office in Simferopol was robbed. Therefore, one could not claim with certainty, that the fliers were posted on the historical monument on the candidate’s order. They might have been placed there by unknown persons to provoke the CPU candidate’s removal from registration. Therefore, the decision of election committee concerning candidate’s removal from registration was found illegal.⁸

We observed the same practices, applied by the election committees at the elections, which took place in the atmosphere of political confrontation or acute competition. Sometimes their actions could be explained by only two reasons: either election committees acted for the benefit of certain candidates, or they were simply incompetent.

⁷ Quoted from the official site of the Voters’ Committee of Ukraine http://cvu.org.ua/?lang=ukr&mid=fp&id=2947&lim_beg=105

⁸ Registry of court rulings <http://reyestr.court.gov.ua/Review/19034870>

Here are some more examples. Thus, on November 13, 2011, Novooleksandrivka village election committee (Zaporizhzhya raion, Zaporizhzhya oblast') refused to register a citizen as candidate for village head position, arguing that she submitted among other documents her own statement, reflecting her property status and incomes, instead of the respective certificate from tax inspection, as required by the amended Law on Elections, which came in force after the Taxation Code of Ukraine was passed. Instead of requesting the said document, obtained from the tax inspection, the election committee denied the citizen her right to run for the village head position. Zaporizhzhya raion court (Zaporizhzhya oblast') on November 17 nullified this illegal decision of the election committee.⁹

On November 18, deadline for submitting the documents for the registration of candidates for mayor's position in Vyshneve, Kyiv-Svyatoshyn raion, Kyiv oblast', the city election committee denied registration to eight candidates altogether. According to TV channel "24"¹⁰, the reason for refusal was well-known — errors in the submitted papers. The commentary contained the information that "all eight candidates represented opposition parties". On the claim of one of the candidates — Yuri Lisnychy, representative of the "European Party", the court found the election committee decision on Mr. Lisnychy removal illegal. According to further information, the election committee planned to appeal the ruling. The unregistered candidate's characteristic statement was quoted:

"Even if they register me, even if my claim is satisfied, they will register me on the 26th, I'll be served the decision on the 27th and without either members of election committee or observers present; my bank account won't be opened, and, practically, I will be deprived of the opportunity to fully exercise my constitutional right of campaigning".

As opposed to the last year elections, the majority of these contradictory (to put it mildly!) decisions were later nullified by the court rulings.

2.4. THE VIOLATIONS OF OBSERVERS' RIGHTS WERE "INALIENABLE" PART OF THE HIGH PROFILE ELECTIONS

According to the Voters' Committee of Ukraine, on November 13, at the mid-term elections of the deputy to the Supreme Council of the ARC in the electoral district No. 13 (Simferopol) the heads of some election committees contrary to the electoral law in force, restricted observers' movement within polling stations. Thus, at the station No. 48 the committee decided to demarcate a so-called "working zone", with access denied to journalists and observers. Similar situation was registered at the station 59. There mass media observers were given the farthest corner of the premises and forbidden to approach the desks of the committee members.¹¹

Fortunately, these were just isolated instances in 2011.

Thus, only minor violations of citizens' election rights, promptly rectified by the court rulings, were registered at the local elections of 2011. However, due to the short-term nature of electoral process citizens often failed to fully participate in the elections.

2.5. LAW ON PEOPLE'S DEPUTIES ELECTIONS WAS PASSED WITHOUT PRIOR PUBLIC DISCUSSION OR DUE TRANSPARENCY

On November 17, 2011 people's deputies of Ukraine by the majority of votes passed the Law on People's Deputies' Elections. 366 deputies voted in favor of the law, including Party of Regions — 187, CPU — 24, People's Party — 20, "Reforms for the Future" group — 19, non-partisan — 18, "BYUT-Batkivshchyna" — 62, NUNS — 36.

⁹ Registry of court rulings <http://reyestr.court.gov.ua/Review/19372918>

¹⁰ TV channel 24 on situation in the town of Vyshneve, Kyiv oblast' про ситуацію у місті Вишневе Київської області http://24tv.ua/news/newsVideo.do?u_misti_vishneve_8_kandidativ_u_meri_ne_zareyestruvali&objectId=160152

¹¹ Voters' Committee of Ukraine noted multiple violations at the ARC Parliamentary elections http://cvu.org.ua/?lang=ukr&mid=fp&id=3134&lim_beg=0

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The Draft Law preceding the actual Law, was devised by the working group headed by the Minister of Justice Olexander Lavrynovych and submitted to Venice Commission. In early November a Provisional special committee was set up to harmonize various draft laws registered in parliament.

On opposition representatives' request amendments, allegedly minimizing the risk of electoral fraud, were introduced. Meanwhile, "political" issues — proportional-majoritarian system, minimum number of members at 5% level, banning party blocks from elections — remained as proposed by governmental bodies.¹²

Passing of the new law on elections was preceded by dramatic developments. Public at large and independent experts, attempting to influence the elaboration of legislation for parliamentary elections of 2012, set up Public consortium of electoral initiatives and organized a broad discussion of the electoral reform. 1359 experts from all over Ukraine participated in public discussions, focus groups and expert polls.¹³ The Head of Board of Voters' Committee of Ukraine NGO Olexander Chernenko characterized their expertise and opinion as precious resource. Nevertheless, their input was ignored by the working group headed by the Minister of Justice Olexander Lavrynovych, by Provisional special parliamentary committee and by the people's deputies themselves, when they cast their ballots.

The Head of Board of the Public Network OPORA Olga Ayvazovska commented on the outcomes of the working group operation:

"The President took electoral reform outside the Parliament by announcing broad expert discussion: however, the actual discussion on proposed proportional-majoritarian system never took place. This tendency is detrimental to the legitimacy of the process and engenders distrust towards its results".

The Head of Board of Voters' Committee of Ukraine NGO Olexander Chernenko pointed out:

"Although Venice Commission recommendations underlined the expediency of proportional system of open regional lists, we are again stuck with the system, which discredited itself at the former election campaigns".¹⁴

"The most sensitive areas of election campaign of 2012 are: the process of defining electoral districts, compiling the voters' lists, steering the voting process and counting the results. The possibility of pressure on mass media is also present, as well as problems with bringing election committees' violations' claims to courts. However the major risk is represented by the mixed system, which stipulates administrative influence on the election results" — stated Denys Kovryzhenko, Director of legal programs, Laboratory of Legal Initiatives.

Public at large believes that despite all the contradictory norms, the new law on elections will not hinder fair and democratic elections.

This opinion was expressed, in particular, by the Head of Board of the Public Network OPORA Olga Ayvazovska. It is possible, however, only under condition of power structures' non-interfering into the electoral process. As a result, we might see total lack of real competition in pre-election campaigning:" The administrative resource makes it possible to "clean up" the districts from the popular candidates. Different methods are used: from persecution by law-enforcement or taxation entities to plain bullying at the everyday level. Hence, the country leadership is primarily responsible for the results"¹⁵

¹² Rada passed a Law on elections by constitutional majority // Dzerkalo tyzhnya — November17, 2011. http://news.dt.ua/POLITICS/rada_priynyal_zakon_pro_vibori_konstitutsiynoyu_bilshistyu-91762.html

¹³ Quoted from the official site of the Voters' Committee of Ukraine http://cvu.org.ua/?lang=ukr&mid=fp&id=3165&lim_beg=0

¹⁴ NGO for the umpteenth time stress the lack of public discussion on amendments to the law on ptole's deputies' elections — 28.09.2011 — official site of the Voters' Committee of Ukraine http://cvu.org.ua/?lang=ukr&mid=fp&id=3102&lim_beg=30

¹⁵ Quoted from the official site of the Voters' Committee of Ukraine http://cvu.org.ua/?lang=ukr&mid=fp&id=3165&lim_beg=0

3. RIGHT TO PARTICIPATE IN REFERENDUMS

3.1. PEOPLE'S INITIATIVE IN HOLDING REFERENDUMS IS FICTITIOUS

Last year our citizens tried to initiate three All-Ukrainian referendums.

The organizers of the first All-Ukrainian referendum wanted Ukrainian citizens to answer four questions:

- “1. Do you support early termination of authority of the Supreme Rada of Ukraine of VI convocation?”
2. Do you support holding pre-term elections to the Supreme Rada of Ukraine within 60 days after making public the results of free expression of people's will at the All-Ukrainian referendum initiated by the people?”
3. Do you support early termination of authority of the President of Ukraine Viktor Yanukovich?”
4. Do you support holding pre-term elections of the President of Ukraine within 60 days after making public the results of free expression of people's will at the All-Ukrainian referendum initiated by the people?”

Organizers of the second referendum proposed another question for discussion: “*Do you support the pension reform, i. e. increase in retirement age to 60 years for women and 65 years for men?*”

Advocates of the third referendum planned to propose the following question for All-Ukrainian discussion: “*Do you support the ban on sales/purchases of agricultural lands and introduction of respective amendments to the Land Code of Ukraine?*” The contents of this question sometimes varied.

Meetings with the goal of setting up task forces took place in all the regions of the country. The initiative concerning All-Ukrainian referendum on finding out public opinion on the ban on sales/purchases of agricultural lands was the most popular.

All these initiatives, however, were hampered by the power and never came to anything. We can define three main groups of obstacles in the way of initiating All-Ukrainian referendums.

First group of obstacles: banning of public meetings with the goal of setting up task forces (Brovary, Kyiv oblast', Vilnohirsk, Dnipropetrovsk oblast', Chernivtsy etc).

Second group of obstacles: refusal of self-government officials to submit the documents related to the setting up of task forces for the organization of All-Ukrainian referendum on people's initiative to CEC, in compliance with the law (Dnipropetrovsk, Nova Odessa, Mykolaiv oblast', Izyum, Kharkiv oblast' et al.).

However, the most instrumental in creating the obstacles was CEC, which denied registration to one hundred sixteen task forces for the organization of All-Ukrainian referendums.

As a result, over the years, our citizens have been unable to exercise their right to hold All-Ukrainian referendums on people's initiative.

3.2. LOCAL REFERENDUMS ARE POSSIBLE ONLY WITH LOCAL AUTHORITIES' GOOD WILL

According to the State Voters' Registry only two local referendums were held in 2011, and one of those was considered invalid.

Our very approximate estimates led us to conclusion that at least eleven attempts to hold local referendums in 2011 failed. Chernivtsy residents tried to organize a local referendum five times, Pervomaysky residents (Kharkiv oblast') — twice; several attempts were made by activists in Odessa, Luhansk, Oleksandrivsk, Kherson, Dniprorudny (Zaporizhzhya oblast').

In all these instances the local authorities found various pretexts to deny the registration for initiative groups and the permission to collect residents' signatures in favor of a local referendum.

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Members of initiative groups in vain appealed the local authorities' decisions in the courts of appeal. Characteristically, the judges refuted the representatives' claims on the basis of counter arguments.

Thus, Chernivtsy circuit administrative court by its ruling of June 30, 2011,¹⁶ on the basis of article 174 of the Code of Administrative Legal Proceedings of Ukraine, regulating specific features of appeal procedure, actions or inactivity during elections and referendums, namely: under p. 6, art. 172 of the Code of Administrative Legal Proceedings of Ukraine, claims can be submitted to administrative courts within 5 days after decision was passed, action committed or inactivity permitted, left the claim of initiative group members from Chernivtsy without consideration, arguing that it was submitted after the expiration of the prescribed date. This decision was supported by Vinnitsa administrative court of appeals on July 4.¹⁷

Zaporizhzhya circuit administrative court by its ruling of November 18, 2011, on the same basis rejected the claim of the initiative group from Dniprorudny (Zaporizhzhya obalst').¹⁸

On the other hand, Odessa administrative court of appeals, when approached by an initiative group of Kherson voters, in its ruling of July 11, 2011, arrived at the opposite conclusion: "Hence, the initiative group for local referendum acquires the status of electoral process or referendum process subject only after obtaining the registration certificate; therefore, the ruling of the first instance court concerning the initiative group claim, under the provisions of the Code of Administrative Legal Proceedings of Ukraine, regulating resolution of electoral process and referendum process-related disputes — is erroneous".¹⁹ As a result Odessa administrative court of appeals nullified the ruling of Kherson circuit administrative court, under which Kherson mayor was obliged to register the initiative group.

Most dramatic turn of events was observed in Chernivtsy.²⁰ In 2011 territorial community of Chernivtsy five times tried to initiate the local referendum. On every attempt the local authorities prevented them not only from organizing the referendum, but also from even starting the collection of signatures in support of people's initiative. Alleged procedural violations at the public meeting dedicated to local referendum were used as a pretext. In order to deny registration to an initiative group or to make court appeal impossible in case of denial, various methods were used: from meticulous verifications of voters' lists and protocols, recordings of initiative groups' meetings to issuing incorrect denial documents to hinder the court appeal and delay the resolution of the matter.

Leonid Tarasenko, a lawyer from the Center of people's advocacy, offered the following comment of the situation:

"The initiative group for local referendum has no right to appeal in court the mayor's refusal to register it, as this initiative group is not registered. The law in force stipulates that initiative group is recognized as such, after it has been elected at the public meeting; after that it submits the required documentation to the city mayor to obtain the right to collect citizens' signatures in support of referendum. Without this registration the initiative group simply cannot collect the signatures, but still is considered set up. These provisions were completely ignored."

Thus, we arrive at the conclusion that local authorities in different parts of Ukraine systematically violate main principles of democracy, spelled out in the Constitution of Ukraine and Law of Ukraine "On All-Ukrainian and Local Referendums", preventing their communities from initiating the referendums. Local officials actively hamper any manifestations of direct democracy.

¹⁶ Registry of court rulings <http://reyestr.court.gov.ua/Review/16845192>

¹⁷ Registry of court rulings <http://reyestr.court.gov.ua/Review/16580709>

¹⁸ Registry of court rulings <http://reyestr.court.gov.ua/Review/19379605>

¹⁹ Registry of court rulings <http://reyestr.court.gov.ua/Review/18666583>

²⁰ Nadiya Zelinska "Right to local referendum — deprived of the right"// Center for people's advocacy <http://cga.in.ua/index.php?itemid=1160>

4. CONCLUSIONS

In 2011 the overwhelming majority of elections took place quietly, ignored by general public, without either serious violations or active interference of administrative resource. Violations, registered in the course of elections, were isolated rather than systematic.

The main sources of violations included low level of competence among election committees' members, their probable bias towards certain candidates, and imperfection of electoral law, which opened the door for the election committees' abuses, e.g. refusals to register candidates or their removal from registration for minor infringements.

A new type of election rights' violation, i.e. refusal of local authorities to fund mid-term elections, came into being.

The majority of wrong-doings were rectified through court procedures. The judiciary system in the few elections-related disputes of 2011 worked rather efficiently.

State Voters' Registry departments worked hard on improving voters' lists, although the State Voters' Registry bodies operated under the threat of staff downsizing and reduced funding.

It is noteworthy that faults, specifically adding the voters' names into the lists on the voting day, under various regulatory acts represented the violations of voters' rights to vote.

Inability of citizens to exercise their rights to initiate and hold All-Ukrainian and local referendums on general or local initiative remains one of the major problems related to the observance of election rights in Ukraine in 2011.

Groups of citizens trying to initiate and hold referendums come across systematic obstacles, created on the regular basis both at the local and national levels.

Passing of the new Law "On Elections of People's Deputies of Ukraine" became a crucial event in 2011. It was not warranted by the objective necessity, but called to resolve specifically political issues of authorities in power.

Ignoring their own promises, the authorities never held broad public discussion on electoral law reform; the results of discussions, launched by general public, were ignored as well.

Despite the lack of transparency and public participation in passing of the election law, it was supported by the constitutional majority in the Supreme Rada. The public observers believe, however, that despite all the contrary provisions, the new electoral law will not become an obstacle for fair and democratic elections, if the authorities do not interfere into the electoral process.

Broad use of administrative resource poses a major threat for the electoral process of 2012, and, specifically, for fair, free and transparent elections.

We point out once more that the authorities won't take into consideration majority of recommendations offered by general public. As a result, the election rights of the citizens are systematically violated.

Year 2012 poses a new challenge for the Ukrainian state and society. Only by joining our efforts we'll be able to decrease the number of election rights violations.

5. RECOMMENDATIONS

1. We stress the expediency of appropriate legal regulation of the procedure for holding national and local referendums. Authorities should be restrained in their capacity to hinder citizens' expression of free will by participating in the referendums.

2. Sufficient funding and governmental support for the better operation of the State Voters' Registry has to be guaranteed. Any attempts to cut down funding and reduce the number of staff in the State Voters' Registry are unacceptable.

3. It is of utmost importance to provide voters, left outside the lists for whatever reasons, with the opportunity to exercise their right to participate in the elections, by court rulings.

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4. Codification of the electoral law shall be continued. The principle of political expediency should be rejected; broad public discussion on electoral process, with the participation of scholars, electoral process organizers, specialized NGOs representatives should be launched. Electoral Code should take into account negative experience, acquired in the election campaigns of 2009–2010, and bring isolated and contradictory election laws to uniformity.

5. Further improvement in the procedure of appeals against electoral law violations remains topical. We believe that existing practice of remanding the appeals to electoral process subjects on the basis of formal or technical errors, while the case is clear on its merits, presently creates a serious obstacle to the renewal of citizens' election rights.

6. Training and upgrading of the election committees' members at all levels has room for improvement. The training should be permanent with dropout of those who failed.

7. Ensuring public officials' non-interference into the electoral process remains the main task.

8. Law enforcement bodies should pay more attention to the cases of citizens' election rights' violations.

XV. PROPERTY RIGHTS¹

1. OVERVIEW

Providing conditions for protection, realization and respect for everybody's right of ownership is an essential element of the implementation by the state of the peaceful proprietary interest. It also includes the legality, reasonableness and proportionality of restrictions of the ownership by the public authorities.

In 2011, Ukraine, as in previous years, had a lot of problems with the introduction of guarantees of property rights, and with unlawful restriction of this right by the state. It should be noted that the authorities were often inefficient responding to various violations of property rights, while on the other hand, people often fought back to the ropes for their rights.

The lack of an effective system of registration of ownership of immovable estate has become one of the thorny problems faced by virtually every person living in Ukraine. Despite some positive steps made by the state to implement the Law of Ukraine "On state registration of rights to immovable property and their encumbrance", this has not led to actual changes that might strengthen the guarantees of property rights protection. Today they are only in for preparations intended to implement this law. In addition, there is still no body responsible for registration which hampers the improvement of the system of property registration.

There is also an important problem of non-enforcement of national courts' decisions protecting property. In recent years, nothing changed in this respect: the state is inept to solve this systemic problem. The number of cases of non-compliance with the lawful judgment of courts increases annually, and, accordingly, the state debt grows. The European Court of Human Rights stressed the existence of this is problem making a "pilot decision" in the case of "Yuri Mykolayovych Ivanov vs. Ukraine" giving Ukraine one year to solve this problem. But the end of second year is near, but this decision remains virtually unenforced. Therefore, there are rally no guarantees that awards will be carried out permitting people to protect their property.

In the context of non-compliance with awards of the court protecting the property, it is noteworthy that there are significant problems faced by thousand of Ukrainians asserting their rights in court. The deadlines of consideration are missed; the frequent procedural violations are committed by the courts failing to institute a legal action; there are problems of demarcation of competence of courts trying cases of property protection.

As before, there are problems using the Law of Ukraine "On alienation of land and other immovable property on it, which are in private ownership for public purposes or for reasons of public necessity." Unfortunately, the shortcomings of the law are very often used for unlawful restriction of property rights. This is a result of vagueness of legal conceptions of social need and social necessity, lack of market principles in matters of compensation for the property and the existing opportunities for corruption among public officials.

¹ Prepared by M. Shcherbatiuk, UHHRU.

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There remain problematic issues of protection of property rights in land relations. Especially if there exists a moratorium on buying and selling of agricultural land; there are also other problems in this area, in particular, financial and procedural obstacles restricting the ownership of those people who have old land titles. Equally difficult are the problems related to construction and paper work for the project.

These and many other problems with property rights in Ukraine show that people in our country still cannot count on the fact that their right to possess, use and dispose of the property is respected, protected and realized by the state at the level, which would allow them to feel themselves as full owners.

2. GUARANTEES OF PROPERTY RIGHTS

2.1. THE STATE REGISTRATION OF TENURE

The creation of a unified system of state registration of tenure (including the land) is one of the main tasks of the state in ensuring the right to peaceful enjoyment of one's possessions. Creating such a system should provide adequate protection for the rights of individuals and juridical entities in real estate.

In Ukraine, over a long period of time, there have been systemic problems in this area, which were repeatedly covered in the annual reports on the human rights². Until now the system of registration of real rights on estate on realty in Ukraine has been functioning in the form of registration of documents establishing ownership; the process includes the registration or record of documents affecting the interest in real property.

The main drawback of such a system of registration of documents establishing ownership is that, by itself, this system does not provide guarantees of property rights: the system simply invites seekers to check the copies of documents and to draw on their own conclusions on the legality of the relevant property rights. The great number of authorities that are responsible for the introduction of various registers, where those rights are recorded, only deepens the problem of actual insecurity of property rights in Ukraine.

The very understanding of the fact that there is such a problem in Ukraine urges to find ways out. The system of registration of property rights is considered an alternative system of registration of documents establishing ownership in the case of transfer of ownership. According to this system, each plot of land or immovable estate should be marked on the plan and the relevant rights related to the plot or estate should be entered in the register. In addition, the name of the owner of the estate should be also entered in the register. When all assets are transferred to the new owner, all you have to do is to change the name of the owner.

In the vast majority of civilized countries the access to the estate registry is open and available to any member of the public without any restrictions on access level. In other words, any person may have access to all information contained in the registry (usually by paying the appropriate fee), even if that information relates to property of another person. Anyway, even in countries in which there are some access restrictions, you can easily obtain the information on the identity of the owner. In Ukraine, it is almost impossible to access information on the owners of real property, including the list of co-owners of condominiums, which prevents the creation of Associations of Co-owners of Apartment Houses; the public comes to know about the property of politicians and bureaucrats only as a result of investigative journalism and so on³.

² Ukrainian Helsinki Human Rights Union. Annual Reports on Human Rights <http://www.helsinki.org.ua/index.php?id=1298357458>, <http://www.helsinki.org.ua/index.php?id=1245859763>

³ T. Montian. Unsupported support apparatus "Dzerkalo tyzhnia. Ukrayina", No. 14, April 15, 2011 <http://dt.ua/articles/79649>

It should be noted that Ukraine over the past two years made certain steps toward reforming the registration of immovable property, including the Ukrainian parliament in 2010 adopted a new Law of Ukraine “On state registration of rights to immovable property and their encumbrances,” which, according to the preamble to it, “...aims to provide recognition and protection of these rights by the state, create conditions for the real estate market.”

The “real estate” in this law was defined as “estate and objects located on the plot which cannot be move without their impairment and change in purpose.” That is “land” and “buildings” finally became “property”, and experts noted that in Ukraine, finally, land and buildings located on it would be registered by one organization, as it is throughout the civilized world.

The law generally aims to better the practice existing in Ukraine in the regulation of relations connected with the state registration of real rights to realty. Thus, the law provides for a unified system of state registration of rights to realty and their liens and identifies new approaches to state regulation of civil relations in this area. This law defined a different conceptual approach to the procedure of state registration of rights to immovable property and the system of state registration of rights to realty.

Under this law the state registration of proprietary rights to realty will be carried out on a “single window” principle, which means that one agency will register all rights and encumbrances to real property, both land and objects located on them.

The new approach to the system of state registration is based on the fact that the state registration of rights to realty and their encumbrances means a formal recognition and confirmation by the state of the facts of emergence, transfer or termination of rights to immovable property and restrictions that accompanied the data input to State Register of real rights on real estate and their encumbrances. That is, the state registration of rights is solely a function of the state, which acquires and exercises its rights and responsibilities through public authorities, and that is why it is the public authority that must ensure the exercise of such functions.

According to the law, the system of state registration of real rights to realty will consist of a specially authorized central executive body of state registration rights, which is the holder of the State register of real rights to immovable property, and its territorial bodies, which are agencies of state registration of rights.

However, in the course of administrative reform the system of agencies of state registration of real rights to realty and their encumbrances changed as well. Thus, according to the Decree of the President of Ukraine dated December 9, 2010 #1085/2010 “On the optimization of the system of central bodies of executive power”, they initiated the administrative reform in Ukraine, one of concepts of which consists in vesting ministries, services, agencies and inspections with different responsibilities.

The Decree founded the State Registration Service which should be responsible for implementing government policy on registration of legal persons and natural persons or entrepreneurs in the field of registration of religious organizations and functions of the Ministry of Justice responsible for implementing the state policy on registration.

On April 6, 2011 the President of Ukraine signed the Decree #401/2011 “On approval of the Statute of the State Registration Service of Ukraine”, according to which the State Registration Service is the central body of executive power with activity directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Justice of Ukraine and is a part of the system of executive power. In accordance with the said decree, this agency, in particular, will provide the state registration of real rights to immovable property according to law.

Experts viewed the decree as a next step to implement the system of registration of immovable property, which was slightly more effective than the existing one.

But on April 8, 2011 the President of Ukraine signed another decree No. 445/2011 “On State Agency of Land Resources of Ukraine”, which approved the Statute of this agency. The decree states that the State Agency of Land Resources of Ukraine is the successor of the State Committee of Ukraine for Land Resources.

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And according to the approved statute, the State Agency of Land Resources of Ukraine is the central body of executive power on issues of land resources and is directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Agricultural Policy and Food of Ukraine, is a part of the system of executive power and realizes the government policy in the sphere of land relations.

according to the decree, this body, performs maintenance and administration of state land cadastre and carries out state registration of plots and state registration of property rights, rights of use of plots (servitude), the right of permanent use of land, contracts of lease of plots, rights of land use for agricultural purposes (emphyteusis), site development licences (superficies).

And it should be noted that in effect in Ukraine they created two registry offices at once, and now it is not clear how this is consistent with the provisions of the Law of Ukraine “On state registration of rights to immovable property and their encumbrances,” according to which “the State register of real rights on realty is the only state information system that contains information about rights to realty, their encumbrances, as well as objects and subjects of these rights”⁴. Therefore, under such conditions the law will be ineffective.

In addition, the experts believe that this redaction of the law is not without flaws. For example, you can take to Article 5 of the Law of Ukraine “On state registration of rights to immovable property and their encumbrances,” which contains a list of real property the rights to which are subject to state registration. According to the article, “The State registry of rights registers rights to such immovable property located on the plot which cannot be moved without their impairment and change in purpose: houses, apartments, buildings with premises intended for human residence, placement of movable property, preservation of tangibles, production purposes etc., structures (engineering, hydraulic facilities etc.), land melioration that does not belong to buildings and premises designed for specific technical functions; premises as a part of indoor cubic content of houses, buildings, apartments, limited with building elements.” This list does not contain such object as a single property complex⁵.

In turn, the Association of BTI representatives notes that the enactment of the new procedure for registration of rights to real estate in 2012 will entail a lot of negativity for the property owners and the state as a whole.

The representatives of the Association believe that the situation in Ukraine is such that the registration of real estate is not possible without constant use of long-term data archives, like settling real estate disputes by a judicial inquiry and work of public officers of the law. It is the result of total absence of registration of property rights (about 40% of all private sector), which reaches back to the Soviet era.

The main blunder made by the Ministry of Justice consists in actual increase, under the new redaction of the Law, of the number of agencies involved in registering the estate of freehold. Their number increases to 4; the chain of offices making this paperwork will include private institutions, whose activities licensed by the state will consist in preparing “indexed cadastral maps”, and notaries. Accordingly, the owners will spend more time and money on realty paperwork and the number of formalities will go up.

The weak point of the law consists in empowering anyone who has a degree in law to work as a registrar at the State registry of rights. In the opinion of BTI representatives, for such work it is not enough to be interviewed by the “theorists” from the Ministry of Justice, but the long-term experience is necessary as well.

The BTI employees pay notice of the increasing expenditures for owners in the process of creation of the future State registry of rights. They think that the register with a new name is essentially the same as the current register, but the owners will have to pay additional money to transfer data

⁴ T. Montian. Unsupported support apparatus // “Dzerkalo tyzhnia. Ukrayina”, No. 14, April 15, 2011 <http://dt.ua/articles/79649>

⁵ I. Marushko. Combining of functions of a number of agencies is a considerable improvement of the new registration system — // *Ukrayinskiy Yuryst*, #5 http://www.lp.ua/ukr/public.php?news_id=270

there from the current Register. The same happened during the transition from hard-copy forms of real estate registration to electronic register; the Association of BTIs expects the same effect in the case of new emendations of the law⁶.

We can conclude that last year the situation with the registration of rights to real estate did not change for the better, but it was a year of certain preparatory actions aimed at reforming the system. However, the effectiveness and correctness of these government actions will be clear from the results of reform.

2.2. GUARANTEES OF LEGAL OWNERSHIP TO CORPORATE RIGHTS

The guarantees of ownership of corporate rights is an important element of the right to peaceful enjoyment of possessions. The legal regulation in this area should be clear and aimed at comprehensive protection of property rights of each owner.

In Ukraine, the relevant regulation was foreseen in the Law of Ukraine “On Joint Stock Companies”. In fact, 2011 had to become the first year of full realization of the law because the law stipulated a transitional period, which ended in 2010.

However, in practice the joint-stock companies found it too difficult to adapt to changes due to a number of factors, including the imperfection of many provisions of the law. Most of the companies ignored the requirements of the law, the other part tried to fulfill all legislative requirements within the prescribed period, but because of the lack of mechanism and numerous related problems they failed to do the job.

No wonder, it resulted in the need in numerous amendments to the Law of Ukraine “On Joint Stock Companies”. There emerged serious procedural problems with such amendments, which significantly violated property rights of stockholders.

The first amendments to the Law of Ukraine “On State Budget of Ukraine for 2010” made on April 27, 2010 presented a good procedural example, but on November 30, 2010 the Constitutional Court of Ukraine in its Decision on the case #1-47/2010 indicated that, according to the Law of Ukraine “On the State Budget”, no amendments to other laws may be introduced, the enactment of laws can neither be stopped nor cancelled because objectively this leads to contradictions in the law, and found these provisions unconstitutional.

The Law of Ukraine “On some questions of the budget process in 2010” adopted on December 3, 2010 did make amendments related to the procedure of approval and payment of dividends. But it is important to note that these amendments eliminated the procedure of payment of dividends, including the timing, which misled businesses even more. And again new amendments were needed. All this did not contribute to legal certainty, and therefore weakened thereby the guarantees of property rights in this area.

At the same time even more problems arose in connection with the adoption of the Bill of Ukraine “On Amendments to the Law of Ukraine “On Joint Stock Companies” in order to improve the mechanism of functioning of joint stock companies.”

The Bill adopted by Verkhovna Rada on December 22, 2010 proposed to establish the right of the controlling stockholder owning 95% shares to require from other stockholders to perform the forced sale of their shares.

It should be noted that the establishment of such a requirement would be a violation of law, because the adopted concept did not account for a real mechanism of private ownership protection and did not comply with the constitutional principle of the inviolability of private property under the Constitution of Ukraine.

The Constitution of Ukraine allows the use of forced expropriation of objects of private property only as an exception for reasons of public necessity, and under the procedure established by law and subject to advance and complete compensation of their value. And in this case we see the

⁶ BTI: chaos awaits the registration of rights to real estate in 2012 <http://news.ligazakon.ua/news/2011/3/16/39611.htm>

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identification of corporate interests to engross 100% of shares for reasons of public necessity, which is unacceptable.

The Ukrainian Helsinki Human Rights Union stated⁷ that this statutory procedure for alienation of shares owned by other minority stockholders could lead to violations:

- Of basic constitutional principles for the protection of all subjects of property rights by the state (Article 13 of the Constitution);
- Of the right of everyone to own, use and dispose of his property, inviolability of private property, expropriation of objects of private property only as an exception for reasons of public necessity (Article 41);
- Of the constitutional guarantees of observance of human and civil rights determined by Article 22 of the Constitution under which the adoption of new laws or amending existing laws shall not diminish the content and scope of existing rights and freedoms.

Taking into account the presence in the new law of these problems with the rights of minority stockholders, the President of Ukraine vetoed the bill. As a consequence, this rule was excluded from the final version of the Law No. 2994-VI dated February 3, 2011.

This situation shows that the big business tends to amass all property of the companies and deprive minority stockholders of the possibility to protect their property. In fact, the state, often declaring support for the middle class, performs actions that lead to its destruction, enlarging the gap between rich and poor existing in Ukraine.

When there are problems with legal regulation of joint stock companies, when there exists a transition period, the property rights of those who can least protect themselves are in real danger. Therefore, the state needs to develop clearly defined and systematic legislation establishing guarantees of ownership of corporate rights in Ukraine.

2.3. GUARANTEES OF JUDICIAL PROTECTION OF PROPERTY RIGHTS

It should be noted that violations of property rights are extremely common in Ukraine. Thus, the uniform state register of court decisions contains more than 420,000 court decisions on violations of property rights (of which more than 180,000 are decisions made during 2010–2011, i. e. in less than eighteen months the uniform state register of court decisions included about 200,000 cases of various violations of property rights). And these are not the comprehensive data, since only a part of the judgments is registered⁸.

But people still have not fully realized what it means to be the owner, and that their ownership is inviolable, that is no one shall be unlawfully deprived of that right or restricted in its realization.

Against this background, it should be noted that the effectiveness of protection of any rights in Ukraine is low; today the system of security and protection of any rights hardly works, including property rights. The delay of the case largely exceeds reasonable time for trial, which greatly affects the efficiency and timeliness of protection.

In most cases involving the protection of property rights, the courts violate terms of consideration; moreover, sometimes the dawdling makes protection irrelevant. There are also procedural violations committed by the court failing to sustain a case, especially in matters concerning the property rights protection. Often, the complainant requests to forbid the defendant or third parties to perform certain actions on his property, for example, build a house (other property) in disputed area, cut down trees, and turn down fences etc. However, the court, in contradiction with the procedural law, shelves such demands, which causes the violation of property rights and the inability to protect its future even if there is a positive decision for the individual.

In addition, the effectiveness of judicial protection is largely influenced by legal disputes of the insiders on the delimitation of competence in dealing with cases, often linked to property and finan-

⁷ Another legal way to take away property from citizens emerged in Ukraine <http://www.unian.net/ukr/news/news-413877.html>

⁸ In Lviv they identified top “10” violations of property rights in Ukraine <http://cga.in.ua/index.php?itemid=1155>

cial affairs related to ownership. The repeatedly changing interpretation of jurisdiction in land disputes between citizens and authorities may serve a striking example. For example, as a result of such frequent interpretation, the citizens have but to file the complaint for the fourth time (initially the lawsuit was filed in accordance with the requirements of civil proceedings; they gave the complaint back explaining that it should be filed in accordance with requirements established by the Code of Administrative Court Proceedings of Ukraine. Following the opening of the trial according to the Code of Administrative Court Proceedings of Ukraine, it was closed once again, because it had to comply with the CPC of Ukraine, and now, after the ruling of the Constitutional Court of Ukraine, which finished this confrontation, they had to go to court again for the fourth time in accordance with requirements established by the Code of Administrative Court Proceedings of Ukraine)⁹.

A bit different, but in many respects similar situation occurred with jurisdiction in cases of social benefits, which were groundlessly transferred from the administrative to the civil justice which the Constitutional Court of Ukraine ruled unconstitutional again. And thus the protection of property rights was considerably complicated.

2.4. FAILURE TO COMPLY WITH JUDICIAL DECISIONS THAT PROTECT PROPERTY

The non-compliance with the lawful judgments of courts on protection of property rights is a huge problem in Ukraine. Lack of effective execution of such judgments leads to the inability of the state to protect property rights, ability of each owner to protect her/his right to possess, use and dispose of their property.

Despite the broad regulatory framework for the completion of the protection of violated rights, today the question remains open and painful, because, according to statistics, about 60–70% of judgments of national courts are not executed¹⁰.

The European Court of Human Rights also recognized the existence of the problem of non-compliance with the lawful rulings of national courts. And this was done not only by making decisions on violations of the right to a fair trial in the event of non-execution of court decisions, but also by the use of pilot judgment in the case “Yuriy Ivanov vs. Ukraine.” This ruling obliged the state within a year to introduce the best line of defense (or a complex of such measures) that would provide adequate and sufficient protection against the failure or delay in execution of the ruling of the national court, for which it is responsible under the principles established by the practice of the European Court of Human Rights.

However, in 2010, the state did virtually nothing to execute pilot decision of the European Court of Human Rights¹¹. So, nothing was done to strengthen the protection of property rights.

In 2011, the time of execution determined to let the country tackle the problem, or at least significantly improve the implementation of decisions of national courts expired. At the same time, Ukraine was given another chance to solve the problem, and, accordingly, the time of pilot decision execution in the case of “Yuri Ivanov vs. Ukraine” was extended for six months (i.e. until July 2011).

The submission to the Verkhovna Rada of Ukraine in January 2011 of the Bill of Ukraine No. 7562 “On state guarantees of execution of court judgments” made one of the reasons advanced by the Government to extend the time of carrying out this decision. But this project contained significant flaws that could hinder the execution of pilot decision. Many NGOs, including the Ukrainian Helsinki Human Rights Union also were against the adoption of this bill.

The Parliament declined the bill. So, before the end of the extended term of execution of the pilot decision Ukraine again did next to nothing to tackle the systemic problems of non-compliance with the rulings of national courts protecting property.

⁹ The inviolable right to property: European Principles and Ukrainian reality <http://cga.in.ua/index.php?itemid=1065>

¹⁰ This is about judgments in civil and commercial cases, as well as judgments of administrative courts. The judgments in criminal cases and cases of administrative violations were not considered. Data for 2004–2010.

¹¹ Human rights in Ukraine: 2009-2010. The Report of Human rights organizations <http://www.helsinki.org.ua/index.php?id=1298357458>

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Instead, on September 8, 2011 the Cabinet of Ministers of Ukraine submitted to the Verkhovna Rada of Ukraine the Bill No. 9127 “On state guarantees of execution of the judgments of courts”, the text of which was almost identical to the text of already mentioned bill No. 7562. However, unlike its predecessor, the bill was considered by the Verkhovna Rada of Ukraine and adopted as a basis.

In connection with possible adoption of this law as a whole it is important to emphasize its main propositions and significant drawbacks.

First, it should be noted that this bill provides for establishment of a special procedure of execution of the judgments of national courts, as well as redistribution of authority among branches of power in the area of forced sale of property of legal persons.

The realization of certain specific measures intended to tackle the problems of non-compliance with the rulings of national courts is the best novelty in the bill. In particular, the authors propose to introduce special procedure of execution of court decisions where the respondent is the state, lift moratorium on execution of court decisions, and implement mechanism of compensation for long-term non-compliance.

However, this project has significant shortcomings that may be obstacles to overcome systemic problems of non-compliance with the judgments of national courts.

There remains the most important question of the sources of funding for execution of decisions of national courts where the State is the defendant, as well as future decisions by national courts in cases currently under consideration. What is at issue is thousands of decisions which, because of non-compliance, sooner or later will be examined by the European Court of Human Rights, which will result in an unconditional obligation of the state to pay these costs.

Although the bill provides for certain procedural steps to resolve this issue, including inventory of court-ordered delayed payments, the execution of which is guaranteed by the state, development on the basis of this inventory of the debt repayment schedule. At the same time they are still not on-budget funds, and there is a reasonable doubt about the capacity of the state to budget the full program provided for this purpose.

Therefore, there remains a high risk that the procedure, which may be approved by the Cabinet of Ministers of Ukraine by 2013, will significantly limit the size and scheduling of debt repayment, as well as establish specific terms of repayment. Accordingly, this procedure will not effectively protect the individual's right to execution of the ruling of the national court within a reasonable time.

The possibility of such limitations is confirmed by the existing provisions of the bill which fix the procedure for determining the amount of court-ordered unpaid debts, which had been enacted prior to this Law (Section 4 of Chapter II of the Bill). The too short periods of submission of execution documents for execution and recognition of documents violating the schedule as executed ones as foreseen in paragraph 4 may lead to actual non-compliance with court judgments which means violation of article 124 of the Constitution of Ukraine on compulsory execution of courts' rulings throughout the territory of Ukraine. This fact may be a reason for the new application to the European Court of Human Rights for non-compliance with such decisions on violations, including the right to peaceful ownership.

The provisions of the bill on implementation of a mechanism to tackle the prolonged non-compliance with court rulings exacerbate the problem. These are very positive steps intended to improve the execution of court judgments; however, the sanctions for execution delays are too small (0.3% per annum). This could be a major obstacle to effective application of this mechanism. If you compare the size of the sanction with the inflation rate (annual inflation rate in Ukraine in 2010: 9.1%), you will understand that this sanction will not become a stimulating factor for the timely execution of court decisions. Moreover, it would be more advantageous for the state to pay this minimum compensation than to comply with the court ruling.

The problem of the lack of budgetary funds for implementation of decisions, where the respondent is a State, is a systemic problem, which is closely related to the complicated system of benefits and social benefits. Due to the presence of benefits and social guarantees, which are nothing but unfunded declaration, there are so many court judgments on Ukraine's default on its commitments.

And many of these decisions are not carried out, because the state does not provide funding to implement them in its annual budget.

At the same time state in the said bill proposes to solve this problem through real reform of social security, and by the way of curbing social and economic rights of people which cannot be an adequate way to tackle the problem of non-compliance with the rulings of national courts.

Another problem concerning the non-compliance with the rulings of national courts, as well as the issue of equality of different forms of ownership is the existence of the moratoriums, which allow the state enterprises to stop the enforcement of decisions. Along with the fact that the bill provides for the abolition of the provisions of laws, which provided such opportunity for public enterprises, the bill proposed to authorize the Government to prohibit the forced sale of property of legal persons.

This proposal does not correlate with the content of the constitutional provision by which the legal regime of property is determined exclusively by the laws of Ukraine, which determine its features (paragraph 7 of Part 1 of Art. 92 of the Constitution of Ukraine). Instead, having received the appropriate authority, the Cabinet of Ministers of Ukraine will realize it through bylaws that is inconsistent with the principle of priority of law in the system of legal acts of Ukraine and with the principle of separation of powers and the requirement for public authorities to act on the basis and within the authority and in the manner envisaged by the Constitution and laws of Ukraine. That is, eliminating the problem, the state creates a new one, similar to the previous one.

In addition, the bill #9127 fails to tackle many important problems recognized, in particular, by the Committee of Ministers of the Council of Europe as systemic ones that require rapid response. In particular, the ineffectiveness of the executive service, inadequate management of public enterprises, problems of legal regulation of bankruptcy, lack of some legal mechanism for compensation of losses made by criminal actions of civil servants and other persons and so on.

Therefore, taking into account the presence of both positive and negative aspects of the bill #9127 “On state guarantees of execution of court rulings”, one can conclude that, despite its focus on implementation of the pilot decision of the European Court of Human Rights in the case “Yuriy Ivanov vs. Ukraine” and the introduction of appropriate mechanisms for effective implementation of decisions of national courts, this bill will not solve most of the systemic problems in this area. Moreover, it may give rise to new complaints to the European Court of Human Rights. Therefore, the Ukrainian Helsinki Human Rights Union has once again expressed recommendations for rejection of this bill in its present wording and resubmission of the document after its improvement¹².

The question of inefficiency of executive service and problems with the legal regulation of bankruptcy were considered by the state during the preparation and adoption of other regulations. The effectiveness of execution of court decisions that protect property largely depends on the solution of these problems.

In particular, the problem of ineffective enforcement service was brought up when considering amendments to the Law of Ukraine “On Enforcement Jurisdiction” and other legislative acts of Ukraine on improving the procedure for execution of court decisions and other bodies (officials). These changes were adopted and entered into force on March 9, 2011. This law aims to improve the effectiveness of the state executive service for execution of courts’ decisions. It is too early to draw conclusions about the results of applying this law; however, it should be noted that many of its provisions, strengthen the possibilities of law enforcement officers carrying out the rulings of national courts.

Some provisions concerning the protection of creditors’ rights in the implementation of bankruptcy procedures or restoration of its solvency were included into the Law passed by the Verkhovna Rada of Ukraine “On Amending Certain Legislative Acts of Ukraine concerning settlement between creditors and consumers of financial services.” This law came into force only on October 16, 2011, and accordingly, it is also too early to make conclusions about possible improvements in this area.

¹² The Bill “On state guarantees of execution of the rulings of national courts”: new name against old problems <http://www.helsinki.org.ua/index.php?id=1316774325>

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Finally, it is noteworthy that since the adoption of “pilot decision in the case of “Yuriy Ivanov vs. Ukraine, namely in January 2010, the state implemented but a few measures to implement this decision. It is important to note that there are some positive steps taken by the state, including legislative changes, which enhance the efficiency of executive service and improve protection of creditors’ rights in the implementation of bankruptcy procedures. Also important is the “intent” of the state to introduce a special procedure of execution of court decisions where the state is the respondent, lifting the moratoriums on enforcement of court decisions, introduction of the mechanism of compensation for long-term failure, as contained in the bill No. 9127.

But at the same time there exist significant problems with the realization of this “pilot decision” due to the absence of real reform of the system of benefits, lack of funding for execution of decisions, where the state is the respondent, existence of various moratoriums on enforcement of court decisions, lack of enforcement mechanisms of execution of courts’ decisions where the state is the respondent. We should also display caution speaking about defects in the “intentions” of the state to improve the guarantees of enforcement of courts’ rulings, as defined in the bill No. 9127, and which may reduce to zero all positive aspects of these “intentions” of the state.

Therefore, one could argue that Ukraine in 2011 was still very far from sufficient in ensuring effective implementation of courts’ decisions aimed at protecting property rights.

2.5. PROBLEMS IN THE IMPLEMENTATION OF GUARANTEES OF PROPERTY RIGHTS IN THE CONSTRUCTION INDUSTRY

Ukraine has a rather complex legislation on registration of documents for the implementation of new construction, expansion of existing construction and legitimization of arbitrarily constructed buildings and structures. The citizens make their property and subsequently cannot process documents in a proper way because of the complexity of this legitimating.

It should be noted that the practice of unlicensed construction is rather widespread. Generally such construction is one of those illegal phenomena, which, on the one hand, violate the requirements of land planning and development and, on the other, afflict the rule of law in modern land relations and create some preconditions for the shadow real estate market. In some cases of unlicensed construction on illegally occupied sites it may not only violate the right to land of citizens, legal persons, state, and local communities, but also harm the environment in general and, in particular, the land as part of the environment.

Despite the relatively large number of laws and regulations in city planning in Ukraine, the residents prefer unlicensed construction, primarily because they believe that legitimating of such construction is simpler than obtaining all permits and approvals for construction. The Civil Code of Ukraine provides for legalization of unlicensed construction in court, namely, p. 3 art. 376 of the Civil Code of Ukraine states that ownership of arbitrarily constructed property can be recognized by the court in the favor of the person, who made the unlicensed construction on the site that had not been reserved for this purpose, subject to the provision that the site would be allocated in the prescribed manner to the person owning the already built real estate. If the owner of the plot objects to the recognition of ownership of real property by a person who carried out the unlicensed construction on her/his site, or if it violates the rights of others, the property is subject to demolition by the person who carried out the unlicensed construction, or at her/his expense.

Unlike the norm of art.105 of the CC of UkrSSR (1963), according to which, in the case of unlicensed construction, the facility, following the suit filed by the local council, could be transferred to its books, the norm of art.376 of the Civil Code of Ukraine establishes another rule. Any land owner (not only the local rada, but also natural and legal persons) or land user may apply to court to demand recognition for her/his ownership of arbitrarily constructed object, if it does not violate the rights of others. Its safety must be confirmed by the findings of sanitary, fire, and architectural inspectorates.

According to the legislation, it looks like legalizing unlicensed construction were simpler requiring less money and effort than the procedure for obtaining a building permit, or replanning. However, in practice it does not look that positive. Legalizing unlicensed construction the developers run into

various problems at the level of administration, and at the level of courts. One of the most common problems consists in obtaining consent of neighbors while legitimizing the unlicensed construction.

For example, in connection with severe housing shortage and the inability of the city rada to improve his/her living conditions, a person performed unlicensed construction, which expanded the area of the apartment using existing cantilevers within a single complex, which increased the total area of the apartment adding a utility room in order to bring the apartment to the norms established by the State construction standards in Ukraine. The person took care of the building documentation, had all permits and permissions, and applied to inter-agency commission to give him permission to legalization. However, because of personal hostility and constant conflict with her neighbor this person cannot obtain such permission. In addition, the neighbor fails to explain the reasons for the refusal of consent — nothing but personal animosity. In this case the person went to the court to recognize the consent of her neighbor unreasonable, although such a question, if the denial is really unfounded, could be resolved at the local government level.

By experience we know that the domestic courts do not redress counter-claims of citizens to legalize unlicensed construction in cases where the public authority was the first to file an action demanding to take the unlicensed construction down.

It is noteworthy that prior to legitimization of the arbitrarily constructed object the title to it does not occur, i.e. there is no building as an object of rights, you cannot sell, give, and receive as an inheritance. So the fact of building a house (a property) is not enough to get ownership. Legally, this house does not exist. That is why the residents take extreme interest in legitimizing property built without proper permits and approvals. Meanwhile, the local authorities often make different decisions in similar cases: sometimes they permit to legitimize, sometimes not.

According to statistics, show that there are very many cases related to unlicensed construction. Some of them deal with legalization of such buildings, while others are related to claims instituted by local governments or state architectural-and-building inspectorates demanding to take the arbitrarily constructed buildings and structures down. All this proves that people, despite the understanding that they violate the law on construction without permits and/or without project documentation, still work their will.

Motives for this are clear: the current procedure for obtaining a building permit is too complicated; moreover, the average resident can hardly grasp it and collect all necessary documents and so on. If you comply with the law, it may take about a year and more. One should also take into account the time and funds necessary for the processing of all necessary documents. Therefore it is easier to build a house, finish building, make alterations, etc., and then let the authorities know about violations and only then they start looking for the way out of the situation; but if the authorities do not know, everything remains as it is. However, the problems can arise at the time of inheritance; for example, the heir would like to inherit the house and while accepting succession it surfaces that it was built illegally, and no documents on it exist.

So we can see, that the problems associated with unlicensed construction, and litigation of this category of cases suggest that at present there is no uniform legal regulation of relations in this area, and as a result there is no single approach to law enforcement practice. This fact weakens the guarantees of the right to peaceful enjoyment of one's possessions.

3. THE ACTIVITY OF THE AUTHORITIES LIMITING THE RIGHT TO OWNERSHIP

3.1. THE PRIVATE SITES BUYOUT FOR PUBLIC USE

The ownership is an inviolable right. It is so stated in Article 41 of the Constitution of Ukraine. Accordingly, no one may be unlawfully deprived of property rights. Also, the Constitution of Ukraine guarantees that the compulsory alienation of private property can be applied only as an exception for reasons of public necessity, and under the procedure established by law and subject to advance

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and complete compensation of their value. Expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or emergency.

This is an important guarantee of observance of the right to peaceful enjoyment of one's possessions, and the state should do its best to enforce these constitutional provisions. This has been declared in the recently adopted Law of Ukraine "On alienation of land and other immovable property in private ownership located on it for public purposes or for reasons of public necessity," which came into force in December 2009 .

This Law applies to social relations associated with the buyout of land and other immovable property located on it, which are owned by individuals or entities, for public purposes or related to the expropriation of these realty objects out of public necessity, if such needs cannot be achieved through the use of state or municipal property.

Unfortunately, along with some positive aspects, the adoption of this law not only failed to improve the situation of implementation of constitutional provisions, but rather led to numerous violations of property rights due to the deficiencies of the law itself and corruption of various state agencies involved in this process.

As predicted by human rights activists¹³, among existing deficiencies of the above law the most detrimental are as follows:

- Blurring of notions of social needs and social necessity, actual duplication of a list of objects;
- Lack of market principles in matters of compensation for the lost property;
- Extensive powers for the court in matters of redistribution of property rights to land, determining its value, and municipalities in matters of initiation of expropriation;
- There are opportunities for corruption in the buyout of real property for public purposes or for reasons of public necessity.

The application of this law in 2011 shows that the guarantees of the rights of residents, whose land is taken away for public purposes, are seriously endangered.

Here is an example of violation of the law: in Lviv Oblast the sites with garages on them had to be bought out for reasons of social necessity in accordance with the decision of the Cabinet of Ministers of Ukraine.

In this case, the resident owned 29 sq m of land pursuant to public act on the right of private property. This plot was located on the territory of garage co-operative on a street in Lviv. It was seized for reasons of public necessity for the reconstruction of the runway at Lviv airport in accordance with the ruling of the Cabinet of Ministers of Ukraine No. 948-r of 21.04.2010. "On the buyout of objects of private property and land for reasons of public necessity." According to this ruling the Lviv Oblast State Administration was obliged to buy out before July 1, 2010, because of social necessity, land, garden houses, refund the cost of perennial plants, as well as buy out garage boxes and other on-site real estate located on the plot of land, which is allocated for construction and reconstruction of Lviv airport in accordance with the reconstruction of the aerodrome of the State Enterprise "International airport" Lviv " approved by the Cabinet of Ministers of Ukraine on January 28, 2009 No. 103, and land use project for allotment of the respective land.

Based on this ruling the Lviv Regional State Administration represented by the Office of Capital Construction carried out the buyout of the objects of private property that have been placed on this land, namely the garage boxes (over 250).

However, the Lviv Regional State Administration "forgot" to decide on the buyout or allocation of other equivalent land in exchange for the seized one.

The Lviv Regional State Administration had just bought out a metal garage box erected on the site belonging to the resident.

¹³ Ukrainian Helsinki Human Rights Union. Annual Reports on Human Rights <http://www.helsinki.org.ua/index.php?id=1298357458>, <http://www.helsinki.org.ua/index.php?id=1245859763>

In fact, the resident received compensation for the building, which belonged to him on the right of private property, but did not receive adequate compensation for his land. This is despite the fact that the law is on the side of owners; namely, it specifies that if the owner of the land, which is to be compulsorily alienated from public necessity, is the owner of the house, other buildings, structures, and perennial plants on this plot, the expropriation of land from public necessity should be considered together with the requirement to terminate the ownership of such facilities (Part 3 art. 351 of the Civil Code of Ukraine). Therefore, contrary to the above requirements of the law, they violate the property rights of owners, which they later have to defend in court¹⁴.

The buyout of land and property to ensure the construction of facilities necessary for holding of Euro 2012 in Ukraine is another example of the shortcomings of the above law that resulted in the violation of property rights. There is a good example of the buyout from the villagers of Zubra Village, Lviv Oblast, of land needed to build a stadium for Euro-2012.

The case concerns the buyout of plots on which, according to the general plan of the territory around the Euro-stadium, they have to build an electrical substation and power lines as well as roads to the future stadium for "Euro-2012". To this end the state had to buy out a large quantity of land owned by the villagers.

At the same time, according to the state expertise, they offer villagers UAH 6.20 per 1 sq m of secondary agricultural land. The seller's price per 1 sq m of land belonging to lawn-and-garden cooperatives makes UAH 65. And the experts called admissible these "funny" non-market prices.

Naturally, some owners did not agree with the above estimates. People are in despair and do not agree to give their land for a song, and maintain that they were threatened. Even the representative of the Lviv City Rada Vasyl Pawliuk said: "Of course, the state has its own interests. But this is private property and the state is not empowered to rob these people blind." He added that people made independent expert evaluation of their land, and it differs significantly from the estimates offered by the state^{15 16}.

But despite assurances from the authorities to somehow fix the problem, the situation does not change. Therefore, the villagers of Zubra are continuing their fight for fair compensation for their land. Moreover, on May 30, 2011 they held a press conference "Who is to blame for the blood of the residents of Zubra Village shed during the expropriation of their land for Euro-2012?"

The problem with the lack of market principles in matters of compensation for the lost property reflects the situation with the land buyout in the Rivne Oblast. Here the road to Euro-2012 was constructed directly on the private land. The road management department is trying to prove that the plot, which is bought out for public use, costs UAH 8,503 (the independent appraisal: UAH 159,768).

It should be noted that the Dubno City-Region Court and Lviv Court of Appeal decided to cancel the decision of Ptytska Village Rada "On expropriation of land motivated by public necessity"; however, the village head still keeps denying the very fact of violation of private property.

¹⁴ The legal assistance in this matter is carried out in the framework of the project "Information and Consultation Center as a legal means of strengthening the legal possibilities of vulnerable population," supported by the Initiative "Strengthening legal capacity of the poor" realized by the International Fund "Vidrodzhennia" according to the Program "The Rule of Law".

¹⁵ The people who disagree with the assessment of their land, seized for the purpose of building the Euro-stadium in Lviv, are offered an alternative <http://zik.ua/ua/news/2010/12/10/261225>

¹⁶ Tomorrow the residents of Zubry will go to the stadium to protect their land from the "Euro-2012" <http://zik.ua/ua/news/2011/05/30/290393>

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In this case, the owner is haunting courts' thresholds demanding fair compensation and lodging complaints against the road management department for disproportionate compensation¹⁷.

These examples bring out significant problems in this area. The biggest problem is that in most cases people do not try to defend their title, and the above examples show that only a few owners, whose rights have been violated, go to court to protect their rights. Accordingly, we cannot fully realize the scope of threat from the use of the Law "On the alienation of private land and other immovable property located on it for public purposes or for reasons of public necessity". And, obviously, the judicial branch will play the key role in protecting the rights of owners as far as the domestic courts will be able to protect these people and their rights.

3.2. MORATORIUM ON SALE OF FARMLAND

Making of a full-fledged land market, one of the important elements of which are free purchase and sale, is a topical problem of land reform in Ukraine that affects the interests of the whole society and its future. This problem also concerns the protection of the residents' right to peaceful enjoyment of possessions.

The citizens of Ukraine, under current legislation, are free to buy and sell only household plots for doing gardening, dacha and garage construction (pursuant to the Decree of the Cabinet of Ministers of Ukraine "On privatization of land" from December 26, 1992).

The postponement on expropriation of other agricultural land in our country, according to the laws that were adopted at different times, was legally authorized in the form of moratorium (ban on the farmland alienation through its sale). Presently the legislator does not link the abolition of "moratorium" to specific dates extending it until two legal facts — entry into force of the laws of Ukraine on state land cadastre and land market.

On July 7, 2011 the Verkhovna Rada of Ukraine adopted on second reading and as a whole the Bill "On State Land Cadastre". The document updates the basics of the state land cadastre, contained in the current Land Code. This law was signed by the President of Ukraine and came into force on January 1, 2012.

Relative to the land market settlement, in March 2011, the Verkhovna Rada of Ukraine turned down three bills on the land market. However, on July 19, 2011 the Cabinet of Ministers of Ukraine brought in one more bill #9001-1 aimed at creating a land market. But because of current animated discussions of this document, nobody knows when the legal regulation of the land will be resolved.

It is clear that the issue of land is one of the most controversial and politicized in Ukraine, which has been discussed for two decades now; however, there is still no consensus on how this market should look like. Many in Ukraine are scared by the possibility of farmland circulation. Thence the difference in suggested, sometimes contrary, solutions of the problem: from land lease market to removal of any and all restrictions on the transfer of the property / trade in farmland.

According to many experts, the private land ownership encourages the efficient use and economic development of the country. The land market brings out the advantages of private ownership: the stability of property rights, possibility of transferring them from one person to another, matching the real value and prices of land and so on.

Prohibition of farmland purchase and sale distorts the nature of real estate: while existing juridically, it does not work economically. The owner cannot use land as an instrument to attract loans and investments because of the moratorium, it cannot be offered as collateral, and the right to land lease is very difficult to give as collateral. Problem is further complicated by the fact that the shadow trade in land is underway in Ukraine.

¹⁷ Preparing for Euro-2012: the asphalted private land <http://novaukraina.org/news/urn:news:9CE898>

On the other hand, it is important to understand that in the absence of clear legislative mechanism of realization of the right of private ownership of land (especially its sale), when there are great differences between the normative and the real (market) price of land, the lifting of the moratorium could bring more harm than benefit¹⁸.

Solving this problem is also complicated by the high level of mistrust of Ukraine's population to the government. Thus, according to the Institute of Sociology of NAS, the negative attitude towards land market is caused not so much by a rejection of the market, as by the lack of faith in the fact that its introduction may be made in an orderly, fair, honest and legal way, i.e. by the distrust in government institutions¹⁹.

Therefore, despite the progress in establishing the legal regulation of farmland purchase and sale and therefore creation of proper conditions for lifting the moratorium, this process is far from its completion. Moreover, as the discussion²⁰ around the draft law on land market, the issues of formation of proper land market and corresponding strict state regulation in this area are unlikely to be resolved soon, as well as the issues of lifting the moratorium on farmland purchase and sale.

3.3. INABILITY OF REALIZATION OF LAND OWNERSHIP IN CONNECTION WITH THE NEED TO REPLACE THE OLD-STYLE STATE ACT WITH A NEW ONE

While discussing the issue of land ownership it is important to note that the old public deeds contain no cadastral number of the plot of land; at the same time, according to the Land Code of Ukraine, this cadastral number of the plot of land should be necessarily stated in the land alienation deeds. The transfer of land ownership occurs during conclusion of various agreements aimed at obtaining a plot of land, such as sale, gift, rent, barter, permanent alimony, and inheritance of land.

However, during the sale of land or execution of inheritance documents there emerges the problem associated with the need to re-state the old deed of land ownership (issued before 2003), because it contains no cadastral number of the plot of land.

The official old land deeds remain valid and certify the ownership of the plot of land. No one shall be forcibly deprived of land ownership on this basis. The only limitation for these owners is the inability to sell (donate) land, which had been certified before the re-processing of the old deed and issuance of the new one (with the cadastral numbers). The same need for a new deed occurs and when you execute the land inheritance documents.

At the same time, in order to get a new deed one needs to make documents, without which it is impossible to re-register the old to the new deed. In particular, you must order the preparation of new land management documentation in the appropriate licensed land management organization (public or private). The list of such organizations one can get at every district department of the State Committee for Land Management. After the contract land surveying organizations carry out surveying to establish the limits of the plot of land on the plan, it will prepare technical land-management documentation for approval to a territorial department of the State Committee for Land Management located in the region of the plot in question. This is a very time-consuming and costly procedure.

Therefore, the procedure for making a new official deed is very expensive and time-consuming, during which period the owner cannot dispose of her/his property²¹.

¹⁸ Serhiy Osypchuk "Underhand dealing with land" "Dzerkalo tyzhnia. Ukrayina", No. 5, February 11, 2011.

¹⁹ Iryna Lukomska "Land market: taking on trust" <http://www.pravda.com.ua/rus/articles/2011/10/18/6659751/>

²⁰ S. Dorosh "Time for purchase and sale of land in Ukraine has not come yet" http://www.bbc.co.uk/ukrainian/business/2011/09/110921_land_market_ukraine_sd.shtml

²¹ Top 10 violations of property rights in Ukraine. The Lviv Research Center for Public Advocacy <http://www.civicua.org/news/view.html?q=1709902>

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3.4. IMPEDIMENTS TO THE RIGHT OF USE OF ONE'S PROPERTY FOR BUSINESS

The fact that in many towns one cannot use the living space on upper floors for offices may serve an example of such obstacles. Such decisions are made by relevant local radas. Such decisions often run counter to the requirements of civil legislation, which guarantees the right to use one's property for business, although, according to Part 1 art.383 of the Civil Code of Ukraine, the owner of dwelling houses or apartment may use her/his living space for her/his dwelling, dwelling of his family, and others and may not use it for commercial production. That is the only restriction for the owner of premises is the inability to use it for commercial production.

Although at the end of 2011 the Verkhovna Rada of Ukraine adopted amendments to the Housing Code of Ukraine, according to which the owner has the right to use the living space solely for dwelling and cannot use it for any other purpose.

However, according to many experts²², such legislative provisions breach the right of ownership, since the limits of property rights, defined by art.319 of the Civil Code of Ukraine, have been determined on other principles. Namely, the owner has the right to perform on his property any action not inconsistent with law; exercising her/his rights and responsibilities the owner must follow the moral principles of society and cannot use the title to the detriment of the rights, freedoms and dignity of citizens, interests of society, impair ecological situation and natural qualities of land. Moreover, the state should not interfere with the exercise by the owner of her/his property rights. Therefore, the recently adopted legislator's amendments do not meet the above principles.

3.5. IMPEDIMENTS IN THE USE AND DISPOSAL OF FOREIGN CURRENCY

In 2011 the National Bank of Ukraine (NBU) made a decision by which the exchange of foreign currency should be performed only upon presentation of a document certifying the person. The NBU also made a list of documents on which individuals can exchange currency. The list of documents is in the letter (No. 28-211/3864-11318), sent to commercial banks. An employee of the bank must ensure the protection of the copies of pages of the document proving the identity of a person in the package of daily documents. In particular, the individual residential status should be confirmed with a passport of individual resident, foreign passport (w/o mark of residence abroad), identity card of a stateless person traveling abroad, refugee certificate, passport of another country of permanent residence. The individual non-resident will need her/his national passport of another country or foreign passport of the citizen of Ukraine, but with a note in the passport for permanent residence abroad.

Such rules of exchange are in force in Ukraine as of September 23, 2011. According to experts²³, it is an unlawful restriction on disposal of property right to national or foreign currency. Currently there are dozens of lawsuits filed against the NBU demanding to annul the above rules. And finally the NBU revoked the order to copy the passport of an individual, but ordered her/him to show her/his passport in the case of currency exchange.

4. RECOMMENDATIONS

1. To create a transparent and effective working system of state registration of rights to immovable property.
2. To improve the protection of the rights of land owners, create mechanisms to counter forced takeover of these lands, adopt legislation regulating main aspects of the land market.

²² Ibid.

²³ Ibid.

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3. To tackle the problem of non-compliance with the rulings of national courts protecting property, including improved judicial control over the execution of court decisions, and to terminate the moratorium on the forced sale of assets of public enterprises. To take other measures to execute the “pilot decision” made by the European Court of Human Rights in the case of “Yuriy Ivanov vs. Ukraine”.

4. To promote transparency and simplifying of procedures for housing development and ensure the rights of investors in this area.

5. To improve the legislative regulation of joint stock companies in order to prevent the illegal seizure of enterprises and organizations in Ukraine, as well as the emergence of corporate conflicts.

6. To eliminate barriers to the realization of the right to use one’s property for business, including the use of living space for any purpose other than dwelling.

7. To regulate the expropriation of land and housing for reasons of social necessity in strict accordance with the Constitution and international obligations of Ukraine.

8. To remove barriers to the use and disposal of foreign currency.

XVI. SOCIAL AND ECONOMIC RIGHTS¹

1. OVERVIEW

Ensuring of social and economic rights is a priority for the state, which, under the Constitution, is a legal and social state, where a man is declared the highest social value. And accordingly, the level of observance of these rights reflects the level of national development, the level of attainment of the goals outlined in the Basic Law.

Unfortunately, the systemic problems with observance of socio-economic rights continue pestering the country. Despite government's efforts intended to reduce poverty in the country, improve living standards and social security, the effectiveness of these actions was not high, and, moreover, the problems only deepened in some areas.

The scale of life of ordinary Ukrainians continues to decline, poverty remains topical for many people living in Ukraine. This inefficiency of government's measures intended to improve the quality of life and combat poverty is recognized even by the public agencies monitoring the effectiveness of budget spending.

In this context, it is impossible to avoid the problem of inadequacy of the existing cost of living index, as well as applications in the social security system of such a shameful indicator as the guaranteed subsistence minimum. In addition, there continues to increase the gap between rich and poor. All this renders the whole system of social protection in Ukraine illusory.

There are serious problems with realization of basic elements of the right to adequate standard of living: the right to safety and quality of food and water, the right to adequate housing. The disregard of these rights in Ukraine remains systemic, and quite often public efforts in this direction are ineffective.

The reform of the system of privileges, which needs urgent attention of the state, is worthy of a separate note. However, such reforms require a systematic approach that would rather not be based on how to refrain from giving people opportunities to get them, but to provide benefits and social benefits only for those who really need them. Unfortunately, in 2011, in Ukraine the authorities went on limiting social and economic rights by making the relevant legal provisions to the Law on State Budget for respective year.

It is equally important to pay attention to the changes in social security for elderly people. There are various estimates of the pension system reform, but virtually every pensioner may experience some adverse effects of this reform, but nobody knows whether s/he experiences any positive effects. This question has no clear answer.

All this leads to the conclusion that Ukraine is still very far from the standards set out in its Constitution, as well as from the standards that have long been the norm in European countries. For Ukraine, achieving these standards remains a dream, the way to the implementation of which is still very vague.

¹ Prepared by Maxym Shcherbatiuk, UHHRU.

2. THE RIGHT TO ADEQUATE STANDARD OF LIVING

2.1. GUARANTEES OF THE RIGHT TO ADEQUATE STANDARD OF LIVING

The quality of life in Ukraine continues to decline. Specifically, according to the study of the global quality of life conducted by such international publication as International Living, Ukraine is ranked seventy-third alongside with Namibia, Botswana, Tunisia, Morocco, Trinidad and Tobago².

The experts, who conducted the study, took into account a number of parameters: cost of living, cultural development, economic situation, climate, environment, and civil liberties.

They also evaluated the quality of infrastructure, health care and security status.

The rating appraisers believe that over the last year the economic situation in Ukraine deteriorated. Having analyzed the level of interest rates in Ukraine, inflation, GDP growth rate and its per capita percentage, the authors of the study concluded that the Ukrainian economy was one of the most backward in the world. With these parameters it belongs to the three worst economies. It is followed only by Zimbabwe and Somalia.

The quality-of-life reduction is also confirmed by the data are released by the Legatum Institute in its compilation of Legatum Prosperity Index³. This ranking included nine subratings: the economic level, personal freedom, and quality of life to name a few. It is important to note that the calculation of the economic level takes into account the situation with Ukraine's compliance with adequate standards of living, including adequate food availability and accessibility of human habitation.

In addition, it is important to note the negative dynamics of Ukraine's position in this rating. From 2009 to 2011 the performance of Ukraine kept going down⁴; there is a negative regularity in such effectiveness of Ukraine's compliance with the right to adequate standard of living.

In the context of ensuring the quality of life there are important indicators of poverty in the country and those ways in which the state chooses to reduce poverty in the country.

According to official figures, poverty declined in Ukraine; Ukrainian authorities report that thanks to their efforts poverty in Ukraine fell by 2.3%, reaching its lowest level in a decade. "This was a result of almost 25% increase of the subsistence level, more than 12% rise of the average pensions and 10% rise in real wages," reads the statement of President of Ukraine Viktor Yanukovich⁵.

At the same time, the trade unions maintain that poverty in Ukraine is on the uptrend. For example, Deputy Head of the Federation of Trade Unions of Ukraine (FTUU) Serhiy Kondriuk says that the monthly poverty line makes UAH1025 and less in Ukraine. "According to recent data, we have 25.4% poverty level in Ukraine. Every fourth Ukrainian is unable to earn her/his living, not to mention members of his family," said S. Kondriuk. According to him, every second family with three or more children is living below the poverty line⁶.

The sociologists also do not share the opinion on poverty reduction. The official statistics takes into account the increase in per-person money supply, but does not reflect what the average Ukrainian can afford for the money, says Head of the Ukrainian Institute of Social Studies Olga Balakirev.

"This is crafty statistics. People increasingly feel impoverished," maintains the sociologist. According to her, the poll shows that last year, in order to survive, 85% of Ukrainians had to save on their food, recreation, leisure, and clothing. "One fourth of Ukraine's population considers them poor."

² International Living's Quality of Life Index 2011 <http://www1.internationalliving.com/qofl2011/?field=final>

³ Legatum Prosperity Index <http://www.prosperity.com/country.aspx?id=UA>

⁴ Legatum Prosperity Index (2009 versus 2011 Comparison) <http://www.prosperity.com/index2011.aspx>

⁵ The UN confirms the lower statistics of the poor in Ukraine <http://www.dw-world.de/dw/article/0,,15467021,00.html>

⁶ The poverty line makes UAH1,025 in Ukraine <http://health.unian.net/ukr/detail/225542>

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According to the Kyiv International Institute of Sociology, the number of those who are short of money to buy enough food increased to 17.5% in the first half of 2011, also the number of those, who can afford to buy some expensive things (such as TV or fridge), but cannot buy everything they want, decreased (from 7.1 to 4.9%). The number of those, who can buy whatever they want, decreased from 0.2 to 0.1%⁷.

The UN recognizes official statistics; however, it takes notice of the fact that their calculations are based on daily living expenses. “In developed economies they also consider those having less than \$14 a day as poor. In Ukraine, there are almost 80% of such people,” says Ms. Kateryna Rybalchenko, manager of the UNDP. But if we count the number of poor according to the specific to Eastern Europe and Central Asia figure of \$5 per day, the percentage of poor, of course, is smaller, she notes. And that is the level treated about in the official figures. After all, if Ukrainians are assessed by all-European criteria, there are almost 80% of the poor in the country⁸.

“Four and a half percent of Ukrainians spend less than \$5 a day. If we talk about poverty in Ukraine, we mean unequal access to certain benefits and resources. One of the manifestations of exclusion from economic life consists in insufficient income for basic needs. By results of 2010, 26.4% of the population can be considered divested”⁹.

The gap between rich and poor continues to increase in Ukraine. According to the survey conducted by Razumkov Center in May, almost half of Ukrainians put themselves into the lower class. While the average salary in Ukraine is two and a half thousand hryvnias, Ukrainian millionaires and billionaires always take top places in the world ratings of rich people. The experts maintain that such stratification of society promotes instability, worsening of economy, boiling protest sentiments and destroys the middle class, which in the leading democracies of the world is the foundation of economy.

However, the government’s actions intended to reduce poverty and ensure people’s rights to adequate living standards proved ineffective. Thus, according to the conclusions of the Chamber of Accounts of Ukraine, the objectives set for the government in Poverty control strategy and Comprehensive program for its implementation in 2002-2009 were not attained, and poverty benchmark was never achieved. It has occurred for the simple reason that the Ministry of Labor as both the indenter and executor of the Complex Program of Poverty Control Strategy failed to implement it, which negatively affected the living standards and poverty level decline¹⁰.

And from 2010 and up to the end of August 2011 Ukraine had no strategy or program of war against poverty at all. Such State target social program to overcome and prevent poverty was approved only on August 31, 2011.

In addition, the experts bring out another problem existing in Ukraine, namely the fact that the living wage, which is the criterion for the formation of salary and benefits, is still determined on the basis of sets of food, consumer goods and services approved eleven years ago by government regulation from 14.04.2000 No. 656. Since then the said sets were never revised, while according to section 1 art. 3 of the Law of Ukraine “On Living Wage” should be determined at least once every five years.

Besides, against the background of rising consumer prices in Ukraine in recent years, the cost of living is understated.

The understated cost of living actually leads to understated pensions, wages, allowances to low-income groups and decrease of real income of population.”¹¹

⁷ Iryna Kyrychenko “And poor as friends of paradoxes?” “Dzerkalo tyzhnia”. Ukrayina”, No. 28, August 12, 2011 http://dt.ua/SOCIETY/i_bidniy__paradoksiv_drug-86039.html

⁸ The poverty line in Ukraine <http://www.radiosvoboda.org/content/article/24265748.html>

⁹ Ibid.

¹⁰ The program is over, the poverty remains <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16735678>

¹¹ For ten years now the Ukrainian Chamber of Accounts has not been combating poverty. <http://www.epravda.com.ua/news/2011/10/19/302410/>

This is a standing annual problem, but each year the state triggers a backlash. For example, the 2012 budget determines the monthly per capita living wage as follows: as of January 1 — UAH 1017, April 1 — UAH 1037, July 1 — UAH 1044, October 1 — UAH 1060 and from December 1 — UAH 1095. At the same time, according to the Ministry of Social Policy, the actual subsistence minimum in August prices amounted to UAH 1049, which exceeded the figures planned for January-September next year. That is, the planned budgetary indicators will not cover the planned price increase.

The same is with the minimum wage: they will not establish minimum standards for wages, because the planned subsistence minimum is lower than its actual size.

Analyzing the draft 2012 budget, the Chamber of Accounts of Ukraine came to the conclusion that due to the authorized establishment of low social standards the part of the poor by national criteria for the next year, according to the indicators in the State Program of economic and social development of Ukraine for 2012, will not decrease, moreover, over a quarter of population will become poor¹².

There also remained the topical problem of the use by the Cabinet of Ministers of Ukraine of the indicator “level of guaranteeing of the minimum of subsistence”, which contradicts the Constitution of Ukraine, the Law of Ukraine “On the State Social Standards and State Social Guarantees” and unlawfully restricts the level of public assistance. The use of this “surrogate” indicator shows the state’s inability to implement basic social standards and to ensure the growth of living standards.

And despite this, the Law of Ukraine on the 2012 State Budget once again provided the use of indicator “level of guaranteeing of the minimum of subsistence,” while this past March President of Ukraine Viktor Yanukovich stressed the need to eliminate this notion in Ukraine¹³.

2.2. FOOD: QUALITY AND SAFETY

Annually Ukraine spends about UAH 740 mln on the system of food safety; however it cannot ensure the desired result.

According to Sarah Ockman, Manager of the IFC Project “Food safety in Ukraine”, the European system of food safety differs from the Ukrainian one by clear differentiation of safety and quality concepts.

“The Security in Europe goes without saying. This is what the companies are obliged to provide for the consumers and the state is obliged to control for its citizens. Man should not be poisoned by buying goods in the store. At the same time the *quality* is rather a subjective category. The specifications are formed by consumer choice, i. e., the market. Accordingly, the government does not intervene in these matters,” she said.

Unfortunately, in Ukraine, everything is quite different: food market businesses are monitored by the Ministry of Health Care, Ministry of Agrarian Policy, Ministry of Economy, veterinary, sanitary, phytosanitary services, the State Committee on Consumer Standards, other ministries and departments.

“At the same time, — says Ms. Ockman — the public resources are used inefficiently. In practice, the above structures do not share information about monitoring. Their data are not systematized and analyzed. In addition, monitoring targets the final product, and not its production. Instead of preventing of the emergence of problems, in Ukraine they prefer to deal with the consequences”¹⁴.

Unfortunately, they create only the illusion of food safety in Ukraine. For example, Ukraine, having joined the international agreements on biosafety, prohibited on the level of legislation the use

¹² The Chamber of Accounts of Ukraine: Findings of the analysis and expertise of the Bill of Ukraine On the 2012 State Budget of Ukraine <http://www.ac-rada.gov.ua/control/main/uk/publish/category/412>

¹³ State Budget—2012: Ukrainian Neo-Liberal Serfdom http://www.fpsu.org.ua/index.php?option=com_content&view=article&id=6367%3A-2012-&catid=60%3A2009-07-30-20-02-29&Itemid=34&lang=uk

¹⁴ In Ukraine, there is an ineffective system of food safety <http://www.epravda.com.ua/news/2011/01/20/267343/>

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of genetically modified organisms (GMO) on its territory without the state registration unless these products are used for state approbation (testing).

However, the results of the Chamber of Accounts' audit of central executive authorities responsible for the state system of biosafety showed that the Law of Ukraine of 31.05.2007 No. 1103-V "On the state biosafety system for creating, testing, transportation and use of genetically modified organisms" was flawed and ineffective, and the introduced state system of biosafety was ineffective.

There is no single body coordinating activities in this area and taking responsibility for the regulation of genetic engineering activities carried out in closed and open systems, state registration, putting into circulation of GMOs and products containing them, export, import and transit of GMOs defined by law, which causes mass irresponsibility in this area.

In recent years the regulations of executive bodies did not provide for implementation of legal authorities ensuring national biosafety systems in creating, testing, transportation and use of GMOs¹⁵.

2.3. ENSURING WATER QUALITY

It is noteworthy that the problems in the field of water relations have assumed extraordinary significance for our country. Improving the ecological status of water resources, drinking water quality and prevention of further pollution of groundwater is essential to maintain the right to adequate standard of living.

Unfortunately, the situation in this field remains extremely difficult. Thus, the Prosecutor General of Ukraine stressed that the river basins used for domestic water supply became receptacles for millions of tons of pollutants dumped by enterprises and public utilities. In Ukraine there are about 73,000 such enterprises. However, the treatment facilities, depreciation of which reach up to 90% in some regions, cannot deliver water of adequate quality. All in all the ecological state of eighty-eight (88) percent of rivers (and their basins), according to the water quality classification in Ukraine, are categorized from "bad" to "catastrophic." This is despite the fact that in Ukraine the quality of drinking water is monitored by only twenty-eight (28) indices, while in the EU by sixty three (63). Low quality drinking water is responsible for over 80 percent of diseases; therefore its consumption affects the duration of life interval to some extent¹⁶.

The Prosecutor General's Office of Ukraine stressed that last year, despite the threatening situation with drinking water, the Ministry of Regional Development, Construction and Housing and Communal Service invested no money in reconstruction and technical reequipment of regional water treatment plants. Ever since 2010 the bodies of the State Ecological Inspectorate conducted over 32,000 inspections, as a result of which almost 26,000 enterprises and agencies were brought to justice. It is noteworthy that the central administration of the State Ecological Inspectorate made answerable only one official (fine to the tune of \$136).

During sixteen years the State Water Resources Agency of Ukraine did nothing to implement the basin principle of the public management of water resources declared in Water Code of Ukraine in 1995.

However, in this situation the Ministry of Environment and Natural Resources of Ukraine resorted to wait-and-see attitude leaving the activities of these departments uncontrolled. The Ministry of Health of Ukraine has failed to develop national standards for drinking water, hygiene and quality control.

It is also noteworthy to pay attention to how the law enforcement agencies help to prevent offenses and investigate criminal cases involving crimes in the field of water resources.

¹⁵ Illusion of safety — "Without GMO" <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16737495;jsessionid=830C4C1B594C81809756FA4CCFB13918>

¹⁶ Prosecutor General of Ukraine Viktor Pshonka has held an expanded meeting of the board http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=98214&fp=81

Thus, the Prosecutor General's Office of Ukraine observes that in the country the law enforcement authorities brought before a court less than fifty criminal cases on crimes in the field of water resources. Of these, only five cases carried an indictment. Seven cases legal proceedings were eliminated for lack of evidence. That is one cannot name any current proceedings against the administration of major enterprises for unauthorized discharges of waste, water pollution and mass death of fish¹⁷.

The program "Drinking Water of Ukraine" has also proved ineffective. In particular, the Prosecutor General's Office found significant irregularities in the use of budgetary funds for the reconstruction of the centralized water supply and drainage system¹⁸.

2.4. REALIZATION OF THE RIGHT TO ADEQUATE HOUSING

The discussion on affordable housing has been going on in Ukraine for nearly a decade now, but it has not become more affordable.

According to researches, today the predicted average waiting period for free housing on the housing waiting list is 74 years. So, if at birth a girl is put on the waiting list, then in her old age she can get a long-awaited housing. While with boys it is a problem, because the average male life expectancy in Ukraine is 63 years.

According to official statistics, 70% of families are on the housing waiting list for ten or more years. Every seventh person on the waiting list is from Kyiv. The young residents of the capital will need to wait for an apartment from the state for 130 years¹⁹.

There are no effective social programs or loyalty and compliant loan programs for families of moderate means, large and poor. There are but scarce paper programs.

Because of stagnant residential development the "housing problem" can become a #1 social problem in the country. Today, on average, there are about 23 sq m per resident, i.e. almost twice less than in Europe and three times than in the U.S. There are about 1.2 mln families on the housing books. The situation will worsen still more because of continuous dilapidation and extremely slow recovery in housing. In 2010 they commissioned only 6 mln sq m (remaining 3 mln are *legitimate* objects built during 10-15 years), almost three times less than in 1990. According to the Ministry of Regional Development, since January the number of unfinished housing remained almost unchanged: about 4,000 objects totaling 17 million square meters (approximately 200,000 apartments). They need UAH 56 bn to be completed²⁰.

It seems that the Cabinet of Ministers of Ukraine understands the housing problem and is ready to combat it, though in words only. The emphasis is on feasibility of reducing interest rates for mortgage loans. But when it comes to action, they allocate but pennies.

Thus, in 2011, the Government invested into the state program "The Affordable Housing" two times less money than the announced amount: 150 instead of UAH340 million. The relevant decree "Some questions of the use of budgetary funds to provide state support for construction (purchase) of affordable housing" the government approved on February 28, 2011²¹.

It is noteworthy that the draft 2012 budget *generously* foresees only UAH 200 million for the state affordable housing program, and reimbursement rates for mortgage to the tune of UAH 111

¹⁷ Prosecutor General of Ukraine Viktor Pshonka has held an expanded meeting of the board http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=98214&fp=81

¹⁸ The Prosecutor General's Office of Ukraine has prevented illegal use of budgetary funds http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=98067&fp=61

¹⁹ Privatization and/or eviction. This article is a continuation of the monitoring of the problems of monitoring of the lodgers of hostels <http://tovarish.kiev.ua/print/Pryvatyzuv.html>

²⁰ We can but become the country of homeless. Vasyl Pasochnyk "Dzerkalo tyzhnia. Ukrayina" No. 37, October 14, 2011 http://dt.ua/ECONOMICS/yak_ne_stati_krayinoyu_bezdomnih-89663.html

²¹ The "affordable housing" in 2011 is not as available as expected. http://news.dt.ua/ECONOMICS/dostupne_zhitlo_u_2011-mu_bude_ne_takim_dostupnim,_yak_perebachalosya-76446.html

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million. In fact, UAH 200 million is a sum allowing to build only two 100-apartment blocks or 35 thousand square meters.

The need to increase these allotments is discussed in the National Bank, and in the Parliament. According to First Deputy Chairman of the National Bank of Ukraine Yuri Kolobov, one of the key tasks of the state today is to create conditions to boost demand for the building sector. “As the central bank, we see that there are enough resources in the banks (equivalent of over UAH 60 billion is on the correspondent accounts, UAH 55 billion are invested in internal bonds, and UAH 20 billion are in the cash-offices of banks). But the key issue is the price of resources. With the current 10% inflation rate the banks attract hryvnias at 12–14%. Accordingly, the loans they can make at annual minimum of 15%, — says the first deputy chairman of the National Bank.

And the price of resources is one of the main factors that actually render impossible the purchase of accommodations by those who need it. The interest rates on loans are gradually declining; however, for the majority of potential home buyers they remain unsustainable. According to the chairman of the board of Finance & Credit Bank Volodymyr Khlyvniuk, in order to arrange a mortgage for \$60,000 (in equivalent) at 15% per annum, the borrower must make UAH 14,000 monthly. While according to the State Committee on Statistics, as of past August the average official salary of employees in Ukraine made UAH 2694²².

According to the National Institute for Strategic Studies, today, in order to buy a two-room apartments, 75 sq m, the average Ukrainian has to work 20-30 years, while a citizen of Chile — four years, Honduras — 4.7, Turkey — 5.6, and Brazil — 6.3 years. And one cannot expect changes for the better, while the state is unwilling to tackle the “housing problem”. It is only a matter of political taste in which way the government gets down to work on it: through subsidizing borrowers, development of infrastructure, deregulation of building or all of this together. But it is important that the government does something to realize the human right to adequate housing.

The problems of the hostel lodgers also remained topical in 2011. It is important to note that due to the existence of this problem, on September 26, 2011 President of Ukraine Viktor Yanukovich approved the law “On Amending Certain Legislative Acts of Ukraine (on improvement of the legal rights of the hostel lodgers)”, which prolonged up to 2015 the opportunity to privatize premises in the hostels. This document also extended the three-year moratorium on condemnation of hostels.

The only problem is that these three years may fly by as three days. And in 2014, these same people will face the same challenge: they will be evicted. Therefore, by itself, extending the moratorium solves nothing.

on the one hand, the law, offers a radical way out of the situation: create a special government program and transfer all hostels to municipal property for further free privatization by inhabitants.

The state-owned hostels or hostels included in the authorized capital of enterprises with the public majority share are to be transferred to municipal property for free. If the state has no share in the company or the share is less than 50 percent, the hostels of such enterprises have to be redeemed. Then people can go over to free privatization.

However, the big problem of this law is that it does not foresee a specific amount of money from the state budget for the transfer. By conservative estimate, such transfer needs UAH 1.2 billion (600 million per every subsequent year).

These funds should be used to something to make the hostels, many of which are in deplorable condition, elementary suitable for living. And thereafter they can be transferred to communal ownership and privatized.

Thus, there exists the legal document allowing privatization of hostels today, but implementation of this law is still very doubtful²³.

²² How not to become homeless? Vasyl Pasochnyk “Dzerkalo tyzhnia. Ukrayina” #37, October 14, 2011 http://dt.ua/ECONOMICS/yak_ne_stati_krayinoyu_bezdomnih-89663.html

²³ V. Matchuk. Three years for hostels: give either/or evict // Ukrayinska Pravda <http://www.pravda.com.ua/columns/2011/09/15/6588602/>

However, much of the hostels together with the enterprises were privatized in the past, and the owners now are trying to evict people from these hostels by hook or crook.

There is an exemplary situation of violation by business owners or managers of human rights of the hostel lodgers in Lviv Oblast. In some cases they try to evict people, in other cases they cut off public utilities, including heating, because of owners' debts²⁴. The Odesa enterprise "Micron" has been dealing with this problem for several years now. Despite the fact that the State Property Fund protects the interests of the lodgers of the hostel belonging to this enterprise, there is still no positive court judgment²⁵.

There are serious problems with ensuring the right to adequate housing for vulnerable population. In particular, there is the issue of compliance with housing rights of orphans and children deprived of parental care.

Thus, according to the Prosecutor General's Office of Ukraine, the local authorities and local self-government bodies do not take measures to save property and homes of children, which are put to children establishments, child care, under guardianship, foster families or children's family-type homes. They fail to control its use, maintenance, guardianship, because of what the premises are left without care, used by a third party free of charge, for other purposes, or ruined.

For example, due to failure of Daryivska Village Rada of Kherson Oblast to preserve the house of orphans, it is in ruins and unfit for habitation.

The agencies of guardianship, while providing consent to the alienation of housing premises or property of children not always ascertain the intention of parents to provide children with equivalent housing or other property, as a result of which the children lose it in contravention of the law.

Thus, the agencies of guardianship of Uzhhorod City Executive Committee of Transcarpathian Oblast failed to check the ability of the family to buy a new home and gave consent to the alienation of the apartment, the right of use of which belonged to two kids. As a result, the family sold the apartment, and did not purchase a new one. Following the objection of the public prosecutor on 20.10.2011 the permission of the executive committee to dispose of the housing premises was canceled. To protect the housing rights of children the public prosecutor initiated consideration of the case and dispossession proceedings.

There are also widespread violations by local authorities and local self-government bodies of the requirements of the Housing Code of Ukraine on providing housing to orphans and children deprived of parental care²⁶.

In addition, it is important to note that virtually no public programs are working properly to provide affordable housing for young people. The program providing young people with housing in 2002–2012, initiated by the state and aimed at improving living conditions for young families, was botched by the state. In particular, such was the conclusion of the Chamber-of-Accounts' Board on the audit of the effectiveness of state programs intended to provide young people with housing premises.

Thanks to the Foundation for Youth Housing for 2002–2010 annually the housewarming parties were given only by 2.8% of young families who were on the housing register²⁷.

The auditors take note of the fact that in nine years the state program providing young people with housing premises for 2002–2012 was underfunded from the budget for more than UAH 790

²⁴ The Lviv Oblast State Administration promises to solve the problem of hostel lodgers whose rights were violated <http://zik.ua/ua/news/2011/10/20/315149>

²⁵ New business owners do not want to give hostels to residents for nothing—Tsar'kov http://www.golosua.com/ua/main/article/politika/20110921_novyie-sobstvenniki-predpriyatiy-ne-hotyat-otdavati-obshejitiya-jitelyam-za-bestsenok-tsarkov

²⁶ The Prosecutor General's Office of Ukraine and its bodies protect housing (property) rights of children http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=98799

²⁷ Chamber of Accounts of Ukraine: this unavailable "affordable" housing <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16736481>

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million, and the volume of commissioned housing made up only 12% of the target figure; as a result three thousand young families did not get an apartment.

“Especially hopeless is the situation of youth in rural areas where only two families got housing premises, as well as among scientific pedagogic and teaching staff. For this period were only 132 people, or 0.5%, had a stroke of luck and got preferential bank loans. No conditions were created for the development of youth housing complexes and sociotechnopolicies.”

The Chamber of Accounts notes that the projects were frozen due to poor management of funds and resources by the fund and its supervisory board of investments to the tune of UAH 140 million and construction credits.

Solving the housing problem of young people, projected by the Government, remains a dream. The inability of the state to help young people to solve the housing problem reduces confidence in the effectiveness of public administration, creates social tension²⁸.

3. THE RIGHT TO SOCIAL PROTECTION

3.1. THE SYSTEM OF SOCIAL PROTECTION AND SOCIAL SECURITY

From the Soviet Union Ukraine inherited the system of benefits and privileges, which now creates a precarious situation. It is no coincidence that in the European Community our country is called “the country of benefits.” The eligibility to benefits in Ukraine is regulated with 50 normative legal documents which are constantly amended and the number of which increases. The total of beneficiaries has reached 13 million and more people who are eligible for benefits on social basis and about 3.2 million on professional one.

This indicates that almost half of the population of Ukraine is entitled to benefits. There is an overall amount of 600 privileges that need more and more money every year, which is a significant burden on the budget and prevent satisfying other needs. Both Soviet benefits, and ill-conceived new ones not only very fail to solve problems of social protection, but create social tensions and inequities. The parliament keeps registering new initiatives that are not aimed at adjustment, but at haphazard and financially uncovered increase in benefits. The standard of living of the population in Ukraine is going down, and various benefits prevent modern system of social protection from tackling the issue²⁹.

In this context, an important way of benefits reforming in Ukraine is to increase the efficiency of providing benefits and increased targeting. However, targeting now is out of the enquiry, because there is no targeting at all when determining benefits, but benefits are reaped by all representatives of a certain category of citizens.

Instead, each year the government stops certain legal provisions on privileges. Thus, in recent years, the Verkhovna Rada of Ukraine, periodically adopting the law on state budget for the relevant year, tends to stop many regulations establishing certain benefits and compensations to some categories of citizens.

2011 was no exception. On June 14 the Verkhovna Rada of Ukraine adopted changes to the law of Ukraine “On State Budget for 2011.” According to paragraph 4 of the Final provisions of this law in 2011, the rules and regulations of many laws of Ukraine, which define that the amount of social guarantees for Chernobyl disaster fighters, servicepersons, children of war, and veterans is paid in

²⁸ Chamber of Accounts of Ukraine: this unavailable “affordable” housing <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16736481>

²⁹ Truth and myths about benefits reforming in Ukraine. Center for Public Advocacy <http://cga.in.ua/fckfiles/Pravda-Mify1.pdf>

the manner and amounts set by the Cabinet of Ministers of Ukraine based on available budgetary financial resources of the Pension Fund for 2011. This means that it is the government that annually shall have the right to establish specific dimensions of individual payments to vulnerable population groups depending on the financial situation in the country.

The Law of Ukraine “On State Budget for 2012” also contains legal provision determining that the regulations concerning social security of Chernobyl disaster fighters, children of war, veterans are realized in the manner and amounts set by the Cabinet of Ministers of Ukraine within available financial resources of the State Budget of Ukraine and budget of the Pension Fund of Ukraine for 2012.

In fact, this is a narrowing of the content and scope of rights to ensure an adequate standard of living, which is prohibited by Article 22 of the Constitution of Ukraine. It is noteworthy that for a considerable number of Ukrainian citizens the appropriate privileges, compensations, and guarantees make an addition to the main sources of livelihood, necessary component of constitutional right to ensure the standard of living.

The Constitutional Court of Ukraine awarded its decision and noted that the State by special laws of Ukraine introduced some social benefits, compensations, and guarantees that were a part of the constitutional right to social protection and legal means of exercising this right, they were mandatory, and equally had to be followed by the government, local self-government bodies and their officials. Failure of the state to fulfill its social obligations concerning certain individuals puts citizens in unequal conditions, undermines the credibility of a person to the state that naturally leads to violation of the principles of social rightful state. In addition, many benefits, introduced by the law of Ukraine “On Militia”, “On public procurator’s office”, etc., are not privileges, but guarantees and other means of professional activity of certain categories of citizens, effective functioning of certain agencies.

This position of the Constitutional Court of Ukraine was determined by the need to protect current conditions in the interests of many citizens who are deprived of benefits and really get nothing in return from the state and will stay in poverty.

Therefore, given the above, in mid-2011, the deputies of the Verkhovna Rada of Ukraine made constitutional representation to the Constitutional Court on the unconstitutionality of these amendments to the law on state budget for 2011.

However, in its decision No. 20-rp/2011 of December 26, 2011 the Constitutional Court of Ukraine made a decision which changed its approach to the assessment of the capabilities of the state to limit the socio-economic rights and actually empowered the Cabinet of Ministers of Ukraine to set the size of social safety in manual mode.

Particularly, the Constitutional Court applied a proportionate approach in assessing the prescribed limits. This approach boils down to ensure that the legislator in making laws regarding the protection of social rights should follow the principle of proportionality between social protection and financial capabilities of the state, between the interests of each individual and the state as a whole.

One should look at the fact that this approach contradicts almost all previous practice of this court in similar cases. Many experts opine about doubtfulness of this approach.

In particular, they say that being guided by the constitutional principle of separation of powers; the Constitutional Court of Ukraine should avoid judicial law-making, substituting of their decisions for existing regulations or create new ones. The Constitution of Ukraine does not contain instructions for restricting human and civil rights in the event of insufficient financial resources. Therefore, having recognized the constitutionality of this limitation, the Constitutional Court will primarily legitimize provisions not provided for by the Constitution in violation of the requirement of art. 64 of the Basic Law. Secondly, according to European researchers, the practice of constitutional courts should avoid institutionalization of certain structures of social rights: the constitutional justice should focus not on the total system, which guarantees the protection of social rights, but on protection of social rights as the final product. The legislator has the freedom of system choice, while the court only checks the product of the system from the point of view of realization of such rights³⁰.

³⁰ A. Blankenahel. Constitutional courts, social rights and social state // *Constitutional Right: East European Review*. — 2003, No. 1, p. 42–44.

XVI. SOCIAL AND ECONOMIC RIGHTS

It is important to say that this decision of the Constitutional Court of Ukraine virtually eliminates the possibility for people in court to defend their social and economic rights, in volume defined by laws.

There were concerns over the “intentions” of the state to reform the system of privileges and protections by empowering the Cabinet of Ministers of Ukraine to set in manual mode the specific amount of benefits depending on the financial resources of the state. These “intentions” were outlined in the government bill #9127 “On state guarantees for the enforcement of judgments,” which was actually twice submitted to the Verkhovna Rada of Ukraine in January and in September 2011.

And if the first time this bill was not even considered at the assembly meeting of the Verkhovna Rada of Ukraine, the second time, on September 9, 2011 the Parliament adopted the document as a basis.

But in the context of the Constitutional Court ruling No. 20-rp/2011 on December 26, 2011 the challenge issued by the government, including the possibility of manual control of social guarantees, was already met. Therefore, there emerged a danger that the Cabinet of Ministers of Ukraine would use its normative legal instruments to reduce the size of social security specified in the law and to save financial resources of the state. And people will actually have no opportunity to defend their right to these guarantees.

Thereby the state creates a myth that there is a real reform of benefits based on social justice, myth that Ukraine implements the state policy in the social sphere. Instead, in Ukraine there is no public thought-out social policy, there is no proper coordination among the authorities responsible for its implementation, particularly among the Verkhovna Rada of Ukraine, the Government and the Ministry of Social Policy of Ukraine; as a result there is no coordination among bodies of power. For example, the Cabinet of Ministers of Ukraine adopts the Strategy of adjustment of the the system of granting privileges to certain categories of citizens by 2012 establishing a moratorium on the introduction of new categories of benefits, the Verkhovna Rada of Ukraine periodically passes laws implementing new exemptions; however, the Ministry of Social Policy of Ukraine does not know how to execute the above strategy and practically does nothing for its adoption³¹.

The state has no overall vision of the problem making it impossible to achieve social justice in public policy in the social sphere. Instead of a consistent reform of benefits, the state from time to time takes chaotic inconsistent steps in this area: it may pass a law on benefits, and it may actually revoke privileges empowering the Government of Ukraine to establish their sum depending on the financial situation in the country. These contradictory actions by the legislative and executive powers destroy coordination among local bodies of power responsible for local policies in the social sphere.

In addition, it is important to note ineffective spending of budget funds to finance benefits. The State declares the effectiveness of the current system of benefits which is able to provide at least a minimum standard of living for recipients of benefits. However, the main sources of financing of those benefits are national and local budgets. Some of these costs bear on enterprises, where the preferential categories of citizens either worked in the past or work now, and enterprises providing utility, transportation and other services. But the amount of money needed to fulfill social obligations is actually enormous. Therefore, the benefits are often underfunded, or other areas of public life remain underfunded donating redistributed costs to fund benefits.

In general, the national budget cannot withstand such a load numerous benefits that exist in Ukraine. The lack of funding leads to reduction of social and economic rights of citizens³². So, very often the recorded benefits are nothing but declaration. This, in turn, gives people the opportunity

³¹ Truth and myths about benefits reforming in Ukraine. Center for Public Advocacy <http://cga.in.ua/fckfiles/Pravda-Mify1.pdf>

³² Truth and myths about benefits reforming in Ukraine. Center for Public Advocacy <http://cga.in.ua/fckfiles/Pravda-Mify1.pdf>

to set up defense of their right in national courts and, in case of failure, to take a review against such judgment in the European Court of Human Rights.

This way, the existing system of benefits does not render social assistance to the poor and is too great a burden for the state budget. The government is trying to secretly reform these benefits, but the absence of sound public social policy does not help.

3.2. GUARANTEES OF SOCIAL SAFETY OF ELDERLY PERSONS

First, it should be noted that the amendments to pension legislation attracting criticism by trade unions, opposition and researchers³³ and undergoing a long discussion were at long last introduced into Ukrainian legislation in 2011.

On July 8, 2011 the Verkhovna Rada adopted the Bill of Ukraine “On measures to ensure legislative pension reform” in second reading, and on September 6 introduced clarity, which was called “technical”. Although there is still appeal investigation of these “technical” adjustments underway, the majority of changes to pension legislation came into force on October 1, 2011.

Therefore, Ukraine actually introduced quite strict system of pension provision as a choiceless mechanism to ensure its balance, in contrast to the wide arsenal of socially neutral and economically reasonable measures that could enlarge the base of pension income.

Despite all objections Ukraine begins phased retirement age increase for women from 55 to 60 years. There remains rather strange approach to retirement during the transition period that smiled upon pensioners born from 1956 to 1961. Under to pension legislation, the increase for these women will take place at a rate “six months twice per year”³⁴.

They tried to sweeten the pills. For women born before December 31, 1961, the pension calculated by the formula increases by 2.5% for each six months during later retirement in the period from 55 to 60 years.

Unfortunately, this is less than peanut incentives for later retirement foreseen in the Law of Ukraine “On measures to ensure legislative support for pension system reforms” for 60 years of age (for both men and women): 0.5% for each full month of insurance record for deferment of retirement for 60 months and 0.75% — if the delay exceeds 60 months.

It should be noted that increasing the retirement age for women to 60 years is ill-adapted to the constitutional provision, under which the adoption of new laws or amending existing laws shall not diminish content and scope of existing rights and freedoms (Article 22 of the Constitution of Ukraine).

Also, the changes to pension legislation immediately increase for ten years the normative duration of insurance record for pension: from 20 to 30 years for women and from 25 to 35 years for men. This provision covers only new pensioners.

Also increases the minimum insurance record for the old-age pension — from five to fifteen years. The person with minimum insurance record can apply only for social assistance.

The law introduces the maximum scale of pension (including increments, promotions, additional pension, target cash benefits, pensions for special merits before Ukraine, indexing and other payments to the pension established by law, except for extra increments to certain categories of persons who have special merits before Motherland) at 10 living wages for the disabled. This rule will affect only those, who will retire after the Law goes into effect, i. e. after October 1, 2011.

So, now there will be privileged pensioners not only depending on which law — general or specific — they they were granted their pensions, but the date of application for pension as well. Such a restriction violates the principle of equal treatment of insured persons liable to receive pension

³³ Ukrainian Helsinki Human Rights Union. Annual Reports on Human Rights <http://www.helsinki.org.ua/index.php?id=1298358010>

³⁴ Natalia Betina. Costly pension,— “Dzerkalo tyzhnia. Ukrayina”, No. 34, September 23, 2011 http://dt.ua/ECONOMICS/doroga_pensiya__-88389.html

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benefits and fulfillment of obligations regarding payment of insurance premiums for the compulsory state pension insurance.

Also, the changes affect special pensions, in particular, they will increase the retirement age for men having special merits to 62 years, the sum of special pension is reduced from the current 90 to 80% of the wages and working pensioners having special merits will get their pension in the sum of conventional one.

Painful is the issue of pension modernization. This problem is aggravated at intervals of three or four years, and until now in Ukraine there is no effective system of pension indexation³⁵.

The existing law regulating the determination of the salary for retirement involves modernizing income of persons at the time of their application for pension. But the use of the index of average salary for three calendar years preceding the application changes the very essence of the approach to the determination of earnings for pension calculation and leads to an artificial lowering of it.

The amendments to pension legislation pay a lot of attention to the second (compulsory savings) level of pension system. But this does not mean that Ukraine is about to introduce it.

The issue of mandatory system of compulsory savings may need more time to tackle than the pension reform.

It should be noted that the main messages since discussions at the end of 2010 remained unchanged. The implementation of mandatory accumulation system in Ukraine is planned from the year which will grant the non-deficit budget of the Pension Fund of Ukraine. the question remains open whether it will be 2013 and or 2014, and therefore the state may actually delay the introduction of this system for a very long period of time. In particular, the figures planned in the draft state budget for 2012 testify to a difficult financial situation in the medium term.

The third level of the pension system is based on the voluntary participation of citizens, employers and their associations in the formation of pension savings in order to grant the citizens their pension payments that will be in addition to the pensions of the first and second levels. The principle of voluntary participation significantly reduces or ends government financial responsibility for the minimum acceptable results or compensation for losses (of course, the functions of supervision and control remain). Therefore, the creation of the third level is much easier and usually precedes the introduction of second one.

At the same time in Ukraine, unfortunately, the financial instruments are underdeveloped and may not convert retirement assets into an effective investment resource; there are doubts about the reliability of the mechanisms of protection against inflation and all sorts of abuse.

In general, the non-government pension system existing in Ukraine is very conservative and inflexible: mainly due to tough government regulation. Its implementation is hampered by low incomes of the vast majority of population, lack of transparency and lack of confidence, and underdeveloped market infrastructure. In the present situation the society and the state must determine socio-economic priorities, particularly on the prospects of non-government pensions³⁶.

4. RECOMMENDATIONS

1. To reform the system of social benefits: to discriminate between legal norms granting social and economic rights, and those that provide certain privileges in connection with holding certain positions or particular merits.

2. To stop non-compliance with the legal norms granting realization of socio-economic rights.

3. To provide full funding of legal guarantees of adherence to social and economic rights.

³⁵ Natalia Betina. Costly pension,— “Dzerkalo tyzhnia. Ukrayina”, #34, September 23, 2011 http://dt.ua/ECONOMICS/doroga_pensiya__-88389.html

³⁶ Belenkaya Yu.Ye. Non-government pensions in Ukraine <http://libfor.com/index.php?newsid=82>

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4. To improve the calculation of the minimum of subsistence, in particular, to adopt a new set of food and a set of non-food goods and services, to adopt a new methodology for calculating this indicator.

5. To annul such index as “the level of provisions for the minimum of subsistence,” which groundlessly reduces minimal social guarantees stipulated by law.

6. To improve regulation of food quality and safety and quality of drinking water.

7. To make arrangements for affordable housing, prevent arbitrary eviction from housing premises (e. g., hostels), violation of rights to housing affordability for vulnerable groups.

8. To ensure adequate funding and clear and effective mechanisms for implementing of programs intended to provide social housing, as well as development of a network of centers for reintegration, social hotels for homeless.

9. To improve social protection of vulnerable population in connection with the increase of tariffs for utility services, in particular, the functioning of transparent and efficient system of utility benefits and subsidies.

10. To gradually reduce the share of direct government funding of social needs and to increase the share of funding by residents based on the increase of all incomes, especially wages, pensions and other social transfers.

11. To implement uniform targeted social assistance in the event of unforeseen circumstances in life: death of a relative, serious disease, natural disaster, and social conflicts.

12. To harmonize social benefits and sources and mechanisms for reimbursement of their cost to providers.

13. To implement a uniform approach to determining government expenditures on reimbursement to providers of special benefit.

14. To go on reforming the pension system through the introduction of legislation on the accumulation levels of this system and create the conditions for this.

15. To avoid discrete increase in the minimum pension; introduce indexation rules for pension increases tied to CPI calculated for groups with different incomes.

16. To improve regulation and supervision of non-government pension funds, taking into account international experience and advice.

17. To guarantee the execution of judgments of national courts on social assistance payments, where the State is the defendant.

XVII. THE RIGHT TO WORK¹

1. OVERVIEW

The right to work is one of the basic rights that define the possibilities of human progress and self-realization. It is extremely important for the state to create conditions for respect for this right and for its protection in the best way possible.

However, once again we have to recognize that the state is far from granting this right; it has systemic problems with almost all its elements and cannot improve the situation.

In particular, there are serious employment problems, when the official level of registered employment does not reflect the real situation and the level of hidden unemployment is high. In fact, vacancies are low-paid jobs and job-seekers cannot feed themselves and their families. The unemployment benefits do not provide the minimum conditions for human survival.

Equally important is the problem of the lack of decent payment for labor. It is difficult to talk about reproductive, motivating and social role of wages, if the major part of Ukrainians draw salary below minimum wage, and, according to official figures, half of the people get below UAH 2,000. Moreover, almost half of the income consists not of wages, but of certain social benefits. And if in this context we consider the problems of adequate subsistence level and, correspondingly, the minimum wage, the situation looks even grimmer.

In the meantime the government cannot solve the problem of the Unified tariff, especially on the low minimum wage in this system, and the problem of repayment of wage arrears, which exist in Ukraine. All this, as well as continuous violations of the rights of workers in enterprises, organizations, and institutions of all forms of ownership lead to a significant weakening of the protection of labor rights.

The occupational safety also remains one of the thorny problems. In Ukraine, there remains a high level of occupational injuries, including death, and many occupational diseases. The performance of the state in the field of prevention of injuries and ensuring acceptable sanitary conditions is rather poor.

There also remain vulnerable workers working abroad. Currently the state pursues an ineffective migration policy; in fact, there are no effective mechanisms of migration records, which would provide real information on the number of migrants. In many cases there are no bilateral agreements on the protection of social and labor rights of migrant workers with receiving countries. Some of the important international conventions in this area have not been ratified by Ukraine.

In the context of numerous violations of the right to work the activities of trade unions as organizations aimed at protecting migrant workers' rights acquires special importance. Unfortunately, this year the state, instead of backing the activities of these organizations, tried to limit their influence and create barriers to some trade unions. However, the lack of sufficient accord within the trade unions led to uncoordinated efforts and lack of effectiveness of their actions.

¹ Prepared by M. Shcherbatiuk, UHHRU.

2. GUARANTEEING EMPLOYMENT

The employment market remained volatile in 2011. Although the number of vacancies increases for many positions, the employment crisis is still there. In particular, the current average demand rate makes 0.7 (i. e. 100 CVs per 70 vacancies). And in the short term the number of applicants will remain bigger than that of vacancies. In such circumstances, the employers are not motivated to open new jobs, rather quite the contrary.

At the same time, according to official statistics, the labor market is in no danger. As of early summer the employment centers registered 565,912 persons, while between January and May this year the employers registered with the employment centers 589 thousand vacancies.

According to the portal rabota.ua, the number of vacancies in the first half of 2011 has doubled. However, the problem is that demand is unevenly distributed by region, and not everybody can take advantage of vacancies.

Thus, 78% of vacancies in the country for the product manager propose jobs in the capital. The share of Kharkiv, Donetsk, Dnipropetrovsk, Odesa and Lviv is 17%. The share of other regions is only 5%. The web programmers are most needed in Kyiv (49%), Kharkiv (11%), Dnipropetrovsk and Lviv (8% each), Odesa (6%), and Donetsk (4%). All other regions account for 14% only².

The structure of employment also does not meet modern requirements. Almost every third worker goes into trading business. 60% of all marketing jobs relate to Kyiv. Other 30% make the share of other cities with a million and more inhabitants. All other towns make 10%.

Therefore it is important to note that in Ukraine there is no effective mechanism to determine the need for human resources. Many functionaries consider the state order for training as a way of redistribution of budget money.

According to experts, including Olexiy Zvolinsky, senior partner of GP Group, the quality of labor market information is insufficient. They only quantify the need for specialists, while there are no methods of centralized quality data collection (i. e., qualification requirements, knowledge, and skills requirements for specific positions). As a result of modernization of production, today even locksmiths have different specialization. Moreover, the definition of quality characteristics of specialists for the needs of economy is in the jurisdiction of the Ministry of Education, Science, Youth and Sports of Ukraine, which has no mechanisms for such data collection.

According to O. Zvolinsky, the problem is that in Ukraine the connection among government agencies, businesses and actual population is broken. The data of the State Statistics Committee do not reflect the real state of things.

“The labor market data are sent from the employment centers to the SSC, from there to the agencies and ministries, including the Ministry of Economy, which forms the state order for training of specialists, and then it is sent to the Ministry of Education, Science, Youth and Sports of Ukraine, which, in its turn, sends its order down to universities. The initially corrupted data are edited (and altered) in corresponding agencies; therefore the final number of needed specialists is distorted,” explained the expert³.

The lack of effective mechanism for determining the need for specialists is closely related to the problem of growing unemployment among young people. Almost one in five (18.8%) Ukrainians aged 15 to 24 does not work anywhere and does not study, according to First Deputy Minister of Labor and Social Policy of Ukraine Vasyl Nadraha.

² Nadiya Hotsuyenko “Weak sections of labor” “Dzerkalo tyzhnia. Ukrayina”, No. 34, September 23, 2011 http://dt.ua/ECONOMICS/slabki_lanki_trudovogo_lantsyuga-88388.html

³ L. Surzhyk, O. Onyshchenko “Top secret state order” “Dzerkalo tyzhnia. Ukrayina”, No. 33, September 16, 2011 http://dt.ua/EDUCATION/strashenna_taemnitsya_derzhzhamovlennya-87981.html

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In Ukraine, every third young person, who wants to work, cannot do it. The results of some polls even maintain that the fifth part has lost confidence that it can apply its efforts somewhere. According to statistics, Ukraine is second on the European list of youth employment decline⁴.

Salary is also a weak point in employment. The recruiters unanimously maintain that, although the correlation between the vacancy and sent resumes opens great opportunities for employment, there are thorny problems of fees. The demand for professionals goes back to 2008 figures, while the salary offered in most cases is lower than before.

The recent studies have shown that 72% of respondents are very dissatisfied with their salary levels, 18% — dissatisfied, 6% — partially satisfied and only 4% — are satisfied. The most dissatisfied with their salaries are teachers, municipal officials, doctors, recruiters, office workers. Low wages can explain the lack of correlation among the labor market indicators. So, the survey of the labor market in the Eastern region of the country shows that nearly 40,000 people of working age have no income for five years already; it makes almost 20% of the total working population. Of course, they are not registered with the employment centers and make some money on the side. According to the rabota.ua portal, 87% of respondents would like to train for a new profession, and fee is the main motive of this desire⁵.

It is noteworthy that one third of respondents indicated the desire to change the scope of activity, since the present work prevents achieving the desired level of income. And the situation is not improving at that. Of course, it became unacceptable in 2011 to have the same income as in 2008, while inflation doubled during that time. Moreover, as the candidates for vacant places maintain, the new job, following the personnel cut, introduces much more official responsibilities.

Similarly, in the context of employment, we cannot avoid the existence of hidden unemployment in Ukraine. Very often the official statistics show only the top of the iceberg. There are numerous cases of involuntary underemployment, particularly on leave without pay, or of part-time work. According to official data of the State Statistics Committee, there are more than 300,000 such people⁶ and the real figures are much higher. Moreover, many people work in the informal sector (natural farming, non-permanent making some money on the side in the city. even the President of Ukraine acknowledged this problem mentioning the hidden unemployment increase⁷.

It should be noted that it looks like the employment problems are not a priority for the government. According to analysts, the labor market lags behind the real economy for two or three years. And they started imposing order on the country in those areas and in such a way that employment not only failed to increase but went down (it would suffice to have a look at business climate). The minimization of losses caused by the crisis does not smooth the problem of employment and aggravates it. The cuts in administrative staff, the so-called network optimization in education and health care, adoption of pension code, narrowing of self-employment opportunities, which greatly increased the insurance record, aggravate the situation even more.

3. STATE AID TO UNEMPLOYED

In 2011, in Ukraine, they continued ignoring the legal provisions of the Law of Ukraine “On the State Social Standards and State Social Guarantees” and the Law of Ukraine “On Compulsory State

⁴ Vasyll Nadraha “How to hire the lost generation” “Dzerkalo tyzhnia. Ukrayina”, No. 30, August 26, 2011 http://dt.ua/POLITICS/yak_pratsevlashtuvati_vtrachene_pokolinnya-86778.html

⁵ Nadiya Hotsuyenko “Weak sections of labor” “Dzerkalo tyzhnia. Ukrayina”, No. 34, September 23, 2011 http://dt.ua/ECONOMICS/slabki_lanki_trudovogo_lantsyuga-88388.html

⁶ The data of the State Statistics Committee <http://www.ukrstat.gov.ua/>

⁷ Yanukovych called for tougher control of wages in envelopes http://news.dt.ua/ECONOMICS/yanukovich_zaklikav_posiliti_kontrol_zarplatami_v_konvertah-87906.html

Social Unemployment Insurance” stipulating that the amount of such aid cannot be lower than the subsistence minimum for able-bodied person.

Although the sum of the aid increased in comparison with 2010, but this UAH30-50 increase did not solve the problem and in Ukraine the minimum unemployment benefit is still less than the subsistence minimum.

Thus, the payments to persons duly qualified as unemployed were as follows: as of January 1 — UAH 510, April 1 — UAH 520, October 1 — UAH 534, December 1 — UAH 544, and for insured persons : as of January 1 — not less than UAH 714, April 1 — no less than UAH 729, October 1 — not less than UAH 748, 1 December — no less than UAH 762, but not above the existing average wage for all types of economic activities in the relevant field for the last month. At the same time, in 2011 the living wage made as of January 1 — UAH 894, April 1 — UAH 911, October 1 — UAH 934, and as of December 1 — UAH 953.

4. ENSURING DECENT WORKING CONDITIONS

The work force in Ukraine is the cheapest in Europe. The salary of 6% of Ukrainians is below UAH 960, which is less than the minimum wage. The salary of almost half of Ukrainians is below UAH 2,000. Only 15% of population draws the salary of UAH 4,000 and more. Every year, the official income of Ukrainians goes down, according to the State Statistics Committee. The workers in fisheries and agriculture get the lowest wages. The financiers, industrialists and professionals in real estate draw higher salaries. The Chernivtsi, Vinnytsia and Ternopil oblasts remain the poorest. according to the State Statistics Committee the richest people live in the Eastern Ukraine and in Kyiv.

DISTRIBUTION OF THE NUMBER OF EMPLOYEES ACCORDING TO THEIR WAGES FOR SEPTEMBER 2011 (CUMULATIVE)

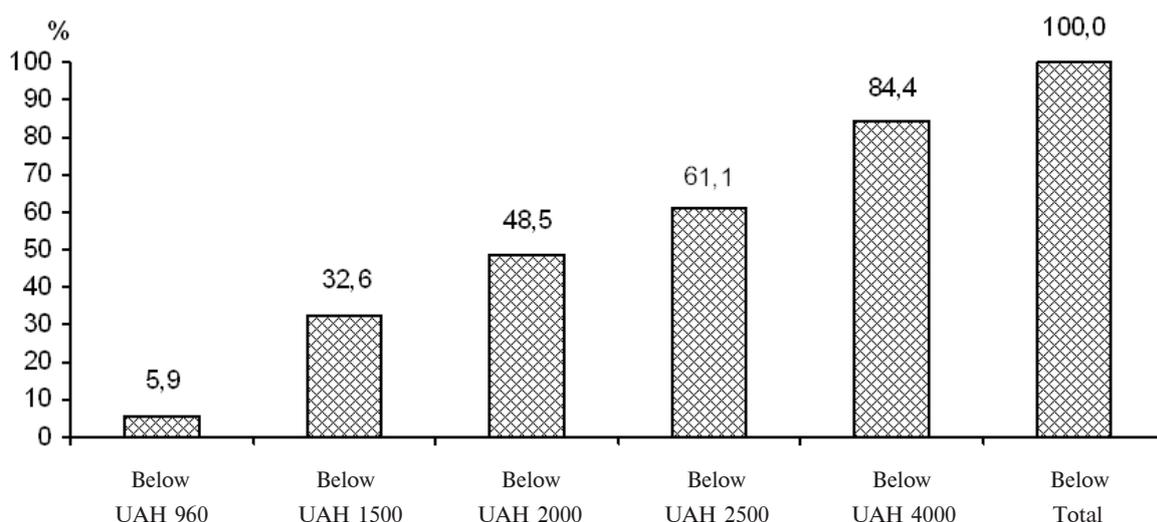


Fig. 1. Average number of employees by salary

The experts maintain that the cheap labor is one of the key factors of competitiveness of national economy, which is unacceptable for the European state.

In fact, the share of wages in the cost of Ukrainian products is very low — about 10%, whereas in developed countries it reaches 40% and more.

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Of late the matter has been rarely thrashed out, though official figures of the State Statistics Committee for 2011 indicate that the situation has worsened. In the first quarter of 2011 the structure of the transaction costs of sales was as follows:

- material costs: 28.4%;
- cost of goods and services purchased for resale and sold without further processing: 53%;
- amortization: 2.9%;
- labor costs: 5.9%;
- social contribution: 2.1%;
- other operating expenses: 7.7%.

So, the share of wages made only 5.9%, and with deductions to social funds, which are proportional to wages, only 8%.

By industry, the share of wages in total operating cost of production sales made as follows: industry — 7.7%, agriculture — 25.5%, construction — 7.7%, trade — 1.8%, hotel and catering industry — 20.1%, transport and communications — 17.3%, financial activities — 1.2%, real estate — 7.4%, education — 40.5%, medicine — 26.4%, and public utilities — 26%.

And in the last two years the share of wages in the cost of Ukrainian goods continued to drop. During the first quarter of 2011 it made 5.9%, while the same for 2010 was 6.3%, and 2009 — 6.8%⁸.

One way of increasing the share of wages in the self-cost consists in priority increase in wages compared to the rate of increase in self-cost and disposal price of products.

That is, the faster is the increase of real inflation-adjusted wages, the greater becomes its share in the self-cost of domestic products. In this respect the situation in Ukraine is not the best one: the real wages growth retardation has become a trend now.

Thus, in March 2011 as against the corresponding months of 2010, real wage growth was 11.3%, in April 9.7%, and in May only 5.2%. So, in three months the growth rate of wages more than halved.

If for the sake of calculation we use not the official inflation, probably greatly underestimated, but a real one, there may be even fall in real wages.

Clearly, the Ukrainian business owners only welcome such dynamics of real wages. The quick-growing salaries of employees reduce the profits of companies and hit tycoons in their pocket.

In turn, the State does next to nothing to increase the share of wages in production self-costs, and therefore this negative trend continues.

It is noteworthy that wages still makes just over 40 percent of population's incomes (Figure 2). That is, in fact, the motivational function of wages as the main component of total wage and salary income of population has been lost.

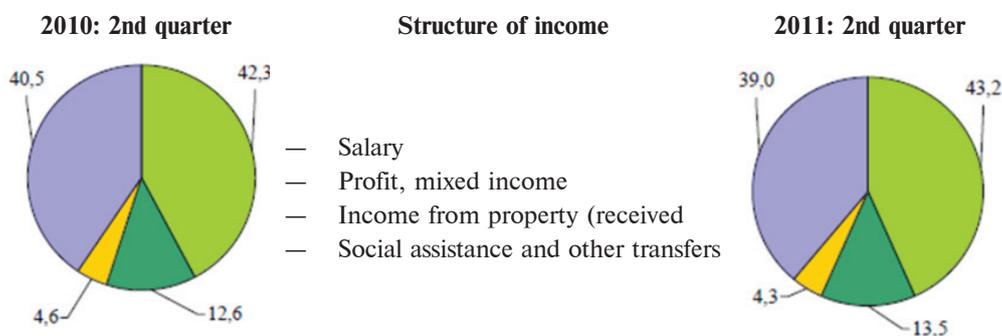


Fig. 2. Structure of revenues naselelnya⁹

⁸ Ekonomichna pravda "Salaries of Ukrainians: from bad to worse" http://www.epravda.com.ua/columns/2011/07/6/290916/view_print/

⁹ The data of the State Statistics Committee <http://www.ukrstat.gov.ua/>

There have remained thorny issues of the level of wages in the public sector. This was also recognized by the Verkhovna Rada Committee for Social Policy and Labor, who noted in 2011 that the government decisions led to the destruction of the tariff system in the public sector and wage leveling, and that the objectives of introducing a single tariff were not achieved.

Now the category of the poor includes educated, qualified and skilled full-time workers (employees of budgetary institutions and organizations of education, culture, science, health care, social workers, civil servants, engineers, etc.). Because of low salaries and pensions they have no opportunity to feed their families and provide them with necessities under conditions of rapid rise in prices and tariffs¹⁰.

For example, the teachers' salary does not correspond to the average for industry as defined by law. This past March the teachers went on a protest against the manipulations with the wage rates distribution. In connection with these rallies the officials promised to solve this problem. However, the analyses of indicators for 2011 shows that the hopeful promises are mere words¹¹.

As of September 2011, the first wage category from which, multiplying by coefficients corresponding categories, they count the teacher's salary and get UAH 641, which is significantly below the minimum wage to the tune of UAH 960. That is the manipulations with the wage rates distribution are going on. By the end of 2011, the first wage grade had to go up to UAH 704, which again was below the minimum wage.

There was also a problem with accrued payroll. According to the Ministry of Social Policy, the Ukrainian employers owe their subordinates UAH 1.1 billion as of September 2, 2011. According to State Statistics Committee, the overdue wages continued to mount as of October 1, 2011 and made UAH 1.180 billion¹².

More particularly the rights of employees are violated at the small enterprises with less than 50 employees. According to Andriy Cherkasov, Head of the State Service on Labor, the violations of labor legislation happen the oftenest at the restaurants, hotels, construction and agriculture¹³.

However, there are many cases of arrears and inefficient actions of the state at the state enterprises. Specifically, in September 2011 the Prosecutor General's Office of Ukraine carried out inspections of eight central executive bodies reviewing the observance of labor legislation at the state-owned enterprises related to their jurisdiction. As a result of this inspection the Prosecutor General's Office of Ukraine established that the indicated central authorities failed to ensure proper control over the timely payment of wages at the subordinate enterprises.

For example, the inspectors found that the arrears of wages to economic players that were subordinate to the Ministry of Agriculture and Food of Ukraine since the beginning of the year rose to UAH 25.3 million, and to the Pension Fund of Ukraine up to UAH 40.2 million¹⁴.

All this shows that the activities of the state to reduce debt in many cases are ineffective.

¹⁰ The Committee on Social Policy and Labour found unsatisfactory the work of the Cabinet of Ministers on implementation of the Decree of the President of Ukraine "On Urgent Measures Intended to Eliminate Poverty" http://portal.rada.gov.ua/rada/control/uk/publish/article/news_left?art_id=259301&cat_id=37486

¹¹ Liliya Hrynevych "Like salary, like education" "Dzerkalo tyzhnia. Ukrayina" No. 35, September 30, 2011 http://dt.ua/EDUCATION/yaka_zarplata__taka_y_osvita-88781.html

¹² Arrears of wages increased by 2,2% http://news.dt.ua/ECONOMICS/zaborgovanist_iz_zarplat_zbilshilasya_na_2,2-90232.html

¹³ Within a month the debt of Ukrainian employers to their subordinates decreased by UAH70 million. http://news.dt.ua/ECONOMICS/za_misyats_borg_ukrayynskih_robotodavtsiv_pered_pidleglimi_skorotivsy_na_70 mln_grn-87755.html

¹⁴ The Prosecutor General's Office of Ukraine continues working to resolve violations of legislation on wages and payment of contributions for compulsory pension insurance <http://www.gp.gov.ua/ua/news.html?m=publications&t=rec&id=98204&fp=131>

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5. GUARANTEES OF JOB SAFETY

The guarantees of job safety are a problem for Ukraine. The situation with the state of occupational injuries in Ukraine during the last two years remains alarming. During 2009–2010, they registered 28,813 accidents, of which 24 319 (84.4%) related to production. 2,634 accidents (9.1% of all accidents) had fatal consequences, but only 41.3% of them were associated with production.

According to official data of various departments of the State Inspectorate for Mining Industry, the overall injury rate went slightly down¹⁵. However, even the official statistics show the increase of this index in many areas. In particular, the incidence of fatal injuries in the coal industry of Ukraine for 9 months of 2011 increased by more than 20% compared to the same period in 2010. During this time, at the Ukrainian coal mines there were 3218 cases of injuries, of which 125 were fatal¹⁶.

Therefore, while the on-the-job traumatism has decreased, the risk remains unacceptable. The growing number of non-occupational accidents and increase of workers' resort to the court testify to concealment of injuries.

The occupational injuries cross the enterprise up to additional expenses and inspections by the supervisory bodies. That is why the administration goes any length to avoid related problems and occupational injuries with the victim's consent are presented as domestic ones.

To avoid liability, the insurers would rather hide the accidents than secure job safety. The employees often play passive and do not take care about their own future being ignorant about their rights and conditions for which their employer is responsible.

Often the wage earners have no labor relations with the employer; therefore the on-the-job injuries are simply not recorded. At the same time, according to experts' estimates, the mortality after the on-the-job injuries among these workers is three times higher than official data¹⁷.

Representatives of the territorial offices of the State Inspectorate for Mining Industry that control the commissions for special investigation of the accidents are also not interested in association of accidents with production, since until recently this figure was the main parameter of their activities.

Therefore, in 2011, we have examples of strange investigations of traumatism. For example, there was a of fatal accident on July 3, 2011, which occurred with the employee N in the central skip pit of the bin trestle of the blast furnace number 3 of the blast-furnace plant of PJSC "Yenakiyev Metallurgical Works." As a result of inspection, the accident was not related to production, and therefore, was not considered an insured event. The Commission, which investigated the case, concluded that the dead person N was at the distance of less than two meters from the dip border without adequate temporary railing, not fulfilling the requirements of State Standard 12.4.059-89 and failed to comply with clause 2.6 of Instruction I-4-80; therefore he himself was to blame for the accident¹⁸.

The incomplete and biased investigation data, especially in the case of investigations of fatal accidents, false conclusions about the causes of injury and death of workers lead to the fact that the results of such investigations produce incomplete (or even formal) list of measures intended to prevent industrial accidents.

By the way, the findings of special investigation commissions virtually are not brought to the notice of labor protection professionals working with other companies, which contributes to the emergence there of similar accidents.

Another problem is that many employees work in conditions that do not meet sanitary standards. Also many people work in conditions that exceed harmful levels. For example, in the Volyn

¹⁵ Analysis of occupational injuries for 9 months of 2011 <http://www.kw.ukrtel.net/tudnop/p220.htm>

¹⁶ In the coal sector the fatal injuries increased by 20% <http://health.unian.net/ukr/detail/225803>

¹⁷ The hidden occupational traumatism and its consequences <http://www.ostrozkarda.rv.ua/index.php?id=357>

¹⁸ "Trade Union News" "Investigation of accidents: who is to profit by it?" http://www.psv.org.ua/arts/Ludina_i_pracia/view-603.html

Oblast of 75,000 workers in industry, construction, agriculture, transport and communications 19,500 people work in conditions that do not comply with sanitary norms. This means that almost one in four Volyn residents works in unhealthy conditions¹⁹.

Another difficult aspect of providing necessary guarantees of safety is that the funds for preventive measures intended to prevent accidents are allocated on the leftover principle. As a result, such precautions in many cases are not taken or are realized ineffectively.

For example, at the roundtable in Chernihiv “On the state of industrial safety, prevention of occupational injuries in the oblast and ways to improve safety management” Deputy Director of Higher Training College in Chernihiv told that due to the existence of unsettled issues at the level of central authorities employees in his educational institution have to undergo medical examinations at their own expense. Also, the college’s list of staff does not include a labor protection engineer, although a large amount of work needs such a specialist²⁰.

In the context of the problems with the financing of measures to improve labor safety it should be noted that the activities of the Fund of Ukraine for Social Insurance against Industrial Accidents and Occupational Diseases also was not effective enough in this area. This was confirmed in the conclusions of the Chamber of Accounts of Ukraine²¹.

The reasons for this state of labor safety are complex. At the regional level, such reasons include insufficient amounts of funding for improving the safety and sanitation in the workplace by both private and public employers, the lack of employers’ liability for breach of legislation on labor safety, total reduction of units and services responsible for labor safety in the administrations at all levels, and dismantling of industrial medicine. Another reason consists in the fact that a significant number of vehicles, machinery, and means of transportation do not meet safety requirements, and their continued operation poses a threat to people. Often, modern production is organized along such lines that workers have to sacrifice protection and safety for high production plan²².

6. STATE MONITORING OF LABOR RIGHTS

In times of economic crisis in Ukraine, the number of violations of labor rights has greatly increased. According to the State Tax Administration, over 95% of employers in Ukraine violate labor legislation²³.

Recently, there occurred a steep rise in illegal sacking, untimely salaries at many public enterprises; the forced unpaid leaves of workers have become a mass phenomenon. The private entrepreneurs do not comply with labor legislation: labor relations are not formalized as prescribed by law, the requirements of the Labor Code on working time and rest periods of employees, conditions, size and timing of payment of wages etc. are violated. Thence the increasing value of monitoring and supervision of compliance with labor legislation.

However, today, the workers’ rights are violated at almost every enterprise, and authorities responsible for securing legitimacy in this area respond but sporadically. Thus, there is an urgent need to reform the system of state control over compliance with labor rights.

¹⁹ In Volyn one in four residents works in in hazardous conditions <http://newspier.net/ua/article/region-ua/3/theme/91?id=206982&date=2011-10-04>

²⁰ Labor safety problems discussed in Chernihiv <http://gurt.org.ua/articles/10243/>

²¹ Chamber of Accounts of Ukraine “Who needs more money: injured persons of industrial accident or enterprises?” <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16737369>

²² Labor safety problems discussed in Chernihiv <http://gurt.org.ua/articles/10243/>

²³ 95% of employers violate labor legislation in Ukraine http://news.dt.ua/ECONOMICS/trudove_zakonodavstvo_v_ukrayini_porushuyut_95_robotodavtsiv-86356.html

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7. PROTECTING LABOR RIGHTS OF MIGRANT WORKERS

The Ukrainians occupy the tenth place among those who emigrate to developed countries. Such is the conclusion of experts of the Organization for Economic Cooperation and Development (OECD)²⁴.

Therefore, for Ukraine the issue of labor migration is a topical one and needs special attention by both the state and public at large.

However, the analysis of current migration shows that today the state is not ready for an effective migration policy, and its possibilities in the field of migration management are very limited or blocked due to imperfections in some cases and lack of appropriate mechanisms of management²⁵.

The active capacity of migration policy depends on many components, especially the availability of reliable information on migration within the country and abroad. It also depends on the pragmatic goal-setting and precise targeting of migration policy, clear vision of tasks that need to be tackled, correct choice of priorities and methodologies to be used for the task.

Unfortunately, a fat lot might be told about the active capacity of migration policy, and, correspondingly, and about the effective protection of migrant workers. Although in 2011, the President of Ukraine approved the Concept of migration policy, the legislative mechanisms regulating migration processes in Ukraine, which would be based on this concept, have not yet been worked out. There is also no mechanism of permanent monitoring of labor emigration.

In addition, Ukraine has not yet ratified the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990. This important international instrument is of great value for Ukrainian migrants outside Ukraine, whose number, according to different estimates, ranges from 5 to 7 million.

Unlike the ratified at the insistence of the Verkhovna Rada Commissioner for Human Rights the European Convention on Legal Status of Migrant Workers (1977), the United Nations Convention applies to all migrant workers, both legal and illegal. And 90% of all migrants outside Ukraine, our countrymen, and inside the country, immigrants, are working illegally. The United Nations Convention for the first time sets out the rights that apply to certain categories of migrant workers and their families, including frontier, seasonal workers, seamen employed on foreign vessels, workers employed in offshore platforms, as well as self-employed workers.

Ukraine's accession to the International Convention for the Protection of the Rights of All Migrant Workers and Their Families is extremely important in the context of the introduction of new effective mechanisms to protect migrant workers' rights, promote more effective protection of rights of Ukrainian workers abroad and foreign citizens and stateless persons, who stay in Ukraine for employment purposes.

Also not ratified is the Convention of the International Labor Organization (2006) on labor in maritime navigation.

In addition, the problem is that there are still no concluded bilateral agreements on social security with the countries in which the number of Ukrainian immigrants is the biggest, particularly with Poland, Federal Republic of Germany, Hellenic Republic, and State of Israel. The agreement on social security with Portugal and Estonia is also not ratified²⁶.

Therefore, the citizens of Ukraine going abroad no longer feel that they are under the protection of their country and any moment can count on its aid.

²⁴ Ukrainian are leaders among migrants in Russia and Poland http://news.dt.ua/SOCIETY/ukrayintsi_-_lideri_sered_migrantiv_u_rosiyi_ta_polschi-84595.html

²⁵ Regulation of Labor Migration. UKRAINE: WAYS AND SOLUTIONS. <http://migrant.org.ua/?p=3859>

²⁶ Speech by First Deputy Minister for Social Policy of Ukraine Vasyl Nadraha at the conference "The Future of Migration in Ukraine" http://www.mlsp.gov.ua/control/uk/publish/article?art_id=134354&cat_id=107177

8. ENSURING THE RIGHTS OF TRADE UNIONS

The situation of trade unions in Ukraine remains rather complicated. 2011 was marked by a number of criminal proceedings initiated by the authorities in connection with the activities of trade unions in Ukraine.

In particular, in connection with this the Joint representative body of all-Ukrainian trade unions and trade union associations for collective bargaining and social dialogue at the national level addressed an official letter to the President of Ukraine about systemic violations of trade union rights, intervention of public authorities and their officials in internal statutory activities of trade unions.

It is noteworthy that the Joint representative body of trade unions unites representatives of 60 national trade unions and trade associations representing over 10 million union members.

The appeal states that the violation of trade union rights in Ukraine has become a routine matter for public authorities who ignore national legislation on the rights of these organizations. The authors give an example of how the Public Service of Maritime and River Transport of Ukraine initiated the establishment of alternative trade unions of workers of maritime transport (united) forcing current union members to join it and how the officials of the Ministry of Education, Science, Youth and Sports of Ukraine illegally demanded from the educational institutions in Kirovohrad Oblast to provide information on the sums of union dues.

The appeal also maintains that the Prosecutor General's Office of Ukraine and its local bodies deserve special concern; for a long time now they have been exerting systematic and coordinated pressure on the Federation of Trade Unions of Ukraine and its member organizations through intervention in the internal activity and persecution of union leaders.

According to Vice Chairman of the Federation of Trade Unions of Ukraine Hryhoriy Osovy, on August 26, 2011 the law enforcement officers accompanied by an armed unit searched the premises of the Federation of Trade Unions of Ukraine, which resulted in illegal removal of all accounts and records and groundless initiation of criminal proceedings. According to him, "they conduct exhaustive checkups of trade union activities, especially the use of their property virtually in all regions of Ukraine. They bring criminal cases before the court, organize trials intended to deprive trade unions of their property which they own for many years on legal grounds."

The Federation of Trade Unions of Ukraine has repeatedly appealed to the Prime Minister of Ukraine, Verkhovna Rada of Ukraine and also to the Prosecutor General of Ukraine demanding to take emergency response measures to stop illegal actions of certain representatives of the Prosecutor General's Office of Ukraine and local prosecution bodies.

According to the Federation of the Trade Unions of Ukraine, all complaints about disregard for the Constitution and laws of Ukraine, international rules of law, court decisions on the legality of ownership of the property of Federation of Trade Unions of Ukraine did not catch on with the top authorities. All attempts by unions to present the background info at the meeting of the National Tripartite Social and Economic Council were not sustained by other social partners, especially administration officials. Unfortunately, the Verkhovna Rada of Ukraine turned down the motion on parliamentary hearings in October 2011 "On the observance of trade union rights in Ukraine, including implementation of the Convention of the International Labor Organization No. 87 "On Freedom of Association and Protection of the Right to Organize"²⁷.

National Correspondent of the International Labor Organization in Ukraine Vasyl Kostrytsia also opines unfavorably about the protection of trade union rights noting "a significant increase in cases of direct interference by the authorities in the statutory activities of trade unions that is a direct violation of the Conventions #87 on freedom of association and protection of organization

²⁷ The Joint Representative Organ of trade unions urges the President of Ukraine to prevent further violations of trade union rights http://www.fpsu.org.ua/index.php?option=com_content&view=article&id=6466%3A2011-11-03-11-07-32&catid=177%3A2011-05-19-06-09-50&Itemid=112&lang=uk

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and No. 98 on the right to association in trade unions and collective bargaining, which back in 1956 were ratified by Ukraine.²⁸

Also, Mr. Vasyly Kostyrytsia noted that on August 15, 2011 the Cabinet of Ministers adopted a Resolution “On creation of the Commission on inventory of the property of all-union public associations (organizations) of the FSU, which had been transferred to their jurisdiction, possession and/or use by a governmental authority of the FSU and the Ukrainian SSR.” The government decision caused concern among the public, as it created the preconditions for violation of the Article 41 of the Constitution of Ukraine. According to the representative of the International Labor Organization, the acts of the Cabinet of Ministers were regarded by the representatives of public associations (organizations) as an attempt to “nationalize” (confiscate) property that belonged to them legally.

“The continued complaints from trade unions to the International Labor Organization testify to the poor quality control mechanisms used by the public authorities to respect fundamental rights and guarantees of citizens to freedom of association in trade unions,” said V. Kostyrytsia.

During the committee hearings on administrative compliance with the trade union rights the experts drew attention to a number of unresolved issues at the legislative level. In particular, following the adoption of the Civil Code of Ukraine and the Law “On state registration of legal entities and individual entrepreneurs” by the Verkhovna Rada the legal conflicts erupted, including the settlement of the issue of legalization of trade unions and their associations and enjoying the status of juridical entity. After the enactment of the Tax Code in January 2011 the tax authorities acquired a right to interfere with the statutory and financial activities of trade unions. They limelighted that the Code allowed the State Tax Administration to file claims for termination of individual primary trade union organizations as legal entities to establish full control over the trade unions’ draft on funds²⁹.

9. RECOMMENDATIONS

1. To increase the size of unemployment benefits up to the minimum subsistence level stipulated by law.
2. To reduce the high unemployment, especially among the most vulnerable people, primarily youth, preretirement persons, and persons with disabilities.
3. To adopt amendments to some laws and remove discriminatory provisions concerning the registration of unemployed rural population.
4. To increase the proportion of wages in GDP and production price.
5. To harmonize the minimum wage as required by the European Social Charter.
6. To ensure effective implementation and differentiation of wages in the public sector through the application of a uniform tariff; to stop the practice of setting salaries (base wage rates. of employee of the 1st tariff category in an amount below the sum fixed by the law on wages.
7. To improve wages in bodies of state power in order to better social protection of ordinary workers, eliminate hidden wages introduced through various bonuses and additional payments that are more dependent on loyalty to the bosses than on productivity.
8. To decrease the arrears of payments in the public sector and arrears of enterprises and organizations of all forms of ownership.

²⁸ Issues of compliance of public authorities with the trade union rights were discussed at the hearing in the Committee on Social Policy and Labor http://portal.rada.gov.ua/rada/control/uk/publish/article/news_left?art_id=286731&cat_id=37486

²⁹ Issues of compliance of public authorities with the trade union rights were discussed at the hearing in the Committee on Social Policy and Labor http://portal.rada.gov.ua/rada/control/uk/publish/article/news_left?art_id=286731&cat_id=37486

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9. To improve the labor safety system in order to reduce occupational injuries and occupational diseases, including emendation of legislation in this area, as well as realization of preventive measures.

10. To improve monitoring of standards and requirements in the field of occupational safety and carry out fast and efficient investigation of the cases of traumatism.

11. To improve the public monitoring of labor rights, develop effective mechanisms to tackle these violations.

12. To conclude bilateral agreements on employment and social protection of migrant workers with the countries, in which our compatriots are seeking jobs and with which we still have no such agreements.

13. To ratify international instruments necessary to strengthen the protection of migrant workers in the area of employment and social protection.

14. To ensure the trade union rights and to promote the development of strong independent trade unionism.

XVIII. THE RIGHT TO HEALTH CARE¹

1. GENERAL OVERVIEW

Despite the principles, spelled out in the Constitution of Ukraine, and international obligations of the state with regards to each person's right to the highest attainable standard of physical and mental health, the Ukrainian health care system fails to provide equal and free access to high quality medical services for everyone.

According to the official data², the situation is as follows:

- Life expectancy for the Ukrainian population is 68.2 years, which is approximately 10 years less than in the EU countries. The factor of children mortality is 2.5 higher than in the "old" EU countries. The rate of premature death is three times higher than the respective indicator in the EU countries; the rate of death from TB is 20 times higher in Ukraine.
- Indigent categories of population suffer from the lack of opportunity to get the necessary medical care. The departmental medicine (i. e. with restricted access) makes the goal of equal access to the services even less attainable.
- The access to medical services in urban and rural areas is incomparable. The burden of fees the public has to pay for medical services is very heavy. According to official statistics the payments, made by public, account for over one third of the whole branch funding (40% in 2008) and are made directly in the process of using health care services.

The Ministry of Health Care of Ukraine and Committee for Economic Reforms under the President of Ukraine point out the following causes of the said problems:

- Lack of connection between the quality of the offered medical services and their funding, as well as lack of motivation among medical staff for providing high quality services;
- Low level of preventive care and, partially, primary care in the total structure of the medical services;
- Inefficient use of budget funds allocated for health care. Per 100 thousand of population in Ukraine there are 5.6 hospitals, while in the EU-10 countries this indicator amounts to only 2.6; number of hospital beds in Ukraine constitutes 868 per 100 thousand of population, while in EU-10 it is only 644; number of physicians per 100 thousand of population in Ukraine is 302 as opposed to 261 in EU-10. 86% of budget funds allocated for health care is spent to maintain medical institutions and to pay doctors' salaries;
- Duplication of medical services at various levels of health care, absence of mechanisms to manage the patients flows at various levels of health care;

¹ Prepared by Andiy Rakhansky, Director of the Center for legal research and strategies, and Natalia Okhotnikova, KhHRG lawyer.

² Results of operation in the health care area in Ukraine for the first half of 2010. — K.: MHC of Ukraine 2010. Program for economic reforms for the years 2010-2014. Committee for economic reforms under the President of Ukraine.

- Low level of independence of medical institutions in the management of financial resources.

The funding of the branch itself also gives grounds for serious concern: the state budget of Ukraine for 2011 stipulated 5.25 billion USD for the health care system, which constitutes 3.4% of the GDP (0.24% less than in 2010, when this figure amounted to 3.64%), while the costs of medical equipment and all health care products are constantly increasing.

The Ministry of Health Care of Ukraine employs over 1.1 million people, including 197.6 thousand physicians and 430.8 thousand nurses and paramedic specialists, who hold respectively 224.6 thousand doctor's and 432,7 thousand nursing positions.

At present there are vacant positions for 19.2 thousand doctors and 17.6 thousand nurses in Ukraine; 5.8 thousand doctor's positions in the rural area remain vacant. Discrepancy between envisaged number of medical professional and actual number exceeds 46 thousand, and, including specialists who have reached retirement age, — 92 thousand. The need for physicians is satisfied up to 81.0% on the whole, and up to 75.2% in rural areas.

The indicator of number of physicians involved in direct care is rather stable (26.9 per 10 thousand of population) and below average, as compared to European standard, i. e. 33 per 10 thousand of population³.

2. FAILURE OF HEALTH CARE SYSTEM REFORM

In 2011 Ukraine launched an ambitious project of reforming the health care system in accordance with the program “Ukraine for the people”, introduced by the President of Ukraine V. Yanukovich, National program for economic and social development of Ukraine for 2010 and Program for economic reform for the years 2010–2014 “Wealthy society, competitive economy, efficient state”.

At the first stage of the reforming its legislative basis was formed by the Law of Ukraine No. 3612 of 07.07.2011 “On Procedures for reforming health care system in Vinnytsya, Dnipropetrovsk, Donetsk oblast' and city of Kyiv” (hereinafter — Law of Ukraine “On Procedures”) and the Law of Ukraine No. 3611 of 07.07.2011 “On amending the Fundamental law of Ukraine on health care with the goal of improving medical services”.

First of all, it should be stressed that implementation of the pilot project concerning reforms in health care system in Vinnytsya, Dnipropetrovsk, Donetsk oblast' and city of Kyiv must go hand in hand with strict adherence to the provisions of the article 49 of the Constitution of Ukraine, stipulating attainability of medical services for all the citizens free of charge in all the public and communal health care institutions. The experiment should be conducted with due consideration of the patient's rights to choose physician and clinic, under the article 38 of the Fundamental Law of Ukraine on Health Care.

Meanwhile, the Law of Ukraine “On Procedures” does not offer any mechanisms for organizing and providing primary, secondary, tertiary and emergency health care, or clear and unambiguous prerequisites for referring a patient to a medical institution where he can get primary, secondary, tertiary and emergency health care. Moreover, the said law does not establish medical staff responsibility for failing to comply with these requirements. The law contains a large number of various forms, which are to be completed for the health care executive bodies to approve the pilot project, but there is not indication of what normative and legal acts are to be complied with, and whether they exist at all.

Therefore, the legal imprecision of the Law of Ukraine “On Procedures” provisions is contrary to the article 19 of the Constitution of Ukraine, which maintains that it is the duty of public bodies

³ Results of operation in the health care area in Ukraine for the first half of 2010. — K.: MHC of Ukraine 2010.

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to operate only within the competences and ways, stipulated by the Constitution of Ukraine and Ukrainian Laws.

It is also noteworthy that the Law of Ukraine “On Procedures”, contrary to the requirements of the article 49 of the Constitution of Ukraine, contains no provisions concerning the preservation of the current network of health care system in the pilot oblast’s and Kyiv.

Planning and forecasting the future operation of the communal health care network in the pilot regions should be done with due consideration of the profile, specialization and intensity of the medical services, health care norms according to various types of medical services (article 2 of the Law of Ukraine “On Procedures”). This, however, is not enough, if the infrastructure of administrative and territorial unit, i.e. roads condition and public transportation, especially in rural areas, is not taken into account. Air medical service, which disappeared in the first years of Ukrainian independence, should be re-introduced into the system.

Article 12 of the Law of Ukraine “On Procedures” establishes prevalence of its norms over the other normative and legal acts for the period of experiment duration in the pilot regions. This provision covers the terms of validity of licenses and other permits, issued to the health care institutions in the pilot regions till the time that the Law comes into force, operation of reorganized health care institutions, which is not harmonized with procedures for licenses renewals, defined by the Law of Ukraine “On licensing of certain types of economic operation”.

Some paragraphs of the Final provisions of the Law of Ukraine “On Procedures” are especially disconcerting.

First of all, p. 2 of the Final provisions reads that medical specialists of the reorganized health care institutions, employed as general practitioners (family doctors), undergo respective specialized training free of charge and in preferential order. The medical specialist retains former qualification category until he/she is issued specialization certificate. It means that for several months a cardiologist, for example of highest qualification, receives his salary in accordance with respective tariffs. On obtaining the certificate of family doctor (general practitioner) he goes down the list in terms of tariffs and loses qualifications, earned by many years of work, as well as some portion of the salary.

Second, p. 3 of the Final provisions reads: “if, as a result of health care institutions reorganization, the staff of the said health care institutions are transferred, by agreement, to a lower paid positions at the same or another institution, they are paid in accordance with the provisions of this Law, or, upon their wish, their former mean salary is retained for the whole term of their work at the lower paid position, but not exceeding six months from the day of the transfer”. This paragraph mixes up several articles of the Code of Labor Laws of Ukraine (hereinafter — CLL), which does not help at all in its understanding and interpreting.

Article 32 of CLL stipulates that a transfer to the lower paid position is one of the indicators of significant changes in work conditions, of which the employee must be warned at least two months in advance. Also, if former work conditions cannot be retained, and the employee refuses to continue his employment under new conditions, then the labor contract is terminated under p. 6 of the article 36 of CLL. The labor contract, signed for indefinite term, as well as labor contract, signed for definite term, can be terminated by the owner or his representatives, before the expiration date only if the conditions of production and employment have changed, i.e. in case of liquidation, reorganization, bankruptcy or change of profile of a company, institution, establishment or organization, its downsizing”. (P. 1 of the article 40 of CLL).

The Law of Ukraine “On Procedures” does not define the types of health care institutions reorganization: mergers, combining, division or restructuring, which is a serious shortcoming. The mechanism to be used for setting up a new network of health care institutions on the basis of the existing one in the pilot regions (separation or merger) is not harmonized with the provisions of the Economic Code of Ukraine. It is possible that the use of the term “reorganization” ad nauseam is the result of legislators’ and reformers’ wish to avoid contradicting article 49 of the Constitution of Ukraine, which prohibits the downsizing of the existing health care institutions network. There

are facts proving that in real life the reform involves not only the reorganization of the health care institutions, but also their liquidation under the article 59 of the Economic Code of Ukraine.

We would like also to point out that the definition offered in p. 3 of the Law of Ukraine “On Procedures”, i. e. “the payment to such employees is done in accordance with the provisions of this Law” is not legitimate, because the order of payment for work is regulated by the Law of Ukraine “On work remuneration”.

It is also noteworthy that the provisions of the Law of Ukraine “On Procedures” are not properly coordinated with other Ukrainian Laws in force. In particular, part 3 of the article 3 stipulates that “the centers of primary health (medical and sanitary) care can be set up as communal non-commercial enterprises or communal non-commercial institutions”, while Civil Code of Ukraine does not stipulate setting up of the said legal entities.

The reform activists seem to forget the most important issue, i.e. mandatory participation of the professional unions of medical workers in the health care institutions “reorganization”, i. e. their liquidation, change of ownership or partial cutting down of the production, which entails dismissal of employees or aggravation of work conditions. All that can be done only after submitting respective information to the trade unions, including the reasons for upcoming firings, number and categories of the employees affected, and time frame, envisaged for downsizing. The owner or his representative not later than three months after the decision is passed shall consult with trade unions on how to mitigate the adverse consequences of dismissals, to reduce the number of employees to be dismissed or to prevent dismissals at all.

The trade unions have right to submit proposals concerning the postponements or temporary stopping of the measures related to employees dismissal (article 49-4 of CLL). The Law of Ukraine “On Procedures» bears no reference to collaboration with trade unions.

Involvement of associations and professional unions in the decision-making process is mostly formal and declarative. Almost total lack of trust towards pilot experiment has been noted in the professional community. Medical workers do not support the course of action, proposed by the authorized bodies of power. The professional community has negative expectations as to the preservation of their labor rights.⁴

Trade unions of medical workers are very skeptical about authorities’ plans of hospitals’ restructuring without additional budget funding. The head of Kyiv medical workers trade union Larisa Kanarovska believes that downsizing the staff and introducing similar reforms will only deteriorate the situation in Ukrainian health care. “According to the trade union data, in October-November 2010 2 thousand medical workers were fired in Kyiv only. People are not satisfied with low salaries. The country is facing TB epidemics, while the authorities intend to cut down the number of hospital beds. With such ambitious plans, the reform authors can quickly run out of resources for its implementation”, — stated L.Kanarovska⁵.

“As a result of the reform our settlement Volodymyrivka (Artemivsk rayon) was assigned to Yakovlev out-patient clinic. There is no way to get there, as public transportation operates only on Fridays, Saturdays and Sundays. We have a lot of elderly people in the settlement. The reform was not meant for them” — stated a patient, who called the “health care reform hot line”, set up in Donetsk oblast’ last year⁶.

“Many children running high fever are brought now to the out-patient clinic, as they cannot be placed in the hospital. Everyone is sent to the out-patient clinic instead. The chief physician said “it’s not his terms of references: someone divided the competences, he does not care a damn”. And slammed the door on that...”- reads information received from Novohrodivka (Donetsk oblast’).⁷

⁴ Donetsk oblast’ organization”Committee of Ukrainian voters” <http://gurt.org.ua/articles/13112/>

⁵ Future health care reform in Ukraine can lead to medical staff downsizing.. www.asz.org.ua

⁶ Roman Lebed’. Medical reform treading on health care? <http://www.bbc.co.uk/>

⁷ Ibid.

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Determination, with which the bureaucrats promise to cut down the number of beds and to shut down the whole hospital wards, caused uproar among the residents of some areas. They even organized protest actions, e. g. in Zugres and Kirovske (Donetsk oblast').⁸

Donetsk oblast' organization "Front zmin" made public the information describing the situation in Kirovske (Donetsk oblast'), received on the "hot line" set up by the organization. The member of Kirovske town council Andriy Nemesh called to report the plans of downsizing medical staff and of shutting down the only town hospital, while another hospital is 26 kilometers away. "Kirovske hospital serves the miners' town of 30 thousand residents as well as the residents of neighboring villages", — pointed out the deputy. "Before shutting down the only town hospital authorities might have organized at least a token public discussion on the issue. We, as well as in the situations, when schools are shut down, invite authorities to open dialogue with local residents. These decisions cannot be made behind the closed doors" — argued the member of Yasynuvata rayon council Serhiy Chiryn.⁹

Public organizations of Vinnytsya oblast' and patients themselves believe that health care reform does not take into account the interests of the main stake-holders, i.e. medical workers and medical services consumers — the patients.¹⁰

Public activists informed that former children out-patient clinic No. 1 does not have allergist, dermatologist or immunologist. The district pediatrician refers patients to the specialists working in other clinics. Young patients have to get acquainted with new doctors: some pediatricians are transferred to other clinics, while their former wards are distributed between other pediatricians. Patients do not understand this system of re-distribution of responsibility. Meanwhile, we hear the declarations to the effect that family doctor is to accompany a patient since birth till old age.

The head of public council for the protection of the patients' rights under oblast' health department M. Bardyn argues that global reforming projects are not patients-oriented at all and ignore the necessity to make health care efficient, convenient and available to an average citizen.

According to the author of the article, officials striving to make the medical institutions network more efficient (bureaucrats try to avoid calling it simply "cost savings") somehow forgot that transportation infrastructure is poorly developed in rural areas, and one third of oblast' population does not have money to get to the closest specialized clinic.

The head of "Vinnytsya medical workers association" R. Kharkovenko considers that "medical community is not living, but barely surviving". The physicians are underpaid, they have no legal protection, hospitals lack appropriate medical equipment and medications. And the main problem, according to R. Harkovenko, is that "No one [among medical workers] knows where he or she will end up as a result of the reform — whether they will be transferred to another institution, re-trained or simply fired?"

Publication devoted to the reform reveals that there are plans of setting up a uniform system of emergency medical assistance in Vinnytsya oblast'¹¹. "These are ambitious plans, especially as far as transportation goes. Ideally the time needed for emergency team to get from the site to the hospital should take 10 minutes in the urban areas and 20 minutes in the rural areas", — points out the director of treatment and prevention department under the Ministry of Health Care M. Khobzey. However, it will become feasible only after the Law "On emergency medical assistance" is approved by the Supreme Rada. At present the draft law has been only registered in parliament.

According to Vinnytsya mayor V. Groysman, setting up of a single center for emergency medical assistance can only deteriorate the quality of the medical services. He believes that "[reformers]

⁸ Roman Lebed'. Medical reform trading on health care? <http://www.bbc.co.uk/>

⁹ <http://frontzmin.ua/ua/party/regional-organization/donetsk-region/>

¹⁰ Health care reform in Vinnytsya oblast': illusions and reality. http://vinpress.org.ua/index.php?Item_Id=28&Doc_Id=183&lang=ua&p=1.

¹¹ Health care reform in Vinnytsya oblast': illusions and reality http://vinpress.org.ua/index.php?Item_Id=28&Doc_Id=183&lang=ua&p=1.

want to take away the existing emergency system which we barely managed to organize properly, responding to the public need, and to set up a unified center for emergency medical assistance, governed directly from Kyiv". V. Groysman assumes that it will negatively affect the quality of emergency system operation. "We are accountable to our city residents for the quality of services we supply. And how can we be in charge without any levers of influence — we would not even know whether the ambulance went out to the patient or not", — argued Vinnytsya mayor¹².

In order to provide legal substantiation of the health care reform strategies, the Supreme Rada of Ukraine on 07.07.2011 passed the Law of Ukraine "On amending the Fundamental law of Ukraine on health care with the goal of improving medical services". This Law comes in force on January 1, 2012, with the exception of paragraph 4 of clause 7 and clause 14 of the chapter I of the said Law, which would come in force on January 1, 2015. Under the Law of Ukraine "On Procedures for reforming health care system in Vinnytsya, Dnipropetrovsk, Donetsk oblast' and city of Kyiv" the stage by stage implementation, based on the best practices, is envisaged.

The Law of Ukraine "Fundamental legislation on health care" legally is the main professional law, that's why the definitions, given in its articles are prerequisites for the very existence and development of health care system of Ukraine with due adherence to the patients' rights.

It is noteworthy that after changes have been introduced to the aforementioned Law, the Ukrainian oblast's, not covered with experiment, remained without strictly defined concepts of primary, secondary and tertiary medical services, which were spelled out in the article 35 of the "old" "Fundamental legislation on health care", as well as the new type of medical services — palliative care. This situation will change only after January 1, 2015, and till then only emergency medical assistance will be in place, as stipulated by the article 35 of the current "Fundamental legislation on health care", despite the fact that article 8 underlines the right of every citizen to the emergency health care, primary, secondary (specialized) and tertiary (highly specialized) medical services, palliative care etc.

On the other hand, paragraph 4 of the clause 7 of the Law of Ukraine "On amending the Fundamental law of Ukraine on health care with the goal of improving medical services", which is to come in force also on January 1, 2015, is incorporated in the current "Fundamental legislation on health care": p. 4 of the article 18 reads "Medical institutions available to public are funded from the State Budget of Ukraine and local budgets. The funds, not used by medical institution, are not reclaimed and respective future funding is not cut down. This clause should be harmonized with the requirements of the article 57 of the Budget Code of Ukraine, which regulates procedures for closing accounts after the end of budget period. Besides, these issues should be regulated exclusively by the Budget Code of Ukraine, which defines legal foundations for the functioning of budget system in Ukraine, its underlying principles, budget process and inter-budget relations, as well as accountability for non-compliance with budget law.

The definition of the term "medical services" — "the operation of health care institutions and physical entities, i.e. entrepreneurs who are registered and licensed in due order, established by the law, in the health care area, not limited only to medical assistance" — does not seem clear enough. In particular, it provides no clue as to what kind of operation in the aforementioned area can be considered "medical services".

Part 7 of the article 18 of the Law of Ukraine "Fundamental legislation on health care" addresses a most important issue concerning paid services: "all health care institutions have the right to use funds, voluntarily supplied by the companies, enterprises, organizations and individuals for the improvement of their operation, as well as with owner's or his representative's permit to charge fees for the health care services". Meanwhile the new version of the said law contains neither definition of the term "health care services", nor the list of the said services. The Constitutional Court of Ukraine in its decision No. 10-rp/2002 of May 29, 2002 ruled that the concepts of "medical assistance" and "medical services" are not to be separated, so that charging any fees for medical services (medical assistance) in public and communal medical institutions is unconstitutional. In general,

¹² Ibid

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p. 7 of the article 18 of “Fundamental legislation on health care” is not legally accurate, as its contents obviously mixes up medical institutions with various forms of ownership in order to get around article 49 of the Constitution of Ukraine stipulating free medical assistance provided by public and communal medical institutions.

Non-governmental organizations, agreeing with the analysis of health care situation in Ukraine, given in the Program for economic reform over the years 2010–2014 and other official documents, with the necessity for rapid increase in the health care services for the population and introduction of new approaches in the system of health care institutions operation not only in the pilot regions, but in the whole country, with their appropriate funding; necessity for more efficient use of budget funds allocated for health care system development, are still concerned with the reforming trends and directions, chosen by legislative and executive official bodies of Ukraine.

This situation is probably accounted for by the fact that both at national and local levels the informational product with respect to the goal and essence of health care system-related experiment, available for various categories of population, has not been yet developed. The information provided by the local authorities cannot be effectively disseminated among various categories of population. On the other hand, the officials in charge of the pilot project implementation do not have viable channels to receive feedback from public at large, professional circles, local communities etc.¹³ In other words, the population is not aware of what benefits they will get as a result of the health care reform implementation in their oblast', city, village or settlement.

Therefore, positive changes in pilot regions are hard to detect, while negative consequences, registered by the non-governmental organizations, can be summarized as follows:

1. Legal foundations of the Pilot project for reforming health care system fail to comply with Constitutional norms, Budget Code of Ukraine, Economic Code of Ukraine, Civil Code of Ukraine, Code of Labor Laws of Ukraine, and Law of Ukraine “On work remuneration”.

2. The downsizing of the existing medical institutions network and charging fees for the health care services are unconstitutional.

Changes (reorganization) of the health care institutions or downsizing of the existing health care network take place not only in the pilot regions, but all around Ukraine.

3. The new “network” is being set up on the basis of the size of population in a given area. The current infrastructure of an administrative/territorial unit, i.e. road conditions and public transportation availability are totally disregarded. Meanwhile it is not feasible, especially in rural areas, to provide emergency assistance within 10 or 20 minutes, let alone transfer the patient to an emergency ward or hospital.

4. Primary health care centers in the pilot regions, especially beyond the boundaries of oblast' center, in the rural areas are set up without any considerations as to their accessibility for the patients, including elderly people with limited mobility.

5. At present primary health care centers in the pilot regions are short of staff with appropriate qualifications, i. e. general practitioners-family doctors; they also lack equipment necessary for diagnostics and treatment of the most spread diseases, injuries, poisonings, pathological and physiological (due to pregnancy) conditions.

6. The patients usually come to the clinic requiring specialized medical care (according to the article 4 of the Law of Ukraine “On Procedures for reforming health care system in Vinnytsya, Dnipropetrovsk, Donetsk oblast' and city of Kyiv” — secondary medical assistance). However, in the pilot regions the medical institutions, capable of satisfying the patients' need for the secondary (specialized) medical care, are located very far from the places of patients' residence. Obviously, the most vulnerable categories of population have no access to the specialized and highly specialized (tertiary) medical care.

7. The prolongation of validity term for licenses and permits, issued to the health care institutions of the pilot regions till this Law comes into force, (p. 2 or article 12. “On Procedures...”) or to the reorganized medical institutions, for the duration of the pilot project is not in compliance

¹³ <http://gurt.org.ua/articles/13112/>

with the Law of Ukraine “On licensing of certain types of economic activity”. It is especially important in palliative care, as the natural question arises, i.e. whether the license will cover the use of narcotic and psychotropic drugs in the reorganized hospital, which becomes a Primary health care center?

Supplying the “palliative care” patients, who stay at home and suffer from pain, with narcotic pain-killers today remains the duty of visiting nurses from the rayon out patient clinic, and is covered from state budget. However, besides the licenses for the use of narcotic and psychotropic drugs, primary health care centers should have appropriate facilities for the storage of narcotic substances, which still remains a problem for small hospitals. The quoted laws do not offer ways of resolving these issues— so one can anticipate further complications in the palliative care patients’ access to main medications.

8. Medical workers’ qualification is another factor contributing to the availability of medical services for the public. The world practice tells us that it takes up to 10 years to train general practitioner-family doctor of appropriate qualification. A cardiologist, for one, cannot acquire knowledge and skills of pediatrician within the six-month’ period. Nevertheless, this is exactly what pilot project stipulates: medical professionals are transferred to the lower paid jobs (because the specialty change annuls former qualification category) of general practitioners — family doctors, undergo retraining free of charge and in priority order (i. e. in accelerated mode).

Anticipated consequences of this reorganization:

- Loss of medical specialists, as they either won’t work according to their specialization any longer, or will establish private practice outside primary health care centers and not as private entrepreneurs.
- Total destruction of pediatric network.
- Long-term deterioration of health care services for the population, and, in particular, for most vulnerable categories of society.

9. Complete disregard of “every person’s right to the highest available level of physical and mental health” by public officials, despite declared principles.¹⁴

10. The pilot project under implementation, as well as reforming plan for the branch by no means “ensures conditions under which everyone is guaranteed medical assistance and care in case of sickness”.¹⁵

3. ANALYSIS OF COURT RULINGS ON “MEDICAL CASES” IN 2011

Protection of patients’ rights is not feasible without appropriate judicial practice. Ukrainian legislation currently in force not always provides the necessary legal norms regulating complicated relations in the health care domain. That’s why summarizing the court practices is a very important component in the operation of human rights organizations.

Having analyzed the court rulings on “medical cases”, which came in force in 2011, obtained from the Unified State Registry of Court Decisions, we could identify certain general tendencies. Namely, out of the whole bulk of decisions, only 9 dealt with hospitals posing as defendant in civil lawsuits.

Three rulings were passed by the courts in Dnipropetrovsk oblast’, two — by the courts in Kyiv oblast’, and in Kharkiv, Donetsk, Cherkassy oblast’ and ARC — one by each oblast’ court.

Detailed analysis of the rulings allowed identifying the following tendencies.

¹⁴ International pact on economic, social and cultural rights.

¹⁵ Ibid.

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3.1. INTERNAL INCAPACITY OF THE COURTS TO SATISFY SUITS AGAINST HOSPITALS.

The analysis of the lawsuits showed that in 6 cases out of 9 the claims were fully rejected, while in 3 cases the judge passed a ruling partly satisfying the claim.

3.2. INADEQUATE PROFESSIONAL LEVEL OF ATTORNEYS AND LACK OF APPROPRIATE SKILLS AMONG CLAIMANTS, WHO CANNOT PLEAD THEIR CASE ACCURATELY AND CLEARLY

The claims often lack the necessary request for material damages. Thus in 4 lawsuits out of 9 only moral damages were mentioned. (*No. 2-42/11, 2-14/11, 2-38/11, 3105/11*).

In 5 remaining lawsuits the claimants requested material and moral damages. It is noteworthy that these lawsuits were rejected by the judges completely. It means that on seeing words: “material damages” in the claim, the courts immediately set up to deny any satisfaction to the claimant, despite the fact that the circumstances of every lawsuit are different.

The analysis of broader spectrum of court rulings (let’s say for the last 5–7 years) is needed to arrive at more comprehensive conclusions.

One of the lawsuits (*No. 2-66/11*) contained the claim “to reimburse the damages” without any indications as to what kind of damages the claimant referred to. It is the result of low legal awareness of the public, as the said claimant represented herself and her minor son without hiring an attorney or other legal representative.

Only one of 9 lawsuits (*No. 2-890/11*) contained claimant’s request to qualify actions and inertia of medical workers as illegal and demand to be reimbursed for moral and material damages.

Here are some reasons which can account for this state of things:

- lack of foresight among the patients who do not keep the receipts for purchased medications;
- incapability of the patients and their representatives to justify material damage caused by the doctors’ actions, and to calculate its amount on the basis of checks, receipts and respective notes;
- failure to believe that the lawsuit can be resolved in the claimant’s favor.

The majority of the lawsuits lack the request to qualify actions and inertia of medical workers as illegal. Only one out of 9 lawsuits contained this request (*No. 2-890/11*).

This negative tendency should be overcome. Under the articles 1166 and 1167 of the Civil Code of Ukraine illegal, harmful or culpable action of the perpetrator creates grounds for tort charges. It means that damages can be reimbursed only if the illegality of actions is established. In other words, damages, caused by legitimate actions, will not be recompensed. It refers to both material and moral damages.

That’s why the claim should contain the clause on qualifying actions and inertia of medical workers as illegal, and, consequently — demand of material and moral damages compensation.

The motivation part of the court rulings confirms the conclusions cited above. In all the three rulings, by which court partly satisfied the claims, judges refer to the illegal nature of medical workers’ actions.

In its ruling *No. 2-42/11* the court decided, having considered all the circumstances, that “as a result of illegal actions of the physician of Simferopol 6th municipal hospital, manifested in untimely diagnosis, the claimant suffered moral damage, as suffering from a spine fracture, he was prescribed physical exercise, which caused him a lot of pain”.

In its ruling *No. 2-38/11* the court also stresses that “under article 23 of the Civil Code of Ukraine a person has right to claim moral damages, caused by the violation of his/her rights. Moral damages consist in physical pain and suffering imposed on a person as a result of injury or other harm to a person’s health; in mental sufferings caused by illegal actions against the said person or his/her close family.

Under article 1167 of the Civil Code of Ukraine moral damages, caused to physical or legal entity by the illegal actions or inaction, is to be recompensed by the entity who caused if the entity’s guilt is shown”.

In its ruling No. 2-14/11 the court states unambiguously “*The court recognizes the fact of illegal actions of “Municipal hospital No. 1” staff in providing medical assistance to so-and-so as established.*”

3.3. LACK OF SUSTAINABLE AND ACCURATE MECHANISMS FOR CALCULATING MONETARY EQUIVALENT OF MORAL DAMAGE, CAUSED BY ACTIONS OR INACTION OF THE MEDICAL WORKERS

Court rulings on satisfying petitioners’ claims rarely make reference to the Resolution of the Supreme Court of Ukraine Plenum “On judicial practices in the cases concerning moral (non-property) damages” of 31.03.1995 (hereinafter — Plenum).

Out of three “positive” rulings only the ruling *No. 2-38/11* made reference to this normative/legal act. The absence of such reference in other decisions can be accounted for by:

- incapacity of the courts to apply the provisions of the said act appropriately;
- disregard for the decisions of the Plenum and undermining the importance of its provisions in “medical cases”.

Neither legislation nor judicial practice defines the procedure for calculating monetary equivalent of the moral damage.

Thus, in two cases, the moral damage was assessed at about 50% of the amount claimed by petitioner (50 thousand UAH as opposed to 100 claimed in one lawsuit (*No. 2-38/11*), and 60 thousand UAH as opposed to 118 claimed in another (*No. 2-14/11*).

In the third lawsuit the court position remains unclear: it ordered the payment of less than 1% of the amount claimed by petitioner: 10 thousand UAH as opposed to 1 million 200 thousand UAH claimed in the suit. (*No. 2-42/11*).

It is noteworthy that the actual damages amount has nothing to do with gravity of consequences suffered as a result of physicians’ negligence. In the first case (*No. 2-38/11*) a surgeon, while performing surgery, negligently left a gauze cloth in the patient’s leg, which led to the inflammation and development of osteomyelitis.

In another case (*No. 2-14/11*) in the course of maxillary sinusotomy, the wick drain was probably left in the patient’s left sinus, which led to deterioration of this latter condition and the necessity for large number of additional procedures.

In the third case the consequences were even more serious (*No. 2-42/11*) — the doctor failed to recognize spine bones fracture and prescribed strenuous physical exercises, which caused the patient severe pain, and, probably, deteriorated his physical condition. The court, nevertheless, ruled that only physical pain, caused to the patient by negligent physician’s order, was an established fact. The patient became disabled as a result of the injuries, lost his mobility and cannot live without medication. It did not stop the court from cutting the claimed amount of 1 million 200 thousand UAH down to 10 thousand UAH.

The motivation, underlying the courts’ rulings, — i. e. why the court would decide to cut down the compensation for moral damage, what mechanisms and ratios are used while calculating it — remains unclear.

3.4. AMBIGUOUS INTERPRETATION OF “MORAL DAMAGE” BY THE COURTS

P. 3 of Plenum Resolution provides the definition of moral damages as losses not related to property, as a result of physical or moral suffering or other adverse effects, exerted on physical or legal entity by illegal actions or inaction of other persons. Under current legislation moral damage may include, in particular, disrespect of honor and dignity, prestige or business reputation, moral suffering due to health deterioration, violation of property rights (including intellectual property), consumers’ rights, other civil rights, sufferings caused by lawless detention and incarceration, breach of normal life links due to incapability of leading active social life, breach of connections with other people, other negative effects.

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The court rulings, analyzed above, show, however, that the courts believe that only physical suffering gives grounds to order compensation of moral damages.

Decision *No. 2-14/11* is a vivid example of this statement. The operative part of the resolution contains denial of satisfaction to two petitioners who, as patient's' relatives, claimed moral damage.

"The court also rules that claims of persons 2, 5 and 3 are not to be satisfied. The claimants demanded payment of moral damages caused by leaving the wick drain in the patient's left sinus, in the course of maxillary sinusotomy, performed in 1998, in the amount of 5 000 UAH to each claimant, as under the article 440-1 of the Civil Code of Ukraine (1963 version), moral damage is paid directly to a person who suffered from it. Besides, the claimants have to prove not only the fact of damage, but also establish connection between this damage and illegal actions of the defendant and his guilt in causing it."

In the same ruling court denied satisfying of the claimant's demand for compensation of moral damage, caused by the loss of the patient's medical history, without offering any explanations:

"Concerning the petitioner's claims on compensation of moral damage due to the loss of the patient's 2 medical histories, at the amount of 10 000 UAH (5 000 UAH per each history), the court finds that the claimant failed to prove the damage and its amount, and, therefore, denies the satisfaction of this part of the claim".

Another ruling (*No. 2-42/11*) also offers explanation in support of this negative tendency:

"The Court believes that the fact of untimely x-raying of the patient's spine and failure to provide accurate diagnosis, i. e. "spine fracture" is established, as confirmed by the letter No. 4512 of 17.09.05, written to the patient by the Deputy Minister of Health Care and the conclusions of forensic medicine experts No. 77 of 07.06.2010.

Taking all the circumstances into consideration, the court rules that illegal actions of the physician, working in the Simferopol city hospital No. 6, i. e. failure to timely diagnose the patient, led to moral damages for the claimant, who suffering from the spine fracture, was prescribed physical exercises causing him severe pain".

3.5. COURT EXPERTS IN CAHOOTS WITH MEDICAL WORKERS, WHOSE ACTION OR INACTION IS UNDER INVESTIGATION

The results of forensic expertise, used in the judicial process to verify the validity of the facts, stated by the persons claiming that they are victims, play very important role in all the rulings.

However, the analysis of the aforementioned rulings leads one to believe that there is a number of unresolved issues, namely, that forensic medicine experts still adhere to the practices of siding with their medical colleagues and offering interpretations in their favor.

The ruling in the case *No. 2-66/11* on *individual 2* claims is most demonstrative in this context. The claimant demanded to be recompensed for material and moral damages, caused by communal hospital "Cherkassy oblast' TB center", the medical staff of which allegedly failed to diagnose the claimant's minor son with Ewing sarcoma on time, which led to substantial waste of precious time and subsequent amputation of the third finger's joint in another hospital.

The expert conclusions read that:

"no causal connection has been established between the treatment of individual 2 in the communal hospital "Cherkassy oblast' TB center" between 07.09.2009 and 22.10.2009 and patient's Ewing sarcoma; at the time of treatment in the said hospital individual 2 already had Ewing sarcoma, but there were no indications for the finger amputation at the time of the treatment. The amputation of the third finger of child's left hand was performed because of Ewing sarcoma, and not due to the prolonged treatment in communal hospital "Cherkassy oblast' TB center", although, taking into account the child's age, they had to detect sarcoma at the beginning and not at the end of treatment, as acute pain, edema of soft tissues, limitation of finger's function are common symptoms for both TB and Ewing sarcoma".

Thus, pointing out that the doctors, by virtue of their qualification, had to diagnose sarcoma, forensic medicine experts, nevertheless, arrive at the conclusion that there is no causal relation between actions (or, rather, inertia) of the medical staff of the hospital and subsequent development of patient's disease.

Therefore, the analysis of the aforementioned court rulings, which came in force 2011, gives grounds to register certain common features in all decisions related to "medical cases".

Nevertheless, one is not to come up with unambiguous conclusions as to certain tendencies prevailing in "medical cases" as the sampling was far from complete. In order to have a more objective view, one should analyze a sampling of cases for a longer period of time, e. g. starting from January 1, 2004 — the date when the Civil Code of Ukraine, defining patients' rights, came in force.

4. RECOMMENDATIONS

1. Bringing the norms of the Law of Ukraine "On Procedures for reforming health care system in Vinnytsya, Dnipropetrovsk, Donetsk oblast' and city of Kyiv" No. 3612 of 07.07.2011 and Law of Ukraine No. 3611 of 07.07.2011 "On amending the Fundamental law of Ukraine on health care with the goal of improving medical services" into compliance with the Constitution of Ukraine, Budget Code of Ukraine, Economic Code of Ukraine, Civil Code of Ukraine, Code of Labor Laws of Ukraine, Law of Ukraine "On work remuneration".

2. Defining in the Law of Ukraine "Fundamental law of Ukraine on health care" primary, secondary (specialized) and tertiary (highly specialized) medical care, referred to in the article 35 of the "old" "Fundamental law...", and the new type of medical assistance — palliative care.

3. Bringing provisions of the Law of Ukraine "On Procedures for reforming health care system in Vinnytsya, Dnipropetrovsk, Donetsk oblast' and city of Kyiv", concerning the licensing of the newly set up or reorganized health care institutions, into compliance with the Law of Ukraine "On licensing certain types of economic activity", in particular, with respect to obtaining licenses for handling narcotic and psychotropic drugs.

4. Continuing reorganization of health care institutions in the pilot regions with due consideration of the available infrastructure in the administrative/territorial units, i.e. road conditions and public transportation.

5. Introducing target budget lines for road construction and development of air medical service in the pilot regions.

6. Banning downsizing the health care institutions network and charging fees for the medical services under the Constitution of Ukraine, enhancing law enforcement and prosecutor's office control over the process of health care institutions' reorganization and abiding with economic and labor legislation in force. Prohibiting termination of economic entity (health care institution) operation by way of its liquidation.

7. Introducing the institute of family doctors step-by-step, with respective training of medical professionals, taking into account best international practices (up to 10 years of training).

8. Developing primary health care centers adequately staffed with specialists of relevant qualifications. Staff list of the primary health care centers in the pilot regions should include positions of district physicians and pediatricians only.

9. Amending article 49 of the Constitution of Ukraine with respect to provisions dealing with free medical services, supplying precise list of free medical services and identifying the sources of funding for health care reform: state budget and fund, set up on the basis of mandatory medical insurance.

10. Drawing lawyers' attention to the necessity of filing accurate claims, which would not only refer to moral and material damages, but also contain request to qualify actions or inaction of the medical workers as illegal.

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11. Issuing a handbook of sample claims against medical workers related to their actions or inaction.

12. Recommending the courts to make reference to the provisions of the Resolution of the Supreme Court of Ukraine Plenum “On judicial practices in the cases concerning moral (non-property) damages” of 31.03.1995 in their rulings.

13. Recommending the courts to take into account in their rulings the gravity of consequences of certain actions or inaction of the defendants.

14. Recommending the courts to interpret correctly p. 3 of the Plenum decision, with due attention to the definition of “moral damage” provided by the Supreme Court of Ukraine.

15. Drawing lawyers’ attention to the necessity of referring to p. 3 of Plenum decision, when establishing what kind of moral damage was caused to the petitioner by illegal actions of the defendant.

16. Making broader use of alternative experts’ assessment to avoid “mutual protection” between experts and medical workers.

17. Recommending the courts to treat the results of forensic medicine with prejudice as to their objectivity and validity.

XIX. ENVIRONMENTAL RIGHTS¹

1. RIGHT TO SAFE ENVIRONMENT

It is not for the first time that we have to point out the absence of main source of summarized information with regards to environmental safety in Ukraine, i.e. the national reports on natural environment status. These reports ought to be published on the annual basis. As it is, fragmented and often contradictory environmental information is gathered from dispersed reports of the Ministry of Environment and Natural Resources, other agents of environmental monitoring, and control, law-enforcement and statistical account bodies, mass media.

Despite the decreased levels of economic activity, the volumes of hazardous emissions into the air and of discharges into the bodies of water do not decrease. The largest number of exceeding the norms in 2011 was registered in the machine-building industries and metallurgy — 32%. The Ministry of Environment and Natural Resources registers constant increase in the level of urban air pollution in all the regions of Ukraine. Most significant excess was noted in maximum permissible concentrations of formaldehyde. The quality of air with respect to formaldehyde contents is the worst in the eastern region. In the cities of Lysychansk, Mariupol, Uzhgorod, Mykolayiv the contents of formaldehyde in the air exceeds the maximum permissible concentrations five times. The content of nitrate dioxide is two times higher than the maximum permissible concentrations in Zaporizhzhya, Mariupol, Makiivka, Khmelnytsky and Lutsk. The content of dust in the air is two times higher than the maximum permissible concentrations in Kryvy Rih and Alchevsk.²

State Committee for Statistics confirms that the density of emissions from stationary sources per 1 square kilometer of the territory remains unprecedentedly high in Ukraine, reaching the indicator of 6.8 tons of hazardous matter, and 90.1kg — per capita. In some regions these indicators are even higher — 7.6 times in Donetsk oblast' (3.4 times per capita), 4.3 and 3.1 times respectively — in Dnipropetrovsk oblast',

2.8 and 2.5 times respectively in Luhansk oblast' and 1.8 and 1.4 times — in Ivano-Frankivsk oblast'. The highest technogenic load — over 100 thousand tons of emissions — was registered in the atmospheric air of Kryvy Rih, Marioupol, Zelenodolsk, Luhansk and Burshtyn.³

Industrial enterprises in Kyiv emitted 34.3 tons of pollutants per 1 sq. km, exceeding mean country factor five times. In terms of the volumes of transport emissions, non-efficient use of water,

¹ “Environmental rights” chapter is prepared by Olexander Stepanenko, Board member of UHHRU, executive director of ENGO “Green World”, Head of public organization “Helsinki initiative — XXI”.

² Ukraine: reviews, bulletins and environmental reports — <http://www.ecobank.org.ua/GovSystem/EnvironmentState/Reviews/Pages/default.aspx>

³ Analytical report of the State Committee for Statistics “Natural Environment in Ukraine in 2010” http://www.ukrstat.gov.ua/operativ/operativ2011/ns_rik/analit/arhiv.htm

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accumulation of non-sorted waste Kyiv also ranks first among other big cities of Europe, and is rightfully considered the most polluted capital on the continent.⁴

As compared to the last year, the increase in emissions into the atmosphere was registered in 17 regions. It was most significant in Crimea (6 thousand tons or 22,7% more), Rivne oblast' (3,0 thousand tons or 29,7% more), Zaporizhzhya oblast' (36,7 thousand tons., or 20,3% more), Dnipropetrovsk (141,0 thousand tons or 17,8% more), Ternopil (2,2 thousand tons or 13,6% more), Odessa (3,3 thousand tons or 12,7% more) oblast's.

Instances of significant water pollution were registered in the rivers of Dnister and Dnipro basins. According to the data provided by State Water Agency, in 2010 14.8 billion cubic meters of water were taken out of the natural reservoirs, which is 2,5% more than in the last year. 15% of the whole volume of water was lost in the course of transportation. 1,7 billion cubic meters of waste water, i.e. almost a quarter of the whole sewerage volume, were discharged into water reservoirs. Almost 18% of the polluted re-circulated water (0,3 billion cubic meters) were returned to the water reservoirs without any treatment. It is 15,6% (42,0 million cubic meters) more than in 2009.

In the second half of 2011 many regions of the country, especially in the West and in the South, were subject to abnormal meteorological and climatic phenomena — between August and December the weather was extremely dry and warm. State Committee for Hydrometeorology informed that in October-November only 4–18% of the average monthly precipitations were registered in the basins of Dnister, Prut and Siret rivers. Similar phenomenon was observed in Southern Bug basin and in the Crimea.⁵ Prolonged low-water period, not experienced for decades, set in on the rivers. In many villages of Chernivtsy, Trans-Carpathian, Ivano-Frankivs, Ternopil and Khmelnytsky oblast's water supply systems were seriously threatened — potable and domestic use water had to be imported, and its quality often was poor.⁶ According to the Ministry of Regional Development, in 261 settlements in Ukraine the water supply systems fail to meet the normative requirements.⁷ It means that in many cases the authorities prove incapable of ensuring the right of people to the drinking water in sufficient quantities.

The Ministry of Environment and Natural Resources registers permanently high levels of radio nuclides' concentrations in surface water samples in the areas, affected by the Chornobyl NPP disaster, i. e. of Cesium-137 in Azbuchin lake, Strontium-90 in Hlyboke lake.⁸

The Ministry of Extraordinary Situations informs that the number of environmental threats, caused by both natural and technogenic factors, e.g. sliding, inundations, karst activization, is increasing. The largest number of slides was registered in Odessa and Trans-Carpathian oblast' and in Crimea. In Odessa, this number reached 5835, 487 slides among them are active. 156 slides are located within the boundaries of developed areas, activization of 101 slides threaten industrial units. The slides at the shoreline between Lebedivka and Serhyivka are the most active⁹.

In 2011 the Ministry of Environment and Natural Resources finally updated the information on the major environmental pollutants in Ukraine.¹⁰ The situation did not change significantly since the publication of the former list, 4 years earlier. Looks like such enterprises as Dniprodzerzhinsk Dzerzhinsky plant, “Zaporizhstal” plant, Mariupol “Azovstal” and Illich industries, Kryvy Rih “ArselorMittal”, Burshtyn TPP etc. will remain for good on the “Black list of 10 major pollutants”. A reasonable question arises: what is the role of the government, the Ministry of Environment and Natural Resources, Prosecutor's office on environmental protection in amending this situation,

⁴ Study The Economist Intelligence Unit, http://www.bbc.co.uk/ukrainian/news/2011/04/110414_kyiv_ecology_az.shtml

⁵ http://meteo.gov.ua/ua/h_review

⁶ <http://poglyad.te.ua/novyny/na-ternopilschyni-voda-na-vahu-zolota/>

⁷ http://www.minregionbud.gov.ua/index.php?option=com_k2&view=item&id=361

⁸ <http://www.ecobank.org.ua/GovSystem/EnvironmentState/Reviews/Pages/default.aspx>

⁹ http://www.mns.gov.ua/files/2011/5/17/2_1_2010.pdf

¹⁰ <http://www.menr.gov.ua/content/article/201>

which has persisted for years? What are the plans of reducing the negative impact of monstrous pollutants on environment and public health? Who will make them pay for the environmental damages?

The arguments of the Ministry in establishing the environmental safety criteria, under which mainly the scope of emissions and discharges of the operating facilities is taken into account, also seem dubious. The country territory is covered by a whole lot of abandoned industries, which do not have an owner, but remain very dangerous. Somehow they are left beyond the scope of Ministry of Environment and Natural Resources' attention. For example, former coal-mining and chemical enterprises in Kalush never made it to the lists of major pollutants, despite the fact that in the years 2008–2009 this area was proclaimed a zone of environmental disaster. Facilities of the abandoned former “Prydniprovsky chemical plant” in Dniprodzerzhinsk are not mentioned in the list of “100 pollutants” either. In the years 40 — 50-ies of the last century it was here that uranium raw matter for the nuclear weapons was produced. According to Accounting Chamber, the Ministry of Finance in former years ignored the proposals of the specialized parliamentary committee concerning the funding of measures aimed at ensuring environmental safety of the said plant's facilities. As a result, liquidation work was underfunded by 20 mln UAH. In its turn, the Ministry of Fuel and Energy, violating the acting law, dispersed and wasted 26.7 mln UAH, i. e. about 70% of budget money, allocated for priority measures in PCP facilities¹¹.

The government and the Ministry of Environment and Natural Resources quote significant growth in the volumes of pesticides rendered harmless in 2011 as one of the major achievements. In 2011 about 7175,8 tons of waste pesticides (91,8% of total amount) were taken out of Ukraine. 175 mln UAH were allocated from the budget funds to remove and dispose of hexachlorobenzene waste, accumulated by former Kalush and Horlivka industries. 2350 tons of these toxic compounds is to be taken out of Ukraine and de-contaminated. As of today, 1650 tons of hexachlorobenzene are ready for removal; 1575 tons have been taken out already.¹² In total, over the last year and a half 33.3 thousand tons of hazardous waste has been taken out of Ukraine for decontamination. It is 6.7 times more, than for all the years of existence of independent Ukraine.¹³

Meanwhile, one can't help noticing serious discrepancies in the assessment of technogenic impact on environment, offered by various agencies. These discrepancies give grounds for justified doubts as to the objectivity of state environmental monitoring as such. Thus, according to data provided by the State Committee for Statistics, as of January 1, 2011, 13.3 billion tons of waste is accumulated in the special plots and at the enterprises' premises. At the same time, at the interagency meeting in the General Prosecutor's Office “On the Legal Basis for Waste Management” another figure — 35 billion tons of waste of all types — was quoted.¹⁴

According to the information concerning environmental crimes, submitted by the State Environmental Inspection to the General Prosecutor's Office, 245 criminal cases were filed over the year.¹⁵ The prosecutor's checks of adherence to the acting law in the land use by public companies, educational establishments and scientific entities, revealed numerous facts of non-sanctioned land appropriation based on the decisions of local authorities etc. As a result, over the last three years, over 35 thousand ha of agricultural lands were illegally taken out of use¹⁶.

On General Prosecutor's Office order, control checks concerning hazardous waste management were completed by November, 2011. They revealed increase in illegal disposal of the waste in the agricultural lands, forests, water and natural reserves fund. 154 criminal cases, 534 protests, over 5 thousand statements were filed by the prosecutors over the current year. For example, the pros-

¹¹ Considered by the Accounting Chamber Collegiate “Local Chornobyl ” with large-scope threats” <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16736847>

¹² <http://www.menr.gov.ua/content/article/9819>

¹³ <http://www.menr.gov.ua/content/article/9879>

¹⁴ http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=99743&fp=51

¹⁵ <http://www.menr.gov.ua/content/article/9879>

¹⁶ http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=99811&fp=41

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ecutor of Holosyiv district, Kyiv, filed a criminal case concerning contamination of a land plot with waste of diverse morphological structure by a private company, which caused losses for the country amounting to a substantial sum of 491 mln UAH. However, no clarification was provided as to the reimbursement of damages in this case¹⁷.

In general, the level of indemnities paid by the culprits for the environmental damage, caused by them, is ludicrously low. Thus, the Ministry of Environment and Natural Resources published official information to the effect that, based on the results of control checks carried out by the State Environmental Inspections, the violators of environmental law, were obliged to pay about 1.2 billion UAH in 2011, and only 75 mln UAH (or 7%!) were actually retrieved!¹⁸

While this chapter was being written, the text of Supreme Rada Ombudsman on Human Rights' Report on observance and protection of human rights in Ukraine in 2011, has not been made public on the new Ombudsman's web-portal. Therefore, no judgment on relevance of environmental issues in it can be made.¹⁹ Scarce official announcements made by Ombudsman do not contain any information as to the observance of environmental rights specifically.²⁰

Summing up, it makes sense to once again stress the non-priority status of environmental policies within the system of Ukrainian official politics and total neglect of environmental rights of public in Ukraine. Oligarchic power traditionally cultivates a primitive resource-consuming model of development. This model is non-competitive due to its raw-material and industrial orientation, which entails the waste of natural capital, both in production and in consumption. These tendencies become more and more threatening, considering the unprecedented rate of waste accumulation, pollution and exhaustion of resources; technogenic transformation of territories and the level of its negative impact on human health. Detrimental trend in economic development combined with feudal forms of governance, accumulation and distribution with increasing legal arbitrariness deprive the country of European prospective and lead to mass and systematic violations of its' citizens' rights.

2. RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION

For the umpteenth time in this research we want to draw attention to the fact that over many years the legal provisions defining the accessibility of environmental information have been ignored in Ukraine. The Ministry of Environment and Natural Resources, as usual, is lagging behind in preparing National Reports on the status of environment. At the end of 2011 the official web-portals of the Ministry of Environment and Natural Resources and its Information and Analytical Center offered the National report for the year 2007.²¹ Over seven years, in violation of the law "On Natural Environmental Protection", the report has not been submitted to the Supreme Rada for consideration; neither has it been published as a separate edition. The National report for 2011 neither has been submitted to the Parliament.

This year, same way as last year, we observe delays in making public special reports of the Ministry of Environment and Natural Resources — not a single new report appeared on its web-portal in 2011.²² The information on the site of Information and Analytical Center under the Ministry of

¹⁷ http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=99185&fp=121

¹⁸ <http://www.menr.gov.ua/content/article/9819>

¹⁹ http://www.ombudsman.gov.ua/index.php?option=com_content&view=article&id=134:2011-02-16-16-18-23&catid=185:2011&Itemid=194

²⁰ http://www.ombudsman.gov.ua/index.php?option=com_content&view=category&layout=blog&id=74&Itemid=35

²¹ <http://www.menr.gov.ua/content/article/6004>

<http://www.ecobank.org.ua/GovSystem/EnvironmentState/Pages/National.aspx>

²² <http://www.menr.gov.ua/content/article/6010>

Environment and Natural Resources is also being updated with delays. In January 2012 only the quarterly bulletins on environmental situation for the second quarter of 2011 were made public.²³

The General Prosecutor's Office, probably too busy with "witch-hunting" among the ranks of opposition, never managed to submit to the Parliament annual information on law and order status in the country over the years 2010–2011. Usually this information contains consolidated report concerning the violations of natural protection and environmental law.²⁴

The Ministry of Regional Development keeps ignoring the requirement of art. 9 of the Law "On Drinking Water and Water Supply", under which a yearly "National Report on the Drinking Water Quality and Drinking Water Supply" should be devised. The latest report, known to us, dates back to 2006. Despite the information published in mass media, announcing the preparation of 2009 report, it proved impossible to find any reference to it on the Ministry site in January 2012.²⁵ Even omniscient Google failed in trying to find the traces of National report on the Internet — indeed, it's tough job to find something that never existed!

Meanwhile the Ministry of Extraordinary Situations of Ukraine this year complied with the requirements of respective Presidential Decree and made public well-substantiated "National report on the level of technogenic and natural safety in Ukraine in 2010".²⁶

The site of State Inspection for nuclear regulation never updated the National report on the status of nuclear and radiation safety over the year. One can find, same as over the last year, only report for 2009 and all the reports starting from 1999²⁷. On EU recommendation the State Inspection devised and made public the National report of Ukraine on the results of "stress-tests" for the Ukrainian NPPS. Unfortunately, it is available in English only.²⁸

After the law "On Accessibility of Public Information" was passed, some executive bodies demonstrate their desire to bring their own regulatory acts into conformity with legislative innovations. For example, the State Agency for land resources in August approved a new resolution, which banned restrictions in access to four categories of data concerning land resources. Thus, access to information contained in land logs, state registry of the property rights on land, land lease agreements, data on land availability and distribution in raions and cities, database for automated system of state land cadastre etc. was liberalized.²⁹

The State Forestry Committee, in its turn, having in the process of reorganizing changed its name to the State Agency for Forest Resources, left unchanged its tradition of secrecy and total confidentiality. In May 2011 the Agency passed an order with the list of data which are strictly confidential.³⁰ This list includes the whole chapter on environmental information concerning forestry operations: paperwork on the projects for forestry development and organization, state forests cadastre, forests' layouts at the oblast' levels, forestation layouts at the individual forestries etc.

On familiarizing themselves with this order, the members of environmental NGO "Green World" came up with the number of questions as to its compliance with the legislation on accessibility of information. The organization, then, approached the forestry agency with the letter, re-

²³ <http://www.ecobank.org.ua/GovSystem/EnvironmentState/Reviews/Pages/default.aspx>

²⁴ <http://www.gp.gov.ua/ua/vlada.html>

²⁵ <http://www.minregionbud.gov.ua/uk/index>

²⁶ <http://www.mns.gov.ua/content/nasdopov2010.html>

²⁷ <http://www.snrc.gov.ua/nuclear/uk/doccatalog/list?currDir=37795>

²⁸ <http://www.snrc.gov.ua/nuclear/doccatalog/document?id=171796>

²⁹ Order of the State Committee for Land Resources of 29.08.2011 No. 549 "On introducing the changes into the list of data considered confidential, which are governmental property and are considered classified information with restricted availability

³⁰ The Order of the State Agency of the Forest Resources of Ukraine of May 26, 2011, No. 196 with the List of data constituting classified information in the State Agency of the Forest Resources of Ukraine http://dklg.kmu.gov.ua/forest/control/uk/publish/article;jsessionid=B1DA47F07BBD070CEFD5B2D6D901A376?art_id=82020&cat_id=82019

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requesting clarification as to which legal provisions underlie the decision to restrict access to the said categories of data; and, if the agency managers recognize that the contents of the order contradicts the law of Ukraine, pass the decision on its nullification³¹. The Agency did not find grounds for order nullification³², so that the “Green World” in November submitted the claim to the administrative court in Kyiv, demanding that court classifies the bizarre order as illegal.

Local state administrations neglecting the norms of basic nature protection law stubbornly refuse to publish the information on environmental situation in mass media subordinate to them. Last year Zaporizhzhya oblast’ state administration was the only exception. It made public on its web-portal “System of providing information on environmental situation”. Unfortunately, the information, contained in it, has not been updated since mid-2011. At the beginning of 2012 the site map of oblast’ state administration no longer showed the chapter on environmental situation.³³

The public discussion on the necessity of introducing public TV and broadcasting in Ukraine eventually came to a halt, although it is common knowledge that electronic media currently play a most active role in shaping public opinion and behavior. However, it is obvious, that totally commercialized electronic space offers no informational, educational or learning programs, which would form environmental vision and promote environmentally friendly life standards.

Instead, almost every commercial TV and broadcasting channel reveals the “Midas ears” of the Ukrainian oligarchs — the audience is served a distorted image of nature, society and human values in humans. The stereotypes of political scheming, violence, depravity, thoughtless consumerism, the picture of the world as an infinite set of material goods, used by individuals to the fullest satisfaction of their needs, are obsessively imposed on public. Under such predicament, the Internet space remains most free and dynamic medium. However, it remains inaccessible, especially for poor people, residing in peripheral areas, where local broadcasting network is rapidly gaining momentum.

Beyond any doubt, the electronic media should be controlled by the civil society. Without them, it is virtually impossible to exercise the right of access to socially significant information, including environmental issues, and, consequently, to fully enjoy all the other human rights.

3. OBSERVANCE OF THE RIGHT TO PARTICIPATE IN ENVIRONMENTAL DECISION-MAKING

3.1. PUBLIC DISCUSSION OVER THE DRAFT OF THE NATIONAL PLAN FOR ENVIRONMENTAL PROTECTION

A public discussion over the draft of the ‘National Action Plan for Environmental Protection for the years 2011–2015’ was launched in January and February, 2011, in compliance with the Strategy for National Environmental Policy in Ukraine, adopted last year.³⁴ Public consultations, funded by the European Program of the “Renaissance” MF, were held in four rounds — in Lviv, Kirovohrad, Simferopol and Kharkiv, while final expert discussion took place in Kyiv. Representatives from 129 organizations attended the event.

At the beginning of the year some organizations assessed the results of the consultations on NAP as highly positive³⁵, despite the fact, that from the first stage it became obvious that bureaucrats from the Ministry of Environment and Natural Protection wanted to level the contents of the plan proposals as to the guarantees for accessibility of information and public participation in the decision-making, based on Aarhus Convention standards. Devious imitation of dialogue with public

³¹ The letter of the “Green World” No. 10–09 of September 16, 2011, to the Head of the State Agency of the Forest Resources of Ukraine V. Syvets.

³² The State Agency of the Forest Resources of Ukraine response to the Green World” of 28.09.2011, Nos. 11–34/5615 — 11 signed by the deputy Head I. Shyshov

³³ <http://www.zoda.gov.ua/sitemap>

³⁴ <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2818-17>

³⁵ <http://www.mama-86.org.ua/index.php/uk/ecologization/ecointegration-news/246-round-table-nap.html>

has deceived no one by May 2011, after censors from Cabinet of Ministers have worked over the NAP text. The government radically changed the structure of the documents and stroke out of the public discussion a number of key issues. Other NAP provisions were edited to change the meaning and consciously distort the outcomes of the plan implementation.³⁶ This “neutered” version of the plan was approved by the Cabinet of Ministers.³⁷

Over the year the Ministry of Environment and Natural Protection remained active in trying to get hold of 15-billion tranche from EU for the support of the Strategy for National Environmental Policy.³⁸ At the beginning of 2012, though, failure to meet the deadlines for plan implementation became obvious.

3.2. FORUM OF HUMAN RIGHTS ORGANIZATIONS: ASSESSMENT OF ENVIRONMENTAL RIGHTS' VIOLATIONS

On June 16 the 5th Forum of Human Rights organizations took place in Kyiv. A Manifesto of human rights activists of Ukraine “Public against lawlessness”³⁹ was adopted by consensus of the Forum’s 120 participants. A special chapter in it is dedicated to the environmental rights violations.

Forum participants stated that large part of Ukraine is in critical environmental condition. The main cause of the deepened environmental crisis is progressing “de-ecologization” of policy and public awareness. More and more often authorities demonstrate their incapacity in making the companies’ owners responsible for paying indemnities for damages in accordance with the principle “pollutants pay”. Therefore, exorbitant profits of the oligarchs, obtained through excessive exploitation of natural resources, turn into huge amounts of waste, pollution and exhaustion of natural environment.

First of all, concern is caused by large-scale violations of the art. 13 of the Constitution, under which land and other natural resources are the subjects of property law for. In reality, though, the real owners, i.e. Ukrainian citizens, are alienated from the national riches. The stealing of main national treasure — the land — continues. Territorial communities have no say in managing natural resources.

Ukraine, which 25 years ago suffered an unprecedented technogenic disaster, still has not drawn right conclusions from Chernobyl NPP catastrophe or Fukushima disaster. The authorities refuse point blank to revise the Energy Strategy, which stipulates construction of 22 nuclear reactors.

Human rights activists firmly believe that the issues of environmental protection and sustainable development are to be addressed as one of the main priorities in the Ukraine’s European integrations. The Presidential Program of economic reforms, however, is oriented at achieving economic goals, leaving both social and natural factors and citizens’ rights outside its focus of attention. No wonder, then, that Ukraine has been marked as the country systematically violating Aarhus Convention provisions.

Forum participants addressed the authorities requesting cardinal changes in the area of environmental rights observance. Under the Aarhus Convention all the key issues of national environmental policy and use of natural resources shall be addressed with public participation.

3.3. PUBLIC EVALUATION OF THE UKRAINIAN POSITION AT THE UNO CLIMATE CHANGE NEGOTIATIONS

On the eve of the UN Climate Change Conference of the Framework Convention countries in Durban (SAR), which lasted from November 28 till December 9, Ukrainian environmental organizations approached the Ministry of Environment and Natural Protection with the proposal to

³⁶ In the Cabinet of Ministers of Ukraine the Plan was rewritten, <http://www.mama-86.org.ua/index.php/uk/ecologization/eointegration-news/263-neap.html>

³⁷ <http://zakon2.rada.gov.ua/laws/show/577-2011-%D1%80/page3>

³⁸ <http://menr.gov.ua/content/article/8638>

³⁹ <http://helsinki.org.ua/index.php?id=1309335837>

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revise the official position of Ukraine in post-Kyoto period. Environmentalists for the umpteenth time called for embracing the goal of stabilizing the greenhouse gases emissions at 2008 level, or, in Kyoto protocol language, a thoroughly realistic goal of greenhouse gases emissions' reduction to 55% of 1990 level in 2020 with further reductions⁴⁰. The Ministry of Environment and Natural Protection, however, remained unflinching in the issue of Ukrainian contribution into climate changes counteraction. The power prefers to play games, imitating "reduction", which actually means increase in absolute figures of emissions on yearly basis, due to permanent excessive use of national resources⁴¹.

Despite certain positive results, achieved at Durban conference, it demonstrated predominant egotistic interests of the countries-participants in the negotiations, their failure in reaching compromise and joining efforts to counteract climate changes.⁴² So far only European Union and Norway have demonstrated responsible attitude to climate changes.

In this situation Ukraine is trying to sit on two chairs at once: to benefit from old quotas transferred from the last century and Kyoto protocol mechanisms implementation, on the one hand, and to duck any responsibilities in real reduction of emissions, on the other.

3.4. PUBLIC PROTESTS AGAINST DESTRUCTION OF GREEN RECREATIONAL AREAS IN KHARKIV

The protests of Kharkiv residents against destruction of green recreational areas went on for about a year. The ill-famed project of constructing a highway through the city Gorky Park were "supplemented" by others: construction of presidential residence in the same park, large-scope tree-cuttings within the framework of getting ready for 2012 Football Championship, seizure of "Berizky" grove in residential area "Pyatykhatky".⁴³ In November a group of environmentalists "Pechenehy" started to collect signatures under the appeal to organizers and sponsors of "Euro-2012", proposing to draw lessons from the negative Kharkiv experience in order to avoid environment destruction in the cities which will host the championships in future.⁴⁴

3.5. MARCHES OF KYIV DEFENDERS

Looks like Kharkiv protesters' activity this year became the source of inspiration for Kyivites. Over the year four marches for the defense of Kyiv, supported by over 10 NGOs, have been held in the capital⁴⁵. Participants protested against the Master Plan of Kyiv Development, which envisages construction development on over 700 ha of green areas, and demanded actions which would make it impossible to develop construction in Kyiv islands.

3.6. PUBLIC PROTESTS AGAINST NATURAL RESOURCES'EXPLORATION IN THE DESIGNED REGIONAL LANDSCAPE PARK "INGULETS STEPPE"

An LTD company "Granite group" launched an exploration of granite deposit in the virgin steppe of Dnipropetrovsk oblast'. The work started without positive decision of the State Environmental Expertise, although it is obligatory for all mining companies. The public hearings, required by the law, were not held either. Illegal actions of the "Granite Group" owners and inertia of law-

⁴⁰ http://climategroup.org.ua/wp-content/uploads/2007/02/Letter-for-Durban_2011.pdf

⁴¹ The Ministry of Environment and Natural Resources response of 23.12.2011, No. 25211/10/10-11 to the appeal of the Work Group NUO on Climate Change.

⁴² Official press-release of UN FC CC in English http://unfccc.int/files/press/press_releases_advisories/application/pdf/pr20111112cop17final.pdf

⁴³ <http://maidan.org.ua/static/news/2011/1306092895.html>

⁴⁴ <http://pechenegy.org.ua/ru/node/472>

⁴⁵ <http://march.org.ua/>

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enforcement bodies led to the wave of public protests⁴⁶. Dozens of villagers threw themselves under bulldozers, trying to stop the destruction of natural environment.⁴⁷

3.7. PUBLIC PROTESTS AGAINST GYPSUM MINING IN THE VILLAGE OF PYLYPCHE

Conflict between the local community of Pylypche, Borshchiv raion, Ternopil oblast', and private company "Skala-Inter" has been going on for years. This company is allegedly linked with the "Podilsky cement" company, which currently belongs to the foreign owner.⁴⁸ By multiple violations of the law "Skala-Inter" managed to obtain the permit and a land plot of agricultural use for gypsum exploration in the village territory. The official expertise, full of numerous incongruences, was held without public consultations, provoking additional tension between the contenders, which in summer 2011 led to physical confrontation⁴⁹. While Pylypche village council for several years has been refusing to issue a decision on change of use and transfer of the land for deposit exploration, the Economic court illegally terminated its authority and disposed of the land in lieu of the territorial community.⁵⁰ Presently the "Skala-Inter" refusal to provide the results of project environmental impact evaluation, supported by courts of two levels, is being appealed⁵¹.

Pylypche conflict vividly illustrates Ukrainian reality in the sphere of natural resources' use, with all typical characteristics: legal arbitrariness, omnipotence of money, power bodies' servility, violation of citizens' rights.

3.8. PUBLIC PROTESTS AGAINST MOTORIZED TOURS IN NATIONAL RESERVES' TERRITORIES

Last summer "jeeping-tours" across the natural reserves' territories of Ukraine were broadly covered by mass media. In July a team of jeepers, including president Yanukovich's son, decided to take a motorized tour "Ukraine Trophy 2011" on 200 heavy SUVs across the lands of Polissya and Rivne natural reserves and Shatsk National park⁵². Only due to numerous public protests, coordinated by the National environmental center of Ukraine, the route for the races was partly changed.⁵³ In August, however, the jeepers had much fun spoiling and ruining natural forest landscapes in the landscape park "Berezhanske Opillya". The management of the forestry and Berezhany did not dare to refuse a team of jeepers, supported by the highest authority in the country.

4. EXERCISE OF THE ACCESS TO JUSTICE RIGHT IN ENVIRONMENTAL ISSUES

Isolated cases of successful court disputes in environmental issues for the benefit of citizens and NGOs were registered, same as last year.

⁴⁶ <http://helsinki.org.ua/index.php?id=1318234468>

⁴⁷ "Villagers defend the steppe throwing themselves under excavators". <http://maidan.org.ua/static/news/2011/1312465986.html>

⁴⁸ http://uk.wikipedia.org/wiki/%D0%9F%D0%BE%D0%B4%D1%96%D0%BB%D1%8C%D1%81%D1%8C%D0%BA%D0%B8%D0%B9_%D1%86%D0%B5%D0%BC%D0%B5%D0%BD%D1%82

⁴⁹ <http://helsinki.org.ua/index.php?id=1312524546>

⁵⁰ <http://www.reyestr.court.gov.ua/Review/4024934>

⁵¹ O. Stepanenko Appeal to the Supreme specialized court of Ukraine for civil and Criminal procedures re Decision of Ternopil Appellation Court of 06.12.11, case No. 22-ii-1714 and Decision of Borshchiv raion court of 26.10.11 y. on case No. 2-607/11 requesting their invalidation

⁵² <http://www.pravda.com.ua/news/2011/06/24/6327209/>

⁵³ <http://www.necu.org.ua/wp-content/uploads/lystsponsoram-jyping-1106.doc>

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In February 2011, the European Court of Human Rights found a violation of art. 8 of the European Convention, concerning the right for protection of private and family life. The case included 11 individuals from Dubetsky, Naida, Vakiv and Havrylyuk families vs. Ukraine. Residents of Vilshyna settlement (Sokal raion, Lviv oblast'), located at the proximity to a coal mine, waste bank and coal processing plant, for 18 years have suffered adverse environmental effects of coal-mining industry: land, ground water and air pollution, sinking of the ground surface, dilapidation of buildings. Over this period authorities failed to resettle the families to a safe place, in spite of the respective court rulings. The European Court found absence of adequate state actions in resolving environmental problems and ruled that damages are to be paid to the claimants at the amount of 65 thousand Euros. The case was handled by attorney Ya.Ostapyk from Lviv.⁵⁴

On July 21 the European Court found that Natalia Hrymkovska's rights were violated by Ukraine. The claimant lives in Krasnodon (Luhansk oblast') in a residential quarter, through which a highway with intense truck traffic was laid by the local authorities' decision. Judges in Strasbourg ignored Ms. Hrymkovska's statements that the highway in question caused the diseases among her family members and cracks in her building. In fact, cumulative effect of noise, vibration, air and ground pollution had adverse effect on the claimant's family life. Finally, the Court unanimously ruled that Ukraine violated art.8 of the Convention and obliged it to pay moral damages to Ms. Hrymkovska at the amount of 10 thousand Euros.⁵⁵

Kyiv Environmental and Cultural Center and "Ecopravo-Kyiv" won a case concerning protection of "Roztochchya" Natural Preserve, in the Circuit Administrative Court in Kyiv (10.03.2011). The Court obliged the Ministry of Education to nullify its order, which stipulated "closing of the "Roztochchya" Natural Preserve as legal entity".⁵⁶ Oddly enough the notorious ministerial order was signed at the time when UNESCO finally approved the decision on setting up the trans-boundary Ukrainian-Polish bio-sphere preserve "Roztochchya", with Ukrainian preserve being a part of it.

In October 2011 Circuit Administrative Court in Kyiv passed a ruling on "Ecologia-Pravo-Lyudyna" (Environment-Law-Individual) organization case against the Ministry of Environment and Natural Resources. The activists requested that the court qualifies inaction of the Ministry of Environment and Natural Resources, which consisted in failure to make public results of state environmental expertise on its official web-site as illegal. The Court obliged the Ministry to publish 1 293 conclusions made over the years 2009–2011 on its official site within two months.⁵⁷ The deadline passed, but by January 2012, same as last year, the site of the Ministry of Environment and Natural Resources contains nothing, but mere 6 conclusions of state expertise, dating back to the years 2006–2009⁵⁸.

5. EVALUATION OF ADHERENCE TO THE INTERNATIONAL ENVIRONMENTAL CONVENTION

Year 2011 became the "Doom's year" for Ukraine — it was recognized as failing to comply with three most significant international environmental conventions: Aarhus Convention, Espoo Convention and Kyoto Protocol to UN Framework Convention on Climate Change.

⁵⁴ Dubetska v. Ukraine, No. 30499/03, <http://hr-lawyers.org/index.php?id=1303385169>

⁵⁵ Grimkovskaya v. Ukraine, No. 38182/03, <http://hr-lawyers.org/index.php?id=1321877343>
http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=888491&portal=hbkm&source=extern_albydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

⁵⁶ <http://ecoethics.ru/kievskiy-ekologo-kulturniy-tsentr-i-ekopravo-kiev-vyiigrali-vtoroy-sud-v-zaschitu-zapovednika-rostoche/>

⁵⁷ http://epl.org.ua/fileadmin/user_upload/dodatky_do_anonsiv/%D1%80%D1%96%D1%88_%D0%92%D0%95%D0%95.pdf

⁵⁸ <http://www.menr.gov.ua/content/article/6037>

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5.1. UN EEC CONVENTION ON ACCESS TO INFORMATION AND PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING AND ACCESS TO JUSTICE ON ENVIRONMENT-RELATED ISSUES (AARHUS CONVENTION)

In June 2011, 12th anniversary of Aarhus Convention ratification and its inclusion into national legislation was celebrated. It is common knowledge that at the Convention's meetings Ukraine has been recognized as a country which systematically violates its provisions⁵⁹. Public activists many a time criticized the actions of officials, who, in fact, distanced themselves from implementing the obligations stipulated by the Convention⁶⁰.

Fourth meeting of Aarhus Convention parties (Chisinau, July 2011) arrived at the conclusion that Ukraine still does not comply with the Convention. The meeting members regretted very slow Ukrainian progress in implementing the decisions of former meetings and once again warned Ukrainian government⁶¹.

The meeting approached the Aarhus Convention Compliance Committee with the proposal: if Ukraine fails to comply with earlier-made decisions, respective report shall be submitted to the fifth session of the meeting, so that appropriate decision on suspending special rights and privileges, granted to Ukraine by force of the Convention, can be made. So far similar sanctions were never used with regards to any country that ratified the Convention.

Although the Cabinet of Ministers of Ukraine adopted Resolution No. 771 "On Approving Procedure for public participation in the making of decisions, which can affect the environment" at the time of the Fourth meeting of Aarhus Convention parties, the renowned public organizations, e.g. "Ecologia-Pravo-Lyudyna", severely criticized it⁶². The fact of the matter is that in the process of governmental approval of the draft "Procedure" with the participation of national and foreign environmental experts, radical changes have been introduced into the text. The competences of the "Procedure" were narrowed to a single decision (conclusions of the state environmental expertise), while the whole logically structured and well-grounded document was rendered meaningless.

As a result, in December 2011 the government was nominated for annual Anti-prize for gross violations of human rights ("Thistle of the year"), introduced by the Ukrainian Helsinki Union on Human Rights. For the first time the Anti-prize was granted for environmental rights' violations. The Anti-Prize certificate read that the Cabinet of Ministers as the highest body of executive power, responsible for ensuring rights and freedoms of individuals and citizens, failed to ensure the due compliance with the respective provisions of the Aarhus Convention, as recognized by three meetings of the parties-participants to the Convention. The Cabinet of Ministers never set up appropriate legal and institutional mechanisms for the implementation of the Convention, having shifted the responsibility to the institutionally weak Ministry of Environment and Natural Resources. Year in year out the government and the Ministry of Environment and Natural Resources have been concealing from Ukrainian general public the deplorable conclusions of international organizations, concerning Ukraine's compliance with Aarhus Convention⁶³. More information on the "Thistle of the Year" can be found on Internet page of the Ukrainian Helsinki Group.⁶⁴

⁵⁹ http://www.unece.org/index.php?eID=tx_nawsecuredl&u=0&file=fileadmin/DAM/env/pp/mop3/ODS/ece_mp_pp_2008_2_add_14_r_Ukraine.pdf&t=1322732135&hash=357c5ecde70d7c886a349285d1da09c582d492de

⁶⁰ <http://helsinki.org.ua/index.php?id=1298361303>

⁶¹ http://www.unece.org/index.php?eID=tx_nawsecuredl&u=0&file=fileadmin/DAM/env/pp/mop4/Documents/Post_Session/ece.mp.pp.2011.2.Add.1-as_submitted_adv.pdf&t=1322720553&hash=2b48b05653a1141794aa5c30a60495841cac8e0e

⁶² <http://epl.org.ua/novini/anons/browse/1/backPid/393/article/4274/>

⁶³ <http://helsinki.org.ua/index.php?id=1322746870>

⁶⁴ <http://helsinki.org.ua/index.php?id=1318499595>

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5.2. UN FRAMEWORK CONVENTION ON CLIMATE CHANGE

The status of implementation of obligations, undertaken by Ukraine, while ratifying the UN Framework Convention on Climate Change is no better. Thus, on October 12, 2011 the Committee on Supervising the Kyoto Protocol Requirements towards UN FC on Climate Change, made a decision on suspending the Kyoto Protocol flexible mechanisms in regards to Ukraine⁶⁵. The Committee decision concerned both selling the emissions quotas and joint implementation mechanism. It was called to life by incompliance of greenhouse gases emissions' cadastre in Ukraine with international norms. The experts argued that the system of emissions calculations and absorption of greenhouse gases in Ukraine is not transparent enough, inconsequent, incomplete and imprecise. The main shortcomings found with Ukrainian cadastre included absence of energy balance of Ukraine, non-transparent system of forests' inventory, confidentiality of data concerning many industrial processes.

5.3. CONVENTION ON EVALUATION OF ENVIRONMENTAL IMPACT IN TRANS-BOUNDARY CONTEXT (ESPOO CONVENTION)

On June 20–23 2011 Fifth session of ESPOO Convention meeting convened in Geneva. For the first time in the history of the Convention a warning was issued — to Ukraine, as an offending country. The session launched the international procedures within the frame of the Convention concerning the construction projects, i.e. III and IV blocks of Khmelnytsky NPP plant. Under the Convention, the construction of new reactors envisages consultations with all the stake-holders after evaluation of the environmental impacts. International monitoring bodies arrived at the conclusion that current violation of the Convention by Ukraine is linked to legislative issues. Law “On Regulations of Urban Development Activities” dramatically narrowed the list of grounds for environmental expertise, thus making trans-boundary evaluation of environmental impact of the projects, implemented in Ukrainian territory, hardly possible for Ukraine⁶⁶.

6. LEGISLATIVE INNOVATIONS PRESENTING A THREAT OF VIOLATIONS OF ENVIRONMENTAL RIGHTS

Over the last year the Cabinet of Ministers of Ukraine adopted a number of legislative initiatives, which pose a threat to the environmental rights, specifically, to the right of participation in decision-making related to environmental issues, and the right to indemnities for environmental damages.

First of all, it concerns the laws “On Regulations of Urban Development Activities” and “On Introducing the Amendments to the Law of Ukraine “On State Budget of Ukraine for 2011”

The Law “On Regulations of Urban Development Activities” restricted the citizens' rights as to their participation in discussions on planning and developing the territories. It violates the Constitutional guarantees of inadmissibility of restricting the contents and scope of existing rights and freedoms while passing new laws. This law also significantly narrowed the list of grounds for environmental expertise of the urban development documentation, which became a logical next step in the ruination of the institute of state environmental expertise in Ukraine.

Finally, the law does not envisage sufficient responsibility for the negative effects, caused by the violations of construction norms, standards and rules in the process of project expertise and urban development construction.⁶⁷

⁶⁵ http://unfccc2.meta-fusion.com/kongresse/enf15/templ/play.php?id_kongresssession=4055

⁶⁶ <http://www.enpi.org.ua/novina/article/konvencija-espo-sudnii-den-dlja-ukrajini/>

⁶⁷ <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3038-17>

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The amendments, introduced to the law “On State Budget of Ukraine for 2011”, suspended the validity of some provisions of the law “On Status and Social Protection of the Citizens affected by the Chernobyl Disaster”, thus infringing their right to re-compensation in the legally defined amount, for the health damages, suffered as a result of environmental disaster ⁶⁸.

Finally the Cabinet of Ministers adopted a resolution, charging the Ministry of Environment and Natural Resources with the task to design the draft law “On Invalidating the Law ”On National Program for Setting Up National Environmental Network of Ukraine for the years 2000–2015”⁶⁹. The decision on Program termination manifested deplorable lack of professionalism of the Cabinet of Ministers of Ukraine, incapable of fully understanding either its importance in preserving the national legacy, or the consequences of its decision for health and well-being of the present and future generations. The Cabinet of Ministers’ decision is an attempt to destroy the last natural oases still existing in Ukraine. Only due to the numerous public protests and reaction of Parliamentary Committee and President, this odious provision was taken out of the resolution.

7. CONCLUSIONS AND RECOMMENDATIONS

1. President of Ukraine should pass a decree “On Urgent Measures for Increasing the Priority Status of Environmental Policy”.

2. The Cabinet of Ministers should develop a draft Strategy of integrating the Aarhus Convention provisions into the national legislation.

3. The Cabinet of Ministers should convoke an “Interagency Work Group for the implementation of the Aarhus Convention provisions in Ukraine”, headed by one of the vice-prime ministers.

4. The Cabinet of Ministers, the Ministry of Justice, the Ministry of Environment and Natural Resources should elaborate draft laws on introducing amendments to Land, Forest and Water Codes of Ukraine, taking into account provisions of international environmental conventions, sustainable development principles, as well as principles of integral management of natural resources

5. The Cabinet of Ministers, the Ministry of Justice, the Ministry of Environment and Natural Resources should elaborate draft laws on introducing amendments to the laws “On Environmental Expertise”, “On Regulations of Urban Development Activities”, which would rehabilitate the concept of environmental expertise and evaluation of the environmental impacts; offering information to public and guaranteeing its participation in this activity.

6. The Cabinet of Ministers, the Ministry of Justice, the Ministry of Environment and Natural Resources should elaborate draft law “On Public TV and Radio Broadcasting”.

7. The Ministry of Environment and Natural Resources should prepare and make public “National Reports on Environmental Situation in Ukraine” for the years 2008–2011.

8. The Cabinet of Ministers should adopt the resolution on procedure for access to environmental information.

9. The Cabinet of Ministers should finalize and approve the Strategy and National Action Plan for sustainable development education.

⁶⁸ <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=796-12>

⁶⁹ The Cabinet of Ministers’ of Ukraine Resolution of June 22, 2011, No. 704 “On decreasing the number and merging of state target programs”.

XX. WOMEN'S RIGHTS: DOES THE SOCIETY NOTICE THEIR VIOLATION?¹

1. THE SOCIOPOLITICAL CONTEXT

In 2011, negative tendencies that formed in the previous year kept developing. They are, in particular, increase of manifestations of discrimination against women, the Government's failure to fulfill even those few obligations that it undertook, absence of the mechanisms of protection against gender discrimination. An alarming fact is court prohibition of peaceful gatherings, which is in conflict with the Constitution in effect. Total control is being imposed on all participants of any peaceful actions, including video recording of the faces of all participants by police, as noticed by the female activists during peaceful actions and pickets.

The draft filed to Verkhovna Rada concerning activities of NGOs provides for prohibition of financing NGOs by international donors, which will render functioning of Ukrainian women's organization and organizations for gender related issues completely impossible.

A serious problem of communication with the governmental bodies is their irresponsiveness to letters and petitions, in conflict with the Laws of Ukraine "On access to public information" and "On the citizens' addresses." For example, the majority of letters and petitions sent by the center "La Strada — Ukraine" were not answered.

In 2011, the manifestations of discrimination against women started to spread from verbal and political spheres to the legislation. It is quite alarming that it was the Ministry of Social Policy, the authorized governmental body for implementation of gender policy, that acts as an initiator of the legislative initiatives impairing the status of women.

2. THE INTERNATIONAL CONTEXT

Was also ambiguous. Since May till November of 2011, Ukraine presided in the Committee of the Ministers of the European Council. The main topic for presiding was protection of children's and women's rights. In May, the International Conference for protection of children's rights was conducted in Kyiv. In the end of October the International conference for protection of the institutional mechanisms of gender equality implementation was held. Both conferences were notable for their non-transparent preparation by the Government, high levels of the participants from other countries and international organizations, and (especially the latter) for their formalism.

On November 7, 2011, Ukraine signed the Council of Europe Convention on preventing and combating violence against women and domestic violence².

¹ This section was prepared by K.Levchenko — International Women's Advocacy Center "La Strada — Ukraine", Olena Suslova — Information and Consultation Women's Center

² On November 25, 2011, Turkey was the first to ratify it among the 17 countries that signed it.

On June 23, 2011, in the Parliamentary Assembly of the European Council in Strasbourg during the meeting of the Committee for equal opportunities of men and women, the special hearing took place dedicated to the condition of observance of women's rights in Ukraine, which became a practical manifestation of concern about securing the rights of women by the Ukrainian government.

For the first time in all the years of monitoring over Ukraine's compliance with the obligations undertaken by the state when it joined the European Council, which is performed by the monitoring group of the Parliamentary Assembly of European Council, in 2011 started to include the issues of women's rights and gender equality, which also shows how the situation in this sphere became worse.

In 2010, Ukraine reported on observance of the UN Convention on Elimination of all Forms of Discrimination Against Women (the sixth and seventh combined reports), and received the Final notes that are binding for the state; the information on their implementation must be submitted partly in 2012, and in full — in the next report in 2014. At the same time, analysis of the dynamics of social processes and governmental policy in 2011 calls for mostly pessimistic conclusions as to observance by the Ukrainian government of its undertaken obligations³.

3. ELIMINATION OF INSTITUTIONAL MECHANISMS

The biggest problem of 2011 was elimination, due to the administrative reform, of the institutional mechanism for implementation of gender equality and protection of women's rights. The Presidential Decree as of December 9, 2010, disbanded the Ministry of Ukraine for Family, Youth and Sports, which was the authorized central executive body in the mentioned spheres. By the Presidential Decrees as of April 6, 2011, Provisions on the central bodies of executive power were approved, and some of the functions of the disbanded Ministry were transferred to the Ministry of Social Policy. But only since November 1, 2011, in the Ministry of Social Policy of Ukraine, the Department for Family Policy started to function, which came into place of the Department for Family and Gender Policy. As one can see from the new name, gender issues are not a priority for the newly created department, and gender problems are limited to family issues, which considerably narrows their understanding. As a result, the State Program for facilitation of implementation of gender equality and the State Program for Support of Family for 2011–2015, developed as early as in 2010, were never approved.

Absence of a clear chain of command in this sphere had a negative impact on the activities of governmental structures on the local level, as well as on those of local self-government bodies, and is causing minimization of such activities. There is a serious threat of losing the facilities (regional gender resource centers) and human resources (officials responsible for gender policy who work locally, trained gender experts for work on the regional level) due to the administrative reform. Presently, according to the information from the local bodies of executive power, the departments responsible for implementation of the Law "On securing equal rights and opportunities", receive directives from three different central executive governmental bodies — the Ministry for Social Policy, the Ministry of Education, Youth and Sports, and the State Service of Youth and Sports of Ukraine. Most activities were implemented by international and non-governmental organizations, on their initiative.

In addition to destruction of the institutional mechanism, in 2011 there were several manifestations of illogical administrative decisions in this sphere. For example, on December 7, 2011, during the Governmental meeting the assignment to develop the State Program for Support of Family⁴ was

³ This section was prepared using the materials from the participants of Gender Strategic Platform — informal association of experts in the area of women's rights and gender issues: V. Bondarowska, T. Isaieva, L. Kolos, N. Kostiuk, E. Lamakh, L. Magdiuk, K. Levchenko, L. Nechyporenko, M. Rudenko, A. Savenok, O. Savenko, O. Semykolenova, M. Skoryk, Ya. Sorokopud, Yu. Strebkova, O. Syslova and others.

⁴ "Welcoming Remarks of Mykola Azarov, Prime Minister, at the session of the Cabinet of Ministers of Ukraine on December 7, 2011." Governmental Portal; "It is obvious that what is the major precondition for implemen-

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given not to the Ministry of Social Policy, which has the Department for Family Policy, but to the Ministry of Education, Science, Youth and Sports.

The year 2011 was marked by further inaction of the Advisor of Prime Minister of Ukraine for gender issues. Implementation of such position in 2010 was a positive step in itself, yet in the conditions where the advisor has no opportunities to discuss issues with the supervisor and to work with his team for implementing the gender policy, existence of such position is just nominal, has no real sense, and is just misleading for the Ukrainian and international community. The Provisions on Advisor for gender issues do not exist. During 2011, the Advisor failed to provide any information on her activities in response to numerous inquiries from NGOs. There were no public speeches or petitions of the Advisor in response to numerous facts of women's rights violations, except for one interview for the *Deutsche Welle* radio station, which prevents this position from being perceived as a manifestation of institutionalization of the gender equality policy.

The draft Presidential Decree "On Strategy of combating discrimination in Ukraine" submitted for public evaluation caused additional misunderstandings because its implementation was supposed to completely overhaul the institutional mechanism, destroying the existing one without noticeable increase of its efficiency in general. In addition, the draft of the Strategy pays no attention to the issues of overcoming gender discrimination.

4. DRAFT AMENDMENTS TO THE LEGISLATION: ON THE WAY TO PROMOTING GENDER EQUALITY

On December 07, 2011, the Committee of Verkhovna Rada of Ukraine for the issues of human rights, national minorities and interethnic relations considered the draft of the Law of Ukraine "On amendment of some Laws of Ukraine (for securing equal rights and opportunities for women and men in employment sphere)", registration No. 8487 as of 12.05.2011. The draft aims to amend a number of legislative acts of Ukraine with provisions regarding securing equal rights and opportunities of men and women. In particular, the laws that regulate the elections of the people's deputies of Ukraine, elections of the deputies of Verkhovna Rada of the Autonomous Republic of Crimea, local councils, and elections of village, town and city councils, have to be amended to include provisions that stipulate representation in every 5 candidates of both men and women at the level of at least 2 representatives. The Law of Ukraine "On securing equal rights and opportunities for women and men" should provide definitions for new terms "direct discrimination", "indirect discrimination", "systemic discrimination", "sexism", etc.

While being generally positively evaluated, this draft still calls for some critical comments. In particular, some laws, for which amendments are being offered, have already been adopted in new wording (the law on governmental service, the law on the elections of people's deputies of Ukraine, the draft of the Labor Code of Ukraine, which had been prepared for the second reading, which includes anti-discrimination provisions). The draft was recommitted to the Committee. At the same time, as the national legislation for securing equal rights and opportunities of women and men requires further improvement, the Working Group for improvement and development of legislation in the area of gender relations was established under the Committee of Verkhovna Rada for human rights, national minorities and interethnic relations. The group is open for participation, and has to start its activities with development of the updated version of the Law of Ukraine "On securing equal rights and opportunities of women and men".

tation of our plans is the stable, or, more precisely, accelerated development of the economy. First of all, I give a task to the Ministry of Education, Science, Youth and Sport to develop a new State Program for Support of Family till 2015. By the way, the previous program expired in 2010. The minister should not have waited for the Prime Minister to tell him to develop a new one", — he said. www.liga.net

5. DRAFT AMENDMENTS TO THE LEGISLATION: ON THE WAY TO DENYING GENDER EQUALITY

In contradiction to Article 4 of the UN Convention on elimination of all forms of discrimination against women, the legislation of Ukraine does not provide for plans or any specific temporary measures.

The majority of the discriminative drafts of the normative enactments presently are produced in the depth of the Ministry of Social Policy (without any consultations with the public, or discussions). The draft 9516, submitted by the Cabinet of Ministers of Ukraine, which amends the Law of Ukraine “On Governmental Aid for Families with Children”⁵ can be considered as an attack against women’s rights. As the impudent memo for the draft says, “the draft was developed as part of implementation of measures under the Program of Economic Reforms for 2010–2014 “Welfare society, competitive economy, effective state” concerning unification of approaches towards providing all kinds of social aid based on the principles of targeted aid and income-based differentiation”. It aims to implement unified approaches for providing different kinds of social assistance, taking into account family income levels. It proposes “to limit the right of child assistance to single mothers for those persons whose average monthly income exceeds the sum of corresponding subsistence rate for each child established as of the moment of application, and average wage of employees, that formed in Ukraine for the month preceding the period for which the total income is calculated. “Article 18³ shall be amended to include the following: “Child assistance to single mothers, to single guardians, to a parent in case of death of the other parent shall not be paid if the family’s average total monthly income exceeds the sum of the corresponding subsistence rate for each child under 18 years of age, and for each family member and child who studies under 23 years of age, — the average salary established for employees in Ukraine for the month preceding the period for which the total income is calculated”. This Law, in case of its adoption, will become effective since January 1, 2013.

The public also criticizes the government’s experiments aimed to impair the status of women with children. For example, in December of 2011, the government planned to conduct an experiment — to implement indirect methods of evaluating the incomes of citizens who claim they need social welfare. This provides for evaluation of incomes and expenses for “individual evaluation of each mother’s welfare”. This method is already being applied in Volynska, Kirovohradska and Chernihivska oblasts. Now, as the Minister of Social Policy S.Tihipko declared, the experiment will be extended to the entire country. The need for such measure is explained by lack of funds in the state budget⁶.

One more draft calls for concern, which amends the Law of Ukraine “On protection of public moral”, which does not protect children from negative influence as it claims to; what it does it limits various rights of citizens, and thus threatens women’s rights.

The renewed Tax Code negatively affected businesswomen in small and medium business or under contract, by depriving them and their families of income. The pension reform providing for increase of the retirement age of women, without taking into account the double load, and gap in salaries of men and women, etc., will have negative impact on vulnerable categories of women.

6. (IM)POSSIBILITY OF APPEALS AGAINST GENDER-BASED DISCRIMINATION

In 2011, the Expert Council for consideration of appeals against cases of gender discrimination gathered only once, in April of 2011. The representatives of NGOs sent a letter with questions

⁵ http://w1.cl.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=41918

⁶ O. Vesnianka. Are you Getting UAH 200 of Child Assistance? Your neighbors will be surveilling you. <http://www.dw-world.de/dw/article/0,,15555979,00.html>. “Those who will be inspected include single mothers; inspectors of the departments of labor and social welfare will be inspecting them, surveying their neighbors about the incomes of single mothers. The child assistance will not be provided to women who own an air conditioner, a modern bicycle, a scooter, a dish-washing machine, those who make renovations with expensive materials. Also inspectors will be asking questions about cohabitants and boarder of such women, their pedigreed animals and whether they receive any money transfers”.

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concerning recommencement of the Expert Council's operation to the head of the Department of Family Policy, the Ministry of Social Policy, and to the Minister of Social Policy. As of the end of the year, there was no response.

The attempts to resolve the issues of counteracting gender-based discrimination in court showed absence of real mechanisms and absence of access to fair trial. For example, basing on the lawsuit of "La Strada — Ukraine" against the Cabinet of Ministers of Ukraine and the Ministry of Internal Affairs of Ukraine, held according to administrative appeal, concerning the admittance rules of higher educational institutions of the Ministry of Internal Affairs of Ukraine that are discriminative for women, and concerning the gender-discriminative experiment, the Administrative Court of Kyiv city found no facts of gender-based discrimination. Just in the same way as in 2010, the courts did not see any gender discrimination in the words of the Prime Minister of Ukraine M. Azarov. As there are no opportunities to seek remedy on the national level, the first complaint was prepared to the UN Committee on elimination of discrimination against women.

We can also talk about complications in identifying violations of women's rights and gender discrimination. The majority of people in Ukraine do not realize what "gender-based discrimination", "sexual harassment" etc. actually is, and what to do in such situations. The legislation fails to create sufficient conditions for court claims, and even the small number of cases that actually makes it to the court shows the bias of judges who consider such cases. Absence of the principle of transferring the burden of proof to the defendant in such cases reduces the possibility of successful resolution of such cases in courts.

At the same time, the trainings on protection of women's rights and counteraction to gender discrimination, organized and conducted by the Ukrainian Helsinki Human Rights Union in 2011, showed that the advocacy-oriented NGOs have barely any interest in these issues. This way, regardless of the efforts made, inclusion of gender problems to the agenda is taking place very slowly, or does not happen at all.

7. SEXISM IN INFORMATIONAL AND MEDIA SPACE

In 2011, new sexist phrases from the highest governmental officials were aired. Speaking during the Forum in Davos, President of Ukraine invited Europeans to Ukraine, adding that Ukraine "needs to be seen with one's own eyes" at the time when "the chestnut trees in Kyiv start blooming and women start to take off their clothes"⁷. The "excuses" of the head of the Party of Regions faction O.Yefremov he voiced in the Parliament were no less sexist: "I, as a man, feel pleased that in spring our nature is blooming and I am pleased when I look at our women. For understanding this humor one must live in Ukraine," — he said"⁸.

In 2011, there was a tendency of growing sexism manifestations in advertisement and in mass media. This background made it obvious that the state is doing nothing and is unable to protect women from violation of their rights by gender stereotype-exploiting broadcasts in mass media and widespread sexist advertisement even after many petitions of NGOs to representatives of the authorities, to representatives of advertisement agencies and owners of the shows and of the advertisement. Another issue here is absence of successful court practices concerning such cases.

⁷ Andriy Lavreniuk. Yanukovych in Davos invited investors to Ukraine when women get undressed <http://www.unian.net/ukr/news/news-418652.html>

⁸ <http://www.unian.net/ukr/news/news-418812.html>. — "I subscribe to the thought that we have very beautiful girls and women and when people come from other countries and see what we have in the streets... And what is taken around in cars is even better... This is why it may be true," — added Yefremov.

8. EMERGENCE AND SPREADING OF FUNDAMENTALIST MOVEMENTS

In 2011, the threat of church interference, and its counteraction to implementation of the state gender policy became very real: the letters are being written to the central bodies of executive power; draft laws are being submitted, which demand acknowledgement that such policy is hazardous for the traditions of the Ukrainian society; brochures are being issued in mass circulation that misrepresent the very idea of gender policy.

In Verkhovna Rada, people's deputies ever more often voice homophobic appeals and proposals. In 2011, "Deputy Prayer Group" was created, which supports, among other things, fundamentalist and patriarchal values under the mottos of protecting "traditional" family, what became known during the Parliamentary hearings on September 21, 2011, concerning the problems of modern family in Ukraine.

9. DISCRIMINATION OF WOMEN ON LABOR MARKET

We can see inaction of the government and its inability to protect women against gender stereotyped attitudes on the employment market. Discriminative job advertisements continue to be published, and this practice is never confronted by the state. Gender-stereotyped attitudes are reflected in the informational materials like official profession descriptions offered by all governmental employment centers. Employers, both in private and in public sector, regularly emphasize the desired gender of a potential employee in the announcements about vacancies, and use the information about family circumstances that they learn at the interviews to reject female candidates. Requirements concerning age and looks also become an obstacle, even if women completely correspond to professional requirements for the position.

Ukrainian legislation bans women from taking certain position and doing certain jobs. Such conditions had a goal to protect women against hard and dangerous working conditions. Yet the number of such limitations exceeds the accepted international norms for regulating employment of women, and the instruments identified by the Ukrainian legislation are based on subjective criteria that contradict the principles of gender equality and have discriminative influence on women by reducing their competitiveness on labor market.

Among other problems here we can mention employers who in many cases ignore the norms of labor legislation concerning employment guarantees for persons with family responsibilities, heads of governmental bodies, of companies, agencies and organizations, as well as military units commanders having low level of awareness concerning gender issues, absence of proper legal aid on the local level, as well as women's poor knowledge of law concerning mechanisms of protection of their rights.

The draft of the law "On governmental service" (Article 42) provides for dismissal of a state official in case of "failure to appear at work for more than 60 calendar days in a row, or 100 calendar days in the same year due to temporary disability (without taking into account the time of leave due to pregnancy and childbirth)". This provision, in particular, concerns women who usually take care of sick children and other family members, and for this reason can fall under these provisions.

Most women employed in small and medium businesses do not have a work record book, do not sign contracts or employment agreements because these lead to additional burden on their salaries, as the employers do not wish to pay the taxes for them. In practice this means: absence of work track record for pension purposes, absence of paid sick leaves, of annual vacations and of other types of social protection. State inspection bodies check only the fact of employees having medical certificates, not the actual level of social protection of female employees.

Also, we can see absence of organized and systemic counteraction to sexual harassment against women at work (suppression of cases, obstacles for court trial, etc.).

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10. POLITICAL AND PUBLIC LIFE

In 2011, the situation with women's representation on the higher tiers of power, in the Government and in local self-government did not improve any. The share of women among people's deputies, deputies of oblast and city councils is still low. At the same time, the draft of the new election law does not contain any provisions on gender quotas. There is no official data concerning qualitative and quantitative indicators for numbers of women in international delegations and agencies of Ukraine in other countries.

In December of 2011, in Verkhovna Rada an interfactional association of MPs was created called "For equal opportunities"; these MPs think that the topic of gender equality is important for Ukraine, including the issue of perception of these problems by the society. The initiators of establishing this association consider as their priority goals advocating for equal opportunities of men and women in the spheres of employment, education, and access to health care, participation in social and political life of Ukraine⁹.

11. RIGHTS OF IMMIGRANT WOMEN AND FEMALE REFUGEES

One of the features of the present is increase of the number of both male and female immigrants from Muslim countries and influence of the Muslim culture and values, which has different directions with the ideas of gender equality. At that, there is no system for protection of the rights of immigrant women. Manipulation with some notions of the national mentality and traditions, detached from the general historical background and modern social context, increases gender discrimination, belittles and disparages the role of women in the development of the Ukrainian society. Interests and needs of women from ethnic minorities are not taken into account, which causes increase of gender discrimination in the context of disrespect to ethnical and cultural peculiarities of the ethnic groups of the Ukrainian society.

12. EDUCATION

On December 29, 2010, the Cabinet of Ministers of Ukraine approved Order No. 2355-p "On conducting the experiment on training of specialists for MIA", which limits the right of women for education in higher educational institutions within the Ministry of Internal Affairs system.

The system of public education requires implementation of systemic gender approaches. At the same time, there is no governmental system to train experts in gender problems in the system of higher educational institutions. Due to non-systematic inclusion of the gender component into the public primary, secondary and higher education, controversial approaches continue to exist in the education sphere, and this, of course, hinders the process of implementation of the ideas of gender equality in the society as a whole.

Since 2010, with support of the Equal Opportunities and Women's Rights in Ukraine Program, trainings have been conducted on governmental gender policy for governmental officials, and on gender education — for teachers. These trainings have a goal of increasing gender problems awareness and knowledge in these groups. Unfortunately, it is mostly people who have no part in decision making and distribution of financial resources that participate in trainings. At the same time, higher officials have no gender sensitivity and gender awareness. As a consequence, we see lack of systemic changes in all spheres and on all levels.

⁹ http://portal.rada.gov.ua/rada/control/uk/publish/article/news_left?art_id=292268&cat_id=374861

The Ministry of Education and Science of Ukraine recommends discriminative texts. Example: Edition by O.M. Pavlichenko, English language. Final tests.

Limited access of women to education in the system of vocational schools in the specialties that are in higher demand on the labor market, require usage of modern technologies and secure better economic independence and stability. The state standards of vocational training (on competences, specific professions) contain the stereotyped differentiation of vocational training between “women’s” and “men’s” specialties, what translates into discrimination of women in choosing a profession and further employment. Employment of women who graduate from vocational schools is also not properly regulated and secured.

13. HEALTH CARE AND FAMILY PLANNING

Wide-scale closing down of rural health posts and hospitals in rural areas encumbers women’s already limited access to corresponding services and deprives them of jobs that are already scarce in villages. The majority of girls and women from small towns and villages lack funds for transportation and lack time and funds for treatment in the cities. Local bodies of self-government pay no attention to this and fail to create conditions to at least make easier the life of women who live with HIV/AIDS (they are considered pariahs), and of girls engaged in sex business. All of them face double discrimination. Currently these women can get help only from NGOs.

14. WOMEN WHO LIVE IN RURAL AREAS

Absence of specialists, social centers and social institutions prevent women in rural area from getting protection from domestic violence. Rural women’s access to resources and their use is limited: absence of modern conditions for civilized household organization; arduous working conditions, where women are involved mainly in manual labor; limited access to studying new technologies and impossibility to acquire technical aids for household because of absence of opportunities to obtain loans; limited access to decision-making, planning and controlling the process of establishment and development of cooperatives, especially in strategic agricultural branches (for example, grain production and storage, grain trading; meat production), which are promising in revival of agriculture.

15. SOCIAL SPHERE

Absence of, or limited access to social services was a problem and still is. Presence of centers of social services for family, children and youth allowed women under 35 years of age, and women with children, to receive free assistance of social workers, psychologists and lawyers, there was an opportunity to stay in the social protection institutions (shelters, rehabilitation centers). After reformation of the central governmental agencies, the wave of reforms reached the local level: social institutions are being closed down, transferred into subordination to other organizations; financing is not provided, workers in the social sphere are being laid off. The planned experiments in the social sphere are conducted in the interests of the rich, not those who needs help most.

Ill-conceived actions concerning increase of payments due to birth of a child and absence of measures that provide for responsibility of parents for raising children caused increase of birth rate in underprivileged families. Legislative changes concerning exclusion of the time of vacation from the time of total pensionable service also causes worsening of the situation of women and families with children, in spite of the principles of family support and demographic policy development.

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16. RECOMMENDATIONS

1. To continue work of improvement, and lobbying for adoption of the State Program for implementation of gender equality in the Ukrainian society in 2012-2016, to make adjustments in the developed project and the indicators basing on the provisions of the UN Convention on elimination of discrimination against women, engaging independent experts and NGOs for this.

2. To prepare information from NGOs to the UN Committee for liquidation of discrimination against women concerning follow-up on clause 31, on political participation of women, the Final notes of the Committee based on the sixth and seventh scheduled reports on adherence to UN Convention on liquidation of all forms of discrimination against women submitted by Ukraine (January 2010).

3. To prepare information from NGOs to the UN Council for human rights concerning women's rights and gender equality for the second Universal Overview on human rights.

4. To monitor compliance with the Main directions of economic and social development of Ukraine in the sphere of implementation of gender equality and protection of women's rights in 2012.

5. To participate in the working group for improvement of the legislation in the sphere of gender equality, created in the Committee of Verkhovna Rada of Ukraine for human rights, ethnic minorities and interethnic relations.

6. To proceed with public education in the sphere of women's rights and gender equality, conducting informational campaigns.

7. To more actively use court proceedings as an instrument of protection of women's rights, as well as instruments of international organizations.

8. To use more actively the Law "On access to public information" for protection and advocating for the rights of women.

9. To use more actively the Ombudsperson authority, to send to her petitions on the issues mentioned above.

10. To conduct in 2012 monitoring of adherence to the Law of Ukraine "On securing equal rights and opportunities for men and women".

11. To conduct trainings for non-governmental advocacy organizations, especially lawyers, on the cases of identification of gender discrimination and protection against them.

...AND STILL UNRESOLVED

(UNFULFILLED RECOMMENDATIONS OF THE PREVIOUS REPORT OF ADVOCACY ORGANIZATIONS
FOR YEARS 2009-2010)

1. To develop, and to implement the action plan for fulfillment of the Recommendations of the UN Committee on liquidation of discrimination against women.

2. To develop an effective and independent mechanism for responding to complaints regarding gender discrimination.

3. To cancel order No. 155 of the Cabinet of Ministers of Ukraine "On approval of recommendations concerning dress code for the officials of the Secretariat of the Cabinet of Ministers of Ukraine".

4. To implement real education of governmental officials in the sphere of gender policy.

5. To conduct tests and exams of knowledge of the Law of Ukraine "On securing equal rights and opportunities of women and men" for governmental officials of all levels.

6. To implement practice of public debates for politicians and high ranking officials for various socially important issues, including gender equality.

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The year 2011 was marked by increased number of problems and strengthening of the negative tendencies concerning observance and protection of children's rights in Ukraine. Just like with other problems, the absolute majority of the evaluations, conclusions and recommendations provided in the previous report "Human rights in Ukraine. 2009–2010" are still relevant and not implemented.

1. INSTITUTIONAL MECHANISM

Consistency of the policy and programs in the interests of children was challenged by destruction, due to the administrative reform, of the institutional mechanism for protection of children's rights. The Presidential Decree as of December 9, 2010 (No. 1085/2010), disbanded the Ministry of Ukraine for Family, Youth and Sports, the authorized body of the central executive power in this sphere, as well as in implementing the family policy. The Presidential Decrees as of April 6, 2011, approved the provisions concerning central bodies of executive power, so its functions were partly transferred to the Ministry of Social Policy. Yet, only in November 2011 the Ministry of Social Policy established the Department for protection of children's rights and adoption. Its activities were funded on leftovers.

Reformation in the Ministry of Internal Affairs of Ukraine also caused liquidation of the Criminal Police Department for issues of minors, and instead of it, establishing in different departments of two weak subdivisions barely connected with each other — for offence prevention and for criminal investigation. Locally, there was also overall lay-off of the police officers, including lay-offs in these services.

One can consider it a positive factor that in August of 2011 the institute of the President's Authorized Representative for Children's rights was established; Yuriy Pavlenko, ex-Minister of Ukraine for Family, Youth, and Sports, was appointed to this position, his professional team was formed and expressed their willingness to cooperate with NGOs. Yet, this new body cannot be considered an independent monitoring institution, which is supposed to be established according to the UN Convention. In addition, the main function of the Representative is monitoring of the situation concerning observance of children's rights in Ukraine, not implementation of the policy, which puts further consolidation of the services for children on the agenda. The first wave of attention to the problem was raised by the All-Ukrainian council for protection of children's rights. On December 12, 2011, the Presidential Decree No. 1163/2011 was signed, aimed to strengthen the policy of children's rights protection.

¹ Prepared by K.B.Levchenko, president of the International Women's Rights Center "La Strada — Ukraine". This section was prepared using the materials of the All-Ukrainian Network Against Commercial Sexual Exploitation of Children, organization "Child Protection Service" and the President's Authorized Representative in Children's Rights.

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2. INTERNATIONAL CONTEXT

In 2011, Ukraine presented in the UN Committee on the Rights of the Child its third and the fourth consolidated scheduled report (CRC/C/UKR/3-4) on compliance of the state with the UN Convention on the Rights of the Child. The same Committee at its 1611th meeting, which took place on February 3, 2011, adopted the Final Remarks, where it formulated its conclusions and recommendations concerning protection and observance of children's rights. They refer to the entirety of the children's rights and their various violations. For example, while acknowledging the necessity of reformation and rationalization of the governmental management system, the Committee, though, is especially concerned about the fact that disbanding the Ministry for Family, Youth and Sports, and transferring its functions to the State Service of Youth and Sports under the Ministry of Education, Science, Youth and Sports, as well as disbanding the central state bodies related to the liquidated ministry, would constitute a threat for the existing professional and technical potential in the sphere of children protection. In addition, the Committee notes with concern that the reform did not start with adoption of a clear plan concerning delegation of powers and functions, related to child care or child protection.

In the end of 2011, the UN Committee on the Rights of the Child completed its work on the third Optional protocol to the UN Convention on the Rights of the Child, which enables children to independently file complaints on their rights violations.

Since May till November of 2011, Ukraine presided in the Committee of Ministers of the European Council, and selected the topic of protection of children's rights among the priority topics for presiding. Within this framework, in May 24–25, the international conference “Combating violence against children: from isolated actions to integrated strategies” was conducted in Kyiv, attended by many international experts.

3. IMPROVEMENT OF LEGISLATION

According to the conclusions of both national experts and the UN Committee on the Rights of the Child, the Ukrainian legislation on children's rights remains non-conforming to the provisions of international documents, first of all, the UN Convention on the Rights of the Child and Optional protocols to it. First of all, this pertains to general approaches in the governmental policy concerning guaranteeing children's rights. This policy considers a child just as an object to be protected, not a person with their own rights. Many legislative norms concerning children's rights remain declarative, and not all children's rights defined in the Constitution are secured by the relevant laws. For example, the right of children to take part in making decisions pertaining to them is not secured in any way. As a response to this commonion, in 2011 in Verkhovna Rada of Ukraine a large number of legislative initiatives was registered, which in case of their adoption would, on one hand, promote improvement of child protection, yet, on the other hand — would impair the situation with their protection.

3.1. PREPARING FOR RATIFICATION OF INTERNATIONAL DOCUMENTS

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse remains not ratified, although it was signed yet in 2007. This convention was incorrectly translated in the Ministry of Internal Affairs of Ukraine (in the translation, the term “molestation” was used in its title and text), which narrows and changes its meaning. In 2011, over 20 petitions were prepared concerning the necessity of urgent ratification of the Convention and correct official translation of its terminology. Regardless of these addresses, neither the Ministry of Internal Affairs nor the Ministry of Justice responded to these messages timely. On November 9, 2011, the President filed for consideration by Verkhovna Rada a draft of the

Law “On ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse” (No. 0232). On December 12, 2011, at its meeting, the Committee for Foreign Affairs resolved to recommend to Verkhovna Rada of Ukraine to support the necessity of ratification of this Convention, yet only provided the translation of the title of the Convention is corrected and the corresponding translation of the terms is used in it. Such resolution was also prepared by other Committees of Verkhovna Rada, for example, the Committee of Ukraine for legislative support of law enforcement activities. This way, ratification of the Convention is postponed due to necessity of amending the draft documents, which could have been done yet in 2010.

On November 7, 2011, the Council of Europe Convention on preventing and combating violence against women and domestic violence was signed on behalf of Ukraine, which also has great significance for protection of children’s rights, and requires considerable changes in the legislation for its ratification and further implementation.

3.2. NATIONAL LEGISLATION

In September 2011, Verkhovna Rada of Ukraine adopted the Law of Ukraine “On Counteraction to Trafficking in Human Beings”, which has a separate chapter on securing the rights of children who are victims or suspected victims of trafficking. It considerably improved the national legislation in this sphere². Authors of the “Scientific and practical analysis of the national legislation’s compliance with the provisions of the Council of Europe Convention on the actions to counteract trafficking”, mention that in these articles the Law complies with the provisions of the mentioned Convention³. The main problem is its application on practical level, allocation of sufficient funding, and coordination of actions.

In 2011, the La Strada — Ukraine Center, with support from UNICEF in Ukraine, continued implementation of the project “Supporting harmonization of the legislation of Ukraine and of the law application practice concerning child protection against trafficking in human beings, child pornography, child prostitution and sexual violence”. As a result, the expert group worked out a number of drafts and proposals concerning amendments to the legislation, which were reflected in the registered drafts, in particular, No. 9135 on amendment of the Criminal Code and Criminal Code of Practice of Ukraine (concerning the crimes against morals in the sphere of sexual relations), No. 9136, on amendment to the Criminal Code and Criminal Code of Practice of Ukraine (concerning sexual relations with a person under 16 years of age). The comprehensive draft developed by the expert group “*On amendments to some laws of Ukraine concerning counteraction to child prostitution*” was introduced for consideration of Verkhovna Rada of Ukraine on December 6, 2011, under the number 9540 by the people’s deputies of Ukraine V.V. Shemchuk, O.F. Bondarenko and K.Y. Lukianova. At the same time, not all amendments were conceived by the society and legislators with understanding. In particular, drafts No. 7390⁴ and No. 7391⁵, which, among other things, offered to remove administrative responsibility for prostitution for minors of age from 16 to 18, at the same time criminalizing clients of such persons, was incorrectly construed as an attempt to “legalize prostitution of minors”, and due to this the draft was withdrawn by the initiator.

² A more detailed analysis of the Law of Ukraine “On Counteraction to Trafficking in Human Beings” is presented in the section “Trafficking as violation of human rights”.

³ The scientific and practice analysis of correspondens of the Ukrainian legislation to the Council of Europe Convention against trafficking — Kharkiv, Prava ludyny. — 2011.

⁴ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=39070

⁵ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=39071

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3.3. LEGISLATIVE INITIATIVES LEADING TO AGGRAVATION OF THE SITUATION WITH SECURING THE RIGHTS

For example, the law that cancels the maximum difference of 45 years in ages between the adopted child and the potential guardian is negative for children, because it resolves some of the problems of adults without taking into consideration the rights of children (No. 3738-VI as of 09.09.2011)⁶. And, although in Ukraine there is a considerable need to improve legislation for implementing its compliance with the international legal standards in the sphere of adherence to children's rights, in 2011 the Ministry of Social Policy introduced a number of legislative initiatives, that are directed at reduction of governmental obligations in the sphere of social security and policy, including support of families with children. And, as a consequence, they cause violation of children's rights. Partly these problems are covered in the chapter "Women's Rights: does the society notice how they are violated?". For example, the procedure for implementing the methods of indirect income evaluation, introducing dependence of the right to receive assistance due to pregnancy and childbirth on the amount of income per family member can impair the circumstances of the families who bring up children. To the opinion of experts and NGOs, such changes, were they adopted, would complicate the procedure for assigning assistance and reduction of payouts, and reduction of the number of families that will be entitled to receive state-funded assistance. Implementation of the indirect income evaluation can deprive some families of their rights to receive monetary assistance: for child care before the child is three years old; for child care — to single mothers; to families with low income. The amendment of the law "On governmental assistance to families with children" will change the conditions of assigning the assistance (*additional certificates*) due to pregnancy and childbirth, number of recipients of this assistance, which is against article 22 of the Constitution of Ukraine on inadmissibility of narrowing the scope of rights.

One can see the necessity to cease practice of including the payouts for the children in ward into the aggregate income of the family. According to the Law of Ukraine "On governmental social assistance to families with low income", families with low income include children in ward, who are being brought up in these families. This way, payouts to the children in ward are being included to the aggregate average monthly family income for assigning governmental social assistance. Along with this, according to the Law of Ukraine "On governmental assistance to families with children" (Article 16), assistance to a child in ward is equal to two living wages and belongs to the child, that is, it must be used for the child's needs only. So, the legislation contains two mutually exclusive norms: in the first case the funds allocated for a child in ward are a part of the aggregate family income, that is distributed to all family members, and in the second case — the funds allocated for a child in ward is the property of that child. The existing practice of calculating the average monthly aggregate family income with inclusion of payouts for children in ward causes the situation where at the cost of these "orphan" funds the family loses the right to be acknowledged as having low income, and other family members spend money given to orphaned children for their needs. This means that there is an urgent need to prepare amendments for article 4 of the Law "On governmental social assistance for families with low income", and to exclude payouts to children in ward when calculating average aggregate monthly family income.

A contestable one is draft 7132⁷ "On amendments to the Law of Ukraine "On protection of public morals", the authors of which, hiding behind the words of protecting children and morals, attempt to introduce total manipulative censorship and fixation in law of authoritarian relations in family without taking into account the best interests of a child. This draft will be considered by the Parliament in the first reading.

⁶ <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3738-17>

⁷ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38551

4. JUVENILE JUSTICE

Both the UN Committee on the Rights of the Child and the Committee of the Ministers of the European Council mentioned to Ukraine several times that it lacks child-friendly procedures on the national level. In 2011, the activities on developing the concept and implementation of juvenile justice intensified. On May 24, 2011, the President with his Decree No. 597/2011 approved the Concept for development of criminal justice concerning minors in Ukraine⁸. Change of the title from “juvenile justice” to “criminal justice” became the consequence of baseless criticism from a number of religious organizations and so called “Orthodox community”, who are against human rights, in particular, they are against strengthening the rights of women and children, seeing it as ruination of the patriarchal ideology and relations. The Decree stipulated that the Cabinet of Ministers would, within three months, develop and approve measures for implementation of the mentioned Concept. More than half a year passed, yet the plan remains unapproved. The concept’s goal is establishing in Ukraine a full-fledged system of justice concerning minors that would be able to secure legality, good underpinning and efficiency for each judgment concerning a child that is in conflict with the law, leading to the child’s rehabilitation and further social support. Among the directions established by the Concept are securing effective justice for minors who committed an offense, taking into consideration their age, social, psychological and other peculiarities of development; facilitating development of rehabilitating justice; establishing an effective rehabilitation system for minors who committed a crime, with the goal of their rehabilitation and re-socialization; securing at the time of investigation, and at the time of prejudicial inquiry justice for the minors who committed a offense, observance of their rights taking into account their age, their social, psychological and other peculiarities of development; securing minors’ access to free legal counsel; training of the employees of internal affairs agencies, judges, prosecutors, lawyers, employees of guardianship and care bodies on the issues of conducting investigation, prejudicial inquiry and justice for minors; implementation of specialization for judges on trials concerning minors; development of correctional, educational and informational, as well as psychological and pedagogical programs; development and implementation within the rehabilitation system of the measures of educational, preventive, cultural and spiritual nature; facilitation of establishing the service for probation of minors, one of its functions must be collecting, analyzing and providing to the court the information of social and psychological nature on the personality of the juvenile criminal, and securing proper patronage over the minors in the specialized educational institutions, or those who are discharged from them, facilitation of their social adaptation and re-integration, in particular, by means of securing such minors with housing, providing assistance in employment, education, etc. The Concept is built around the principle of increasing the role of family and community in the process of children’s education by means of providing legal, consulting, and other informational assistance to children, to their parents and to people who perform the duty of raising children.

Among the negative points we must add that this Concept pays insufficient attention to the issues of protecting children who are involved into legal proceedings, that is, to those who are either victims or witnesses of crimes. In addition, the Concept does not mention any issues of administrative law proceedings related to children.

Equipping “green rooms” that are a part of implementation of juvenile justice, is performed at the cost of NGOs only (Odeska and Kharkivska oblasts).

5. SOCIAL PROTECTION OF CHILDREN

The issues of adherence to children’s rights for family education, and assistance for orphaned children are still urgent. Although in the last years we can observe a tendency of reduction of the

⁸ <http://www.president.gov.ua/documents/13600.html>

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total number of orphans and children deprived of parental care (social orphans), the numbers are still astonishing. While in 2009 there were 103 thousand of them, in 2010 — 100 thousand, in January 1, 2011, there were 98 thousand of such children. According to the data as of July 2011, the number reduced to 97, 300. AS of January 1, 2011!, 63 thousand children are under guardianship, 9 thousand 200 children are being brought up in adopted families and family orphanages. Every year 3.5 thousand children are adopted by approximately 2,100 Ukrainians and 1,200 foreigners. The national adoption rate, what is rather reassuring, is twice as big as the foreign one. That is, 75% of our orphans and social orphans are being brought up in the families of citizens of Ukraine.

6. PROBLEMS OF CHILDREN LACKING HOUSING

In Ukraine there are numerous violations of law on securing housing for orphans and social orphans. In Ukraine with its 98,119 orphans and social orphans and children, deprived of parental care (as of Jan. 01, 2011), only 13, 599, that is, only one in every seven children, legally owns housing. Yearly, around 12 thousand orphaned children and social orphans become adults, and the majority of them does not have a place to live. In 2010, only 263 children received from the state a place to live and 153 children received housing from the social fund. Not a single apartment was provided to children in Zaporizka, Ivano-Frankivska, Poltavska, and Ternopil'ska oblasts and in the city of Kyiv. Unfortunately, in the great majority of cases their right for receiving government housing on priority basis is not being observed.

According to the legislation, after reaching the age of 18, orphans and social orphans are entitled for temporary social housing (in a dormitory) and later they are provided with an improved place for permanent residence. In Donetsk, Luhanska, Mykolaivska, Poltavska, Rivnenska, Kher'sonska, Cherkaska, Chernivetska oblasts, in the cities Kyiv and Sebastopol, no social dormitories are available.

Due to this, the President of Ukraine's Authorized Representative for children's rights addressed Mykola Azarov, Prime Minister of Ukraine, with a proposal to include in the draft of the Law of Ukraine "On State Budget of Ukraine for 2012" expenditures for establishing social dormitories in the regions of Ukraine, and a proposal to assign to the Ministry of social policy, the Ministry of Regional Development, Construction and Housing and Utilities sector, and to the Ministry of Finance, to develop and approve the national dedicated social program for securing orphans and social orphans with housing, for 2013–2017.

7. PROBLEMS WITH TIMELY PAYOUT OF FUNDS TO THE FAMILIES WHO RAISE ORPHANS

As of fall 2011, in Ukraine there are 565 family orphanages, where 3,795 children are being raised, and 3,356 foster families fostering 5,765 children. Which means that 9,560 orphans and social orphans are being fostered in families. At the same time, there is a problem of delays of the payout of governmental social assistance, or its incomplete payouts. In spite of the measures taken by the government for covering the indebtedness that emerged in the first half of 2011, the issue became urgent again. At the time of the meeting with the Ombudsperson for Children's Rights, foster parents of a number of oblasts claimed that they were warned about an expected delay in payout, or stoppage of the payouts in December — January. For this reason, a special level of control is needed on the part of the Ministry of Finance of Ukraine and the Ministry of social Policy of Ukraine, and taking measures for securing timely financing of the expenses for sustenance of orphans and social orphans, who are being fostered in family orphanages and adopted families.

8. PROBLEM OF OBSERVANCE OF CHILDREN'S RIGHTS IN ORPHANAGES

NGOs keep discovering numerous violations of children's rights in the governmental orphanage facilities. In spite of the direct interdict in the law, in the majority of oblasts of Ukraine till now the titles of general secondary education orphanages include the categories of children there, on the basis of their social background or health condition. The specifications in the titles of these institutions like "for orphans and social orphans with mental retardation", "for children who require correction of physical and mental development", "for children with minor and damped forms of tuberculosis", "for children with post-effects of poliomyelitis and cerebral palsy, with combined deficiencies of mental, psychic and physical development", and others such, is nothing but a gross discrimination of children, violating the Constitution of Ukraine, and the Laws of Ukraine "On Protection of Childhood", "On Education", "On Securing Institutional and Legal Conditions for Social Protection of Orphans or Social Orphans". The government stigmatizes children, and they will have to live with this stigma for their entire lives. Certificates given to graduates of such institutions must include information only on the level of education, not on their condition of health or social status of the graduates' families. The type of the institution and its specialization must be noted only in the institution's foundation documents. On this regard, the President's Authorized Representative for Children's Rights addressed the Ministry of Education, Science, Youth and Sports of Ukraine with a request to eliminate, in cooperation with local self-governments, this and other manifestations of discrimination of the children who study in orphanages. In December of 2011, according to mass media, in Kharkivska oblast 28 orphanage institutions for children are to be renamed.

9. COMMUNITY DISCUSSION ON THE FRAMEWORK SCHOOL CURRICULA

The Ministry of Education, Science, Youth and Sports conducted community discussions of the curricula for basic elementary school subjects. For example, the La Strada Center, together with the Ukrainian Scientific and Methodological Center for Practical Psychology and Social Work, and the Institution of Innovative Technologies and Contents of Education, for implementing the Decree of the Ministry of Education of Ukraine No. 292 as of 29.03.2011 "On organizing educational preventive work against trafficking, exploitation and abuse of children in 2011", conducted an expertise of school curricula for clarifying the opportunities to include the topic of counteracting children's trafficking and exploitation into the basic part of the state component of school curricula. Basing on the results, the methodological recommendations were sent concerning inclusion of such topics in the school curricula⁹. As of now, the response has not been received yet.

10. PROBLEMS WITH SECURING THE RIGHTS FOR HEALTH PROTECTION AND WHOLESOME NUTRITION OF CHILDREN

As of Nov. 01, 2011, provision of all types of meals covered 92.7 per cent of all pupils of 1–11 forms (in 2010/2011 — 91.8 per cent); hot meals are provided for 94.9 per cent of pupils of 1-4 classes (in 2010/2011 academic year this indicator was 98 per cent). Distribution of funds for children's meals in pre-school educational institutions is performed in compliance with article 35 of the Law of Ukraine "On pre-school education" (parents' fee is 50% in the cities and 30% in rural areas).

⁹ http://la-strada.org.ua/ucp_mod_materials_show_124.html).

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Basing on the results of the check-ups, initiated after the All-Ukrainian council for protection of children's rights chaired by the President of Ukraine in October of 2011, the prosecutors initiated 515 criminal cases, 2.5 thousand documents were introduced in response to protection of children's rights, and protection of life and health. At that, 4.2 thousand officials were brought to disciplinary responsibility, including about 700 officials from the sanitary inspection agencies. Due to improper financing from the local budgets, in no institution inspected the established norms for nutrition were complied with. The children's ration consisted mostly of cheap, low-grade, low-calorie products. Diet nutrition for children with chronic diseases is not organized. In the majority of the regions of Ukraine, the prosecutors protested the orders of the school directors, according to which parents were bound to pay additionally for children's board. In spite of the limited financing from local budgets for children's board, there are still many facts of embezzlement of these funds.

The issues of **Combating violence against children, trafficking in children, exploitation of children** are still pressing, but the state failed to address them proactively. The Law of Ukraine "On Combating Trafficking in Human Beings" in its final provisions stipulates development and adoption of the required enactments but none of this was done.

The children were consulted on the La Strada-Ukraine Center hotline on prevention of violence and protection of children's rights. During 2011, the number of such calls grew twofold. But despite the recommendations received from the UN Committee on the Rights of the Child, whose paragraph 81 emphasizes the importance of operation of the hotline run by the La Strada-Ukraine Center and its support by the state, no such support (be it financial, organizational or informational) has been provided.¹⁰

The research of the situation of sexual exploitation of children in tourism in Ukraine was conducted that included analysis of the legislation in the sphere of combating sex tourism, description of causes and scopes, organization of sex tourism and the social portrait of participants¹¹.

The online "hotline" on collecting information about instances of child pornography on the Internet continued operating. During the period from November 19, 2009, to November 30, 2011, this hotline received 547 messages, of them 189 concerning child pornography. Child pornography is most often placed on full-fledged pornography websites, but it can also be found on websites with legal content or forums or bulletin boards. Despite numerous appeals of the Ministry of Internal Affairs concerning some actions in response to the information submitted to them, the Ministry failed to give any answer.

Children and youth collected more than 55 thousand signatures under the Petition against sexual trafficking in children. On October 5, 2011, they were handed to V.Shemchuk, People's Deputy, who is a contracted MP of the Parliamentary Assembly of the Council of Europe from Ukraine on Convention No. 201 for lobbying the amendments in the legislation. The National Trainers' Network, consisting of 156 trainers from 14 oblasts of Ukraine, has been conducting extensive educational activities. In 2011 it started the youth section. During the first six months of the year 2011, the National Trainers' Network conducted 1,001 events for 45,284 participants — 11,237 specialists and 34,047 people from risk groups.

Non-governmental organizations have been repeatedly trying to call attention of the heads of governmental authorities of all levels to violations of children's rights. But the response to such appeals has been formal — or none at all.

13. August 19, 2011 — Address to the director of the Department of general secondary and pre-school education, the Ministry of Education and Science, youth and sports of Ukraine concerning incorporation of the topics of protection of children's rights in the junior school curricula¹².

¹⁰ http://issuu.com/wcuwcu/docs/crc.c.ukr.co.4_ukr

¹¹ The results will be published at the beginning of the year 2012.

¹² http://www.la-strada.org.ua/ucp_mod_materials_show_124.html

14. September 20, 2011 — Address to the President of Ukraine concerning vetoing the Law of Ukraine “On Amendments to the Family Code of Ukraine (concerning adoption)”¹³ adopted on September 9, 2011.

October 1, 2011 — Open address to the Authorized representative of the President of Ukraine for Children’s Rights, the Authorized representative of Verkhovna Rada of Ukraine for Human Rights, the Prosecutor-General of Ukraine, the Minister of Internal Affairs of Ukraine, the Minister of Education, Science, Youth and Sports of Ukraine, the head of Lugansk oblast state administration concerning the open violation of children’s rights and cruel treatment of them by the administration of School No. 22 in Lugansk ¹⁴.

Address of participants of the Youth partnership project against commercial sexual exploitation of children to the Authorized representative of the President of Ukraine for Children’s Rights with a demand to ban the exhibition of works by Daniil Galkin “BDSM-2222” at PinchukArtCentre, which promotes sexual relations between children and with children.

11. RECOMMENDATIONS

Below are the recommendations presented in the previous reports. The italics mark the ones still relevant for the year 2012, that is, **12** out of **15**!

1. *To work through the issue of establishing the institution of the Ombudsperson for Children and to develop a draft of the corresponding law.*

2. To recommend adoption of the Laws of Ukraine, registration No. No. 7390, 7391 and 7340.

3. *To introduce in the education legislation, in particular, in the Laws of Ukraine “On Education” and “On General Secondary Education”, the provisions on obligatory informing about children’s rights, education concerning prevention of offences against child and their harmful consequences, informing about risks of sexual exploitation and sexual abuse, as well as about ways of self-defense in the form fitting for their age.*

4. To include the definition of the notion “trafficking in children” in the Law of Ukraine “On Combating Trafficking in Human Beings.”

5. *To include the definition of the notion “child prostitution” in the Law of Ukraine “On Protection of Childhood.”*

6. *To develop amendments to the Criminal Code of Process of Ukraine concerning: obligatory participation of a psychologist at all stages of the legal proceedings where a child is involved; providing the free legal assistance to children recognized as victims and witnesses that is necessary for protection of their rights; obliging the body of prejudicial investigation to find information about threats to safety of the child concerning whom it is known that he or she suffered from the crime, and to secure his or her protection, before this child is recognized as a victim, no matter whether a complaint or message about a threat to his or her safety was submitted by the child him- or herself or by another person; immediate transfer of materials containing information about a crime committed against a child to the investigative force to decide whether to commence a criminal action, and for the period of inspection of materials to secure the child’s safety in case of necessity before the criminal case is initiated; a separate section in the Criminal Code of Process of Ukraine that would regulate the procedural issues with the purpose of ensuring the best interest of the child affected.*

7. *To prepare the new regulation of the Plenum of the Supreme Court concerning judicial application of the legislation on responsibility for sexual crimes against children.*

8. *To ratify the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.*

¹³ http://www.la-strada.org.ua/ucp_mod_materials_show_115.html

¹⁴ http://www.la-strada.org.ua/ucp_mod_materials_show_120.html

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9. To approve the concept of introduction of the juvenile justice in Ukraine, by paying significant attention to protection of children's rights that became victims and witnesses of offenses.

10. *To ratify the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.*

11. *To conduct the nation-wide educational campaign for the population of Ukraine concerning juvenile justice.*

12. *To develop the system for ensuring and protection of children's rights, to develop the mechanism of interaction between different bodies and institutions concerning protection of children.*

13. *To establish specialized centers for social-and-psychological rehabilitation of children who suffered from sexual violence and sexual exploitation.*

14. *To assign the Ministry of Justice of Ukraine and the Ministry of Foreign Affairs of Ukraine to make a correct translation of the name of the Council of Europe Convention No. 201 in the Ukrainian language.*

15. *To take into account all recommendations in the Alternative Report on Ukraine's adherence to the UN Convention on the Rights of the Child (p. 69–78).*

The recommendations listed above should be expanded with the following positions:

1. To develop a comprehensive document as implementation of the Law of Ukraine "On Protection of Childhood" and the Final Recommendations of the UN Committee on the Rights of the Child and implement it.

2. To conduct public discussions of the topic of introducing of the curfew and their consequences for children.

3. To perform at the end of the year 2012 the monitoring of implementation of the Presidential Decree No. 1163/2011.

4. To allocate the budget funds for equipping "green rooms".

XXII. DOMESTIC VIOLENCE — AS MANIFESTATION OF GENDER DISCRIMINATION AND VIOLATION OF HUMAN RIGHTS¹

Violence is a reason why thousands of Ukrainian households are ruined. About 90% of those who suffer from domestic violence, according to the data of the Ministry of Internal Affairs, are women. It is a violation of human rights and a gender-conditioned phenomenon; it violates the fundamental human right for life: more than 1,000 women in Ukraine annually die at hands of their family members. The number of more than 100,000 calls to police on cases of domestic violence is just the official statistics of the Ministry of Internal Affairs for the eleven months of 2011. This number demonstrates that the current governmental policy of prevention and counteraction to domestic violence is in need of optimization and improvement at all levels.

In 2010, the number of registered abusers was almost 92 thousand abusers, of them 84.2 were men. In the first six months of 2011, the number of registered abusers was 102.1 thousand; of them 94.4 thousand were men. Every year, the number of persons who are listed in the agencies of internal affairs registers as abusers for committing acts of domestic violence, is growing (Table 1).

Table 1.

Year	2005	2006	2007	2008	2009	2010	<i>6 months, 2011</i>
Number of men	72 194	74 571	77 664	8 760	85 680	94 399	97 260
Number of women	10 638	9 284	9 098	8 760	7 190	7 227	7 212
Total number of persons who are registered with the police for committing domestic violence	84 155	85 178	87 831	85 085	93 327	101 652	104 472

Due to the Law of Ukraine “On prevention of domestic violence”, which was adopted in 2001, the scope of the problem became visible, but the existent statistics is still just the tip of the iceberg. It was decided which governmental agencies were to be vested with responsibility to coordinate activities on counteraction to domestic violence. The social services and departments for family, children and youth started to work on its implementation. Several large-scale educational projects for various categories of specialists and informational campaigns (for instance, “Stay Human” and “Let’s Do It

¹ The section was prepared by K. Levchenko — International Women’s Rights Center “La Strada-Ukraine” based on the monitoring of the state of implementation of the legislation in the sphere of prevention of domestic violence, which was performed by the working group consisting of the following experts: V.O. Bryzhyk, T.I. Bugayets, I.I. Dovgal, S.V. Gud, M.V. Yevsiukova, O.A. Kalashnuk, L.I. Kozub, L.G. Kovalchuk, O.O. Lazarenko, B.P. Lazorenko, K.B. Levchenko, M.M. Legenka, Yu.V. Nikolaychuk, O.V. Savenok, O.I. Suslova, A.V. Chygryn and others.

The results of the monitoring are presented in the edition: Monitoring fulfillment of the legislation of Ukraine concerning domestic violence. 2001–2011. — Kharkiv.: Human Rights Publisher, 2011. — 240 c.

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Together”) have been conducted. The analysis of the judicial practice was conducted. The correctional programs for persons who committed acts of domestic violence have been developed and now are being implemented. But these positive achievements are still far from enough for a person who suffers from domestic violence to get the proper protection, and for an abuser to bear the adequate responsibility. This is demonstrated by the rapidly growing number of calls to agencies of internal affairs and to the National Hotline for prevention violence and protection of children’s rights. Starting from November 2004 to December 2011, the National Hotline for prevention of violence and protection of children’s rights received 23,350 calls. During the year 2011 (in December the number of calls for the first 10 days was included here) 11,400 consultations were provided on the hotline.

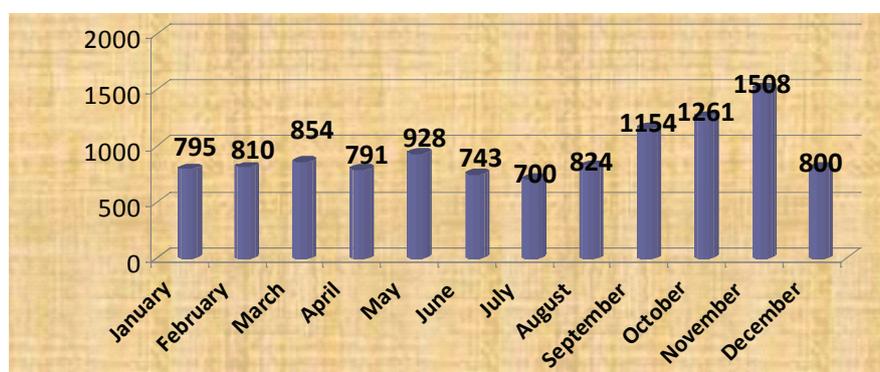
Table 2. Restraining orders and administrative responsibility for their violation²

No.	Year	Total registered	Got registered during the current period	Restraining orders issued	Administrative protocols under Article 173-2 issued for violation of the restraining order
1.	2008	85 085	66 119	6 394	1 505
2.	2009	93 327	72 945	6 551	1 604
3.	2010	102 133	81 135	6 684	Data not available ³
4.	2011, 6 months	104 892	44 088	2 706	Data not available

Trends of growing of number of calls to the National Hotline for prevention of violence and protection of children’s rights (2011 — January–November)



Monthly distribution of calls (2011, for December the data for the first 10 days only)



² The Table was composed based on the statistical data of the Ministry of Internal Affairs of Ukraine.

³ Starting from January 1, 2010, this kind of statistics is not collected anymore due to introduction of the reporting from No. 1-HC (Order of the Ministry of Internal Affairs No. 388 As of September 8, 2009 “On Approval of the Reporting Form No. 1-HC ‘Report on state of counteraction to domestic violence’ (quarterly)”.

To monitor how district police officers implement the provisions of the Law “On Prevention of Domestic Violence”, the survey was conducted in July–September, 2011: 294 police officers were surveyed in eight oblasts of Ukraine and in Simferopol (the Autonomous Republic of Crimea). This survey was not planned as a national-scale research; at the same time it gave grounds to make certain conclusions. District police officers come across cases of domestic violence in their districts rather often. A little more than 14% are informed of them from 10 to 20 times a month, more than 45% — from 5 to 10 times a month, and almost 40% of the surveyed — less than 5 times a month. This means that annual numbers would look like this: 14% have from 120 to 240 cases, 45% have from 60 to 120 cases, and 40% have less than 60 cases a year. If even the smallest of these numbers — less than 60 cases of violence a year — is multiplied by the number of districts (around 13,000), the total would be almost 780 thousand cases.

Based on these calculations, the average number of domestic violence cases per district police officer is 6.8 cases a month, or about 82 cases a year. If taken nation-wide, the estimate annual number of domestic violence cases is about 1,066,000. Obviously, these numbers are nothing but tentative calculations, but they are based on the actual data of the survey.

At the same time, the data of the sectoral statistics shows that the number of calls to agencies of internal affairs for cases of domestic violence is a little more than 100,000 a year. The difference is more than seven-fold. What, then, is happening to other cases? Are they not registered? Are they not registered as cases of domestic violence? Is there something else at play? The conclusion that can be made here is that the agencies of internal affairs register approximately 10% cases of domestic violence.

In 2010, the Ministry for Family, Youth and Sport changed the approaches to collection of statistical data and introduced the statistics of number of calls by gender. For instance, in 2010, 924 calls were made by children (the first six months of 2011 — 557 calls), 100,390 calls were made by women (during the first six months of 2011 — 56,184 calls); 8,938 calls were from men (the first six months of 2011 — 6,411 calls). During 2010, the amount of UAH 556,387.1 was allocated for funding of measures for prevention of domestic violence (for the first six months of 2011 this amount was UAH 242,090). In 2010, the regional databanks of families in crisis registered 8,593 families (during the first six months of 2011 — 3,953 families), of them 3,308 families receive social services at centers of social services for families, children and youth (in the first six months of 2011 — 734). In 2010, 387 families were referred to centers of social and psychological support (in the first six months of 2011 — 81 families).

According to the data of the State Department for adoption and protection of children’s rights, during the first six months of 2011 the child care services received calls about 888 children suffering from violence against them, of these children: 432 girls (22 children were suffering from sexual violence, 22 — from economic violence, 130 — from psychological violence, 258 — from physical violence); 456 boys (27 — from economic violence, 134 — from psychological violence, 259 — from physical violence).

The year 2011 showed some negative trends related to disruption of the already established mechanisms of prevention of violence due to the lingering administrative reform of December 2010, in the course of which these important spheres of the state department were lost. Most conclusions and recommendations made in the previous Report of human rights activist organizations concerning the state of observance of human rights (2009–2010) are still relevant and still waiting for implementation. The Presidential Decree only in April 2011 approved the statement on the Ministry of Social Policy, which was to take on the functions of the central responsible body of governmental authority in this sphere, and this happened only in November 2011. The situation with the oblast departments and rayon branches is still in limbo, what leads to the managerial chaos, loss of resources and achievements and, as a result, failure of the state to secure legal rights and interest of persons who suffer from domestic violence.

There are also issues related to drawbacks in the legislation in this sphere. For instance, as the monitoring of observance of the legislation conducted in 2011 demonstrated that a victim is not protected against domestic violence being committed against her or him, and abusers do not bear the adequate responsibility. Let’s list some of the major issues.

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1. Definitions of terms (what constitutes a fundamental part of any law) in Article 1 of the Law “On Prevention of Domestic Violence” are in contradiction with the essence of the issue of domestic violence and with the international standards. Some of them are not harmonized with other legislative acts. For instance, people to be covered by the effect of the legislation on prevention of domestic violence are described by the notion “family members”, and this makes it impossible in practice to protect certain groups of persons to whom this notion does not refer but who still suffer from domestic violence and require help. This error of omission has to be addressed.

2. The Law “On Prevention of Domestic Violence” (Article 2) does not refer directly to the norms of international treaties, and this causes low effectiveness of application of the international standards in the sphere of counteraction to domestic violence at the level of enforcement.

3. The highest governmental authorities treat counteraction to domestic violence rather formally: the Action plan for the National campaign “Stop Violence!” for the period till 2015 was approved on December 1, 2010, by the Cabinet of Ministers of Ukraine, but in 2011 its implementation was not coordinated.

4. Besides lack of coherence between separate legislative acts, there is an issue with their practical application. For instance, during the cascade trainings for district police officers on the issues of counteraction to domestic violence within the framework of the EU-UNDP Equal Opportunities and Women’s Rights in Ukraine Program⁴, it was discovered that district police officers had poor knowledge of legislative acts and rarely applied the provisions of the Law of Ukraine “On Prevention of Domestic Violence” in their practical activities. As conversations with the trainings participants showed, not all of them even have the text of this Law, or that of Order 3131/386 (2009). A vivid example of such unfamiliarity with the legislation is the information that *official warnings to victims that victim-like behavior is impermissible are still issued* despite elimination of this provision from the Law in 2009, what is confirmed by the letter as of June 30, 2011, No. 01-15/923 of the Department for Youth and Sport of Zakarpatska oblast state administration.

5. Whether the provisions of legislative acts are applied depends completely on whether those responsible for their implementation are informed of them. The monitoring showed a low legal discipline at different levels of power, because of what the instructions and internal documents can in practice overrule the laws, and lower ranks are not informed of amendments to the relevant legislation for years. What is lacking here is the system of constant education of officers of agencies of internal affairs, judges, and social workers about the effective provisions of the legislation in the sphere of combating domestic violence.

6. The funding of activity in the sphere of prevention of domestic violence and assistance to victims is virtually non-existent, what leads to non-observance of the provisions of the legislation. As a result, the number of complaints about inaction and actions of different governmental agencies is growing; these complaints are also shared with the National Hotline on prevention of violence and protection of children’s rights.

“I am 18, and I have problems with my stepfather, he drinks and starts fights all the time and nothing can be done about him, as his brother is a police officer so he is not afraid of anything. Tell me, what should I do? I started to develop hormonal dysregulations because of constant scandals” (15.04.2011, Rivnenska oblast).

“My son threw me out of my apartment. I own this apartment, he is just registered as living here, but he changed all the locks and refuses to let me in. I called the police and waited for them for a couple of hours to come, then the district officer came and told me that he couldn’t do anything, that I should take care of it by myself, and that he would not register my statement. What should I do in such situation?” (01.07.2011, Dnipropetrovska oblast).

⁴ Within the framework of the Equal Opportunities and Women’s Rights in Ukraine Program, in 2009–2011 the All-Ukrainian educational program on the issues of prevention of domestic violence was introduced: 44 trainers were trained and then conducted more than 600 trainings with district police officers (about 60% of all district police officers).

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“The district police officer told me that if I want them to register my statement of the fact of domestic violence, I need statements from two witnesses, and that I have to pay a fine for calling police” (19.07.2011, Sumsk oblast)

7. It is not uncommon when police officers consider domestic violence to be nothing but a “family issue” and fail to perform the duties vested in them.

“My husband beat me. I was admitted to hospital with a concussion. He also commits psychological violence against children. My daughter filed two statements with the police, but they said they do not respond to family conflicts” (25.06.2011, Kyiv oblast).

“I am 91. I live with my daughter and my son-in-law. The son-in-law keeps beating me and bullying me. I called the police, but the police do not want to act because it is family issues. I called the prosecutor’s office but with no results” (22.07.2011, Kyiv).

“I am officially married to a woman who abuses alcohol. We are separated but we have a child. My wife doesn’t take care of the child properly, but when I take the child to live with me, my wife would come in the morning to my house drunk and start causing harm to the property: break the windows, tear down the fence. I called the child care services but they did not respond in any way. The police never came even once after my calls as they explained they are busy as they are already” (24.07.2011, oblast not specified).

From complaints to the National Hotline for prevention of domestic violence and protection of children’s rights, La Strada-Ukraine Center

8. In the issues of protection of children from violence and cruel treatment, the Law “On Prevention of Domestic Violence” is not harmonized with the provisions of the Law “On Protection of Childhood”, which was adopted earlier.

9. The legislation does not specify clearly what governmental agencies exactly are responsible for prevention of domestic violence (Article 3 of the Law of Ukraine “On Prevention of Domestic Violence”), for instance, it is unclear whether it is educational agencies and institutions, or centers of social services for family, children and youth.

10. In 2011, during the first six months 2,494 persons were referred to the correctional programs (in 2010 — 4,965 persons, of whom only 302 persons completed the correctional programs). Of those who were referred to the programs during the first six months of 2011, 198 persons completed them. In Dnipropetrovska, Zakarpatska, Kirovogradska, Luganska, Poltavska, Rivnenska, Sumsk, Ternopoliska, Khmelnytska, Chernivetska oblasts, persons who committed violence were not referred to correctional programs.

Table 3. Statistics of the Ministry of Internal Affairs, 2004 — the first six months of 2011)

Year	Persons registered in the register of abusers as a preventative measure as of the end of the reporting period:
2004	81,957
2005	84,115
2006	85,178
2007	87,831
2008	85,085
2009	93,327
2010	102,113
The first six months, 2011	104,892

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11. The Law “On Prevention of Domestic Violence” does not provide for obligatory establishment of crisis centers. It stipulates that such centers are established by local state administrations following the instruction from the specially authorized body of executive power in the issue of prevention of domestic violence based on the region’s social needs. At that, neither the law nor the existent enactments specifies how these needs of the region are to be determined. There is no information about any such instructions issued by the authorized body. It must be noted that crisis centers have been established and are now functioning still not in every region of Ukraine. But in the majority of the regions there are institutions that provide support to victims of domestic violence. Such institutions are funded both from oblast and local budgets and from international foundations. In 2011, no amendments were made to the Standard provisions on centers of social and psychological support, according to which temporary shelter may be provided only to persons who are no older than 35 and to persons (no age limitations specified) with underage children, whose registered residence is within the region, in which the shelter functions. The same is true for social mother and child centers⁵. The problem of providing assistance to senior citizens who suffered from domestic violence or who are at risk of being victims of domestic violence hasn’t yet been addressed either.

Table 4. Statistics of the Ministry of Internal Affairs (2010 — the first six months of 2011)

Year	Number of domestic violence victims who were referred to specialized institutions for rehabilitation in 2010	Number of persons, who committed domestic violence, and were referred to crisis centers for the correctional program
2010	317	3 673
1 six months of 2011	114	2 047
Total	431	5 720

12. The monitoring showed that centers for health and social rehabilitation of victims of domestic violence do not submit to the Ministry of Health Care of Ukraine information about the amounts of their work for generalization. At the same time, the letter from the department of health care of the city of Sevastopol said that during 7 years of existence of the center, with the staff of 10 workers, including an accompanier, not a single victim of domestic violence came there. At the same time, here are the numbers of those persons in Sevastopol who were registered by the police for committing physical domestic violence: in 2004 — 456, in 2005 — 584, in 2006 — 527, in 2007 — 625, in 2008 — 816, in 2009 — 895, in 2010 — 1,047. It would be rational to assume that the number of those who suffered from physical violence will not be less than that. What, then, does this mean, that victims of domestic violence are not being properly informed about the existence of the center and opportunities to get help or that this center exists only on paper?

13. In 2009–2011, a series of monitoring studies was conducted to research the judicial practice in cases connected to cruel treatment of children, violence against children and women and domestic violence *per se* [2; 3; 4]. Generalization of the information of these studies makes it possible to come to the following conclusions concerning peculiarities of prosecuting for crimes related to domestic violence:

- A. Predominantly, when considering cases about crimes related to domestic violence that can be categorized as non-severe and of medium severity, the court relieves the accused from serving a sentence and puts them on probation with application of Article 75 of the Criminal Code of Ukraine. This means the courts go for relatively milder punishments.
- B. The courts very rarely come up with separate decrees encouraging social services or agencies of internal affairs to pay attention to the family, where domestic violence was com-

⁵ This limitation in providing a temporary shelter is conditioned by the necessity to provide funding for maintenance of such institutions that operate locally at the costs of the local budget allocated for programs addressing children, women and families.

- mitted, to prevent further domestic violence, to prevent a more severe crime, to protect the victim's rights. Such separate decree can help a family to overcome the situation of violence, with the permission of the family members the social service can provide social support to them as a family in the crisis situation.
- C. The judicial practice in Ukraine has almost no instances when the court decrees that the accused who abuses alcohol or drugs should go into rehabilitation as stipulated by Article 76 of the Criminal Code to get treated for his or her drug or alcohol addiction as a condition for their probation according to Article 75 of the Criminal Code of Ukraine. If a person who committed a crime connected to domestic violence is a drug or an alcohol addict, what is confirmed by the medical documents, the court is entitled to oblige this person to go into rehabilitation to get treated for his or her drug or alcohol addiction if Article 75 of the Criminal Code of Ukraine is applied.
- D. The court pays not enough attention to the history of domestic violence and does not consider the possibility that such violence could have been there for years and the committed crime is just an instance in the years-long abuse of the family. Taking into account that among other tasks, the criminal proceeding has to protect the rights and legal interests of persons who participate in it, the courts should abandon a formal approach when considering cases related to domestic violence and consider the risks for the life and health of victims.
- E. There is a practice to proceed with cases related to domestic violence following the simplified procedure as by Article 299 of the Criminal Code of Process on inadvisability of evidence concerning actual circumstances of the case. This makes the process much quicker, no doubt, but in such a case the court may leave out important circumstances what in the future can cause violation of victims' rights.
- F. During court proceedings on cases related to sexual violence against children, the court often calls these children to the court room for interrogation, it is not uncommon that underage victims stay in the court room during the hearings, and such cases are being heard in open court hearings.
- G. Another peculiarity of the cases related to domestic violence against adults is that a lot of those who were serving their time for committing domestic violence were released from prisons in 2009 because of the Law "On Amnesty" adopted by Verkhovna Rada of Ukraine, which came to effect on December 26, 2008.
- H. The monitoring of judicial examination of cases related to domestic violence following the procedure of civil legal proceedings was conducted in 2011 with the support from the Equal Opportunities and Women's Rights in Ukraine Program, and this monitoring showed that *domestic violence is one of the reasons of dissolution of marriages*. In such cases in most cases it is women who are petitioners, but there are also cases related to domestic violence, where men are petitioners. In their statements of claim, women say that family life failed, "because the husband keeps drinking, and starting fights and scandals" or "because the husband committed physical violence and diminished human dignity of the petitioner".
14. Monitoring of the database of the Unified governmental register of court decrees, which was conducted in August 2011, gave ground to a conclusion that there are no court cases on charging the persons who committed domestic violence to compensate the expenses for living expenses of the victim of domestic violence in specialized institutions for victims of domestic violence.⁶

The lawyers of *Kyiv women's city center under Kyiv city state administration*, tried to apply in their practice Article 14 of the Law. But in practice this article turned out to be impossible to apply.

The lawyers had the following questions:

⁶ <http://reyestr.court.gov.ua/>

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What enactment clearly stipulates the mechanism on how a person that committed domestic violence is to be fined, for the benefit of the specialized institution for a victim of domestic violence?

Is there a judicial practice of examination of such category of cases?

Wouldn't filing such a charge cause even more harm to the victim of domestic violence? As the risk here is that the fine charged will be paid not by the abuser but by the family.

15. Administrative penalties for perpetuating domestic violence are still ineffective, what was already pointed out in the previous reports.

*Table 5. Kinds of imposed administrative penalties
(according to statistical reports of the Ministry of Internal Affairs of Ukraine)*

Year	Total registered	Got registered	Administrative protocols drawn up under Article 173-2	Decrees of the court	Prevention	Fine	Correctional labor	Administrative arrest	Community service	Relieved from administrative responsibility
2008	85085	66119	98891	90556	5104	74169	350	10342	—	591
2009	93327	72945	112734	102232	3304	83687	230	14289	—	722
2010	102133	81135	121065	105590 ⁷	797	59332	102	10730	—	858
2011 6 months	104892	44088	66270	54644 ⁸	795	29890	262	4465	2079	462

16. An important reason to improve the national legislation is the fact that on November 7, 2011, Ukraine signed the Council of Europe Convention No. 210 on preventing and combating violence against women and domestic violence, whose ratification requires significant legislative change.

CONCLUSIONS AND RECOMMENDATIONS

1. To use the conclusions and recommendations in the report “Human rights in Ukraine. 2009–2010”.

2. To create a working group in the Verkhovna Rada Committee on human rights, ethnic minorities and interethnic relations that would develop comprehensive amendments to the legislation to harmonize it with the Council of Europe Convention on preventing and combating violence against women and domestic violence.

3. To develop and adopt a separate program on prevention of domestic violence.

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In the year 2011, the state has been engaging both in positive and negative actions concerning trafficking in human beings. For instance, in September Verkhovna Rada finally adopted the Law of Ukraine “On Counteraction to Trafficking in Human Beings”. On the other hand, during the entire year there was no systemic practical work in the sphere of counteraction to trafficking in human beings. No enactments in implementation of the Law have been developed. The authorized body of state authority responsible for implementation of this work has not been determined. Assistance provided to victims was possible only thanks to international and non-governmental organizations. In the Global Report on Counteraction to Trafficking in Human Beings (June 2011), which is prepared by the experts of the US State Department, based on the results of 2010, Ukraine is still in Group 2 (work is being done but insufficiently)².

1. INSTITUTIONAL MECHANISMS

As it was mentioned in other sections, the problem of the year 2011 was disbandment of the institutional mechanism of counteraction to trafficking in human beings. The Presidential Decree as of December 9, 2010, disbanded the Ministry of Ukraine for Family, Youth and Sports, which was the authorized and coordinating body of central executive power in the sphere of counteraction to trafficking in human beings.

By the Presidential Decrees as of April 6, 2011, Provisions on the central bodies of executive power were approved, and some of the functions of the disbanded Ministry were transferred to the Ministry of Social Policy. At that, such important direction as counteraction to trafficking in human beings was left uncovered by any of the central governmental agencies (including as of December 31, 2011). As a result — the State Program of counteraction to trafficking in human beings for the years of 2011–2015, which was developed yet in 2010, was not approved, although it was supposed to be approved as the law, that is, as the state dedicated program with allocated funding. Both the international and non-governmental organizations³ have been bringing attention to this but there was no response from the state. The oblast departments for family and youth, which are in charge of coordinating these activities locally are completely desoriented and have been waiting for more than a year to be re-organized due to the reform. For a year, the intersectoral committee failed to convene even once.

¹ Prepared by K. Levchenko — International Women’s Rights Center “La Strada-Ukraine”.

² <http://photos.state.gov/libraries/ukraine/164171/pdf/tip-2011-ukr.pdf>

³ http://www.la-strada.org.ua/ucp_mod_materials_show_93.html, <http://motilek.com.ua/index.php/2010-03-04-07-14-12/1327-2011-04-30-06-05-42>

2. COLLECTION AND GENERALIZATION OF INFORMATION

Due to absence of the program and the responsible governmental agency, in 2011 the governmental institutions neither collected nor analyzed the information and reports on the problem's status and activities in the sphere of counteraction to trafficking in human beings, despite the recommendation of the UN Committee on the Elimination of Discrimination against Women. There is no information as to whether Ukraine is using the Trafficking Information Management System (TIMS — The Trafficking Information Management System), a safe online resource, which was launched at the level of the Council of Europe in May 2010, although this system is an efficient tool for information management that enables GRETA (Council of Europe's Group of Experts on Action against Trafficking in Human Beings) and the governments to share the key documents prepared in the course of the monitoring, including the GRETA evaluation reports and governments' comments to them, as well as the recommendations of the Committee of State Parties to the Convention.

3. DEVELOPMENT AND IMPROVEMENT OF THE LEGISLATION AS POLITICAL NECESSITY

On September 20, 2011, Verkhovna Rada of Ukraine approved the Law "On Counteraction to Trafficking in Human Beings". The draft was submitted by the people's deputy of Ukraine O.O. Zarubinsky on May 10, 2011. It was based on the draft developed by the working group that was established in the Ministry for Family, Youth and Sports yet in 2008 and was supported by the Office of OSCE Project Coordinator and included representatives of international and non-governmental organizations as well as independent experts.

Despite the negative conclusion concerning this draft issued by the Chief Scientific Expertise Department⁴ — "based on the results of its assessment in the first reading, it is advisable to decline the draft", and the fact that on May 31, Verkhovna Rada voted 239 votes of the 313 registered against even including it in the agenda for the plenary session, on July 5, 2011, it was adopted in the first reading. And then in less than three months it became an effective regulatory document of the state. The Committee on Fighting Organized Crime and Corruption in its submission No. 04-12/3-997 as of June 2, 2011, informs as follows: "At its session on June 1, 2011, (Minutes No. 81) the Committee decided to recommend Verkhovna Rada of Ukraine to decline the draft Law of Ukraine 'On counteraction to trafficking in human beings.' This Committee's decision is based on the fact that most provisions of this draft have a contradictory and legally groundless"⁵. But already in the conclusion concerning the draft being prepared for the second reading, this very Committee supported adoption of the Law: "Considering the further improvement of work on implementation of the state's international obligations as to counteraction to transnational organized crime, which includes counteraction to trafficking in human beings, to be an urgent need, the Committee suggests to adopt in the second reading and in general the draft Law of Ukraine on counteraction to trafficking in human beings (the Minutes of the session of the Committee as of September 8, 2011, No. 85)". Such a change of heart can be explained by the political expediency of adopting the Law, which is one of the positions of the National Plan on implementation of the Action Plan concerning liberalization of the EU visa regime for Ukraine, approved by the Presidential Decree as of April 22, 2011 (No. 494/2011). In compliance with it, the Cabinet of Ministers of Ukraine is vested with implementation of this Plan, and, as to this specific position, the Cabinet failed to accomplish it. Therefore, adoption of the Law aimed not only to promote counteraction to trafficking but also implementation of the said Action Plan. What the Ukrainian society obtained as a result of adoption of the Law of Ukraine "On Counteraction to Trafficking in Human Beings" — a step

⁴ http://w1.c1.rada.gov.ua/pls/radac_gs09/g_zak_list_n?word=8469

⁵ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=40311

towards simplification of the visa regime between Ukraine and the European Union, or a practical tool for combating this crime — is more of a rhetorical question.

The Law states its purpose as “determining the ways for legislative regulation of the issue of counteraction to trafficking in human beings, minimizing of its consequences through establishing the corresponding organizational and legal grounds, powers of the bodies of executive power, determining the status of persons who were affected by trafficking in human beings and the procedure of providing assistance to such persons”. The Law determines: the major directions of implementation of the state policy for counteraction to trafficking in human beings; powers of the bodies of executive power when taking actions on counteraction to trafficking in human beings; the mechanism for prevention of trafficking in human beings, counteraction to it, providing assistance and protection to those affected by it; the rights of the victims of trafficking in human beings who applied for assistance; the grounds for international cooperation in the sphere of counteraction to trafficking in human beings. Besides, it outlines the repatriation procedure of foreigners and stateless individuals who suffered from trafficking in human beings, as well as special principles of counteraction to trafficking in children. It includes provisions concerning protection of rights of foreigners and stateless individuals who suffered from trafficking in human beings on the territory of Ukraine. The Law contains a series of innovative provisions, especially the ones concerning protection of victims of trafficking in human beings. For instance, with the purpose of effective assistance to people who suffered from trafficking in human beings, and their protection, it stipulates establishment of the national mechanism for interaction of entities conducting activities in the sphere of counteraction to trafficking in human beings (Art. 13). A person who considers her- or himself a victim of trafficking in human beings has a right to apply to a local state administration for obtaining the status of a victim of trafficking in human beings, and to the agencies of internal affairs concerning protection of their rights and freedoms (Art. 14). The status of a victim of trafficking in human beings is given for the period of up to two years (Art. 15). A person who obtains such status has a right for securing of her or his personal safety and respect, as well as for free of charge: medical, psychological, social, legal and other necessary assistance; temporary housing, in case she or he has no place to stay and wants one, in institutions that provide assistance to persons who suffered from trafficking in human beings for the period of time of up to three months, which, if necessary, can be prolonged by the decision of the local state administration, in particular, due to this person’s involvement as the victim or witness in a criminal trial; compensation for emotional damage and bodily harm at the cost of the persons that caused it, in accordance with the procedure stipulated in the Civil Code; one-time material assistance; assistance in employment, implementation of the right for education and occupational training, etc. (Art. 16)

But even a rather superficial analysis of the Law “On Counteraction to Trafficking in Human Beings” shows that it is not in full compliance with the provisions of the Council of Europe Convention on Action against Trafficking in Human Beings. For instance, the Law does not contain provisions concerning compensation payments to those suffered from trafficking in human beings and establishment of the special purpose fund for compensation to victims of trafficking, as stipulated by Art. 15 of the Convention. It does not use the term “establishing the period for recuperation and reflection for persons” concerning whom there are reasons to believe they are victims of trafficking. There are provisions that cause suspicion. Art. 6 of the Law “Powers of the Cabinet of Ministers of Ukraine” lists, among others, determining the procedure of establishment and operation of the Unified State Register of Crimes of Trafficking in Human Beings”. This provision gives reasons to doubt whether it would be possible to protect the personal data of victims of trafficking in human beings, as disclosure of their personal data would contribute to their victimization and discrimination.

Another doubtful conclusion is that adoption of this Law does not require any amendments to other enactments. For instance, currently all centers for providing assistance to people in difficult circumstances (crisis situations) operate based on the standard provisions, which, in their turn, are developed based on the Law of Ukraine “On Social Work with Youth”. But the Law of Ukraine “On Social Work with Youth” that legitimizes their operation limits the age of those to be admitted to such centers — they cannot be older than 35. Thus, there are contradictions between the laws of Ukraine and they need to be addressed.

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Expectations from adoption of the Law “On Counteraction to Trafficking in Human Beings” are ambitious but their implementation depends on political will as well as on how the provisions of the Law will be developed in the State Program on counteraction to trafficking in human beings, which has to be approved by the Cabinet of Ministers, and specified in the statutory instruments and whether there will be sufficient funding for implementation of the planned activities, etc. For instance, the explanatory note for the draft Law mentioned that implementation of the Law would require allocation of funds in the amount of UAH 2,003,400 from the state budget, of UAH 13,954,100 from local budgets and UAH 3,264,100 from other sources for monitoring of activities of entities of counteraction to trafficking and publication of the annual report⁶.

The people’s deputies of Ukraine also propose to license the activities of “lonely hearts clubs” and “dating agencies”. The Parliament adopted the draft Law “On making amendments of some legislative acts of Ukraine concerning counteraction to trafficking in human beings” in the first reading. The originators of the new draft propose to include in the Criminal Code additional sanctions. And namely: if lonely hearts clubs and dating agencies operate in Ukraine without a special permit they are to be fined for the amount from UAH 8,500 to 17,000 “with or without confiscation of equipment”⁷. Specialists express their doubts as to expediency of such changes.

According to the Law “On Amnesty” (as of July 8, 2011, No. 3680-VI), there is no amnesty planned in 2011 for persons who serve time for crimes specified in Articles 143 and 149 of the Criminal Code of Ukraine⁸.

4. LAW ENFORCEMENT

The statistics of criminal cases initiated by the law enforcement agencies of Ukraine according to Article 149 of the Criminal Code stays at the same level, with a slight tendency towards reduction. In particular, during the 6 months of 2011, 126 cases were initiated (in 2010 — 337). This tendency, to our mind, is connected with deterioration of work of the corresponding departments of the Ministry of Internal Affairs of Ukraine, due to re-organization and overextended reformation within the Ministry — liquidation of the Department of counteraction to crimes related to trafficking in human beings, establishment in its stead of the Department of counteraction with cyber crimes and trafficking in human beings, and later the plans to disband this newly formed Department and include it in the Criminal Investigation Department.

In 2011, the first loud scandals emerged concerning activities of the Department of counteraction to crimes related to trafficking in human beings; they were widely covered online⁹, but nothing was heard at to performed inspections, confirmations or rebuttals. Many journalists and experts mention the controversy of initiating the criminal case against the head of the Department of counteraction to crimes related to trafficking in human beings in Mykolayivska oblast¹⁰. All this is far from contributing to effective crime fighting, and demonstrates how crucial the public control over the police activities is.

5. PREVENTATIVE WORK

Like in the previous years, both NGOs and governmental structures were active in this area. In 2011, the Ministry of Education, Science, Youth and Sports issued yet another decree No. 292 as of March 29, 2011, “On organization of the informational and preventative work concerning prevention

⁶ http://www.la-strada.org.ua/ucp_mod_news_list_show_140.html

⁷ 3. <http://www.radiosvoboda.org/content/article/24378968.html>

⁸ <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3680-17>

⁹ “Uniformed Pimps” — <http://umdpl.info/index.php?id=1320911004>, <http://tema.in.ua/article/6806.html>

¹⁰ <http://ua.life.comments.ua/2011/05/23/151178/nachalnik-viddiluviddilya-borotbi-z.html>

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of trafficking, exploitation and cruel treatment of children in 2011”¹¹. The expert group kept working on completion of the standards of providing services in the sphere of counteraction to trafficking in human beings. Their work resulted in 4 project documents: the Standard of providing informational and educational services on prevention of trafficking in human beings; the Standard of providing social services to children that suffered from trafficking in human beings; the Standard of providing services on prevention of trafficking in human beings for persons in vulnerable positions; the Standard of providing social services to persons who suffered from trafficking in human beings. These documents are open for discussion¹². But, despite the positive evaluations they received, they are still not approved.

The expert evaluation of school curricula was conducted to see whether it would be possible to include the topic of counteraction to trafficking in human beings and exploitation of children into the base part of the state-determined component of the school curricula. Based on the evaluation results, the methodological recommendations as to inclusion of these topics in school curricula were submitted to the Ministry of Education, Science, Youth and Sports¹³. In the course of the study “State of implementation of the curricula (topics) in the issues of prevention of trafficking in human beings in the system of training of teachers and social workers by institutions of higher education” information was collected and generalized concerning presence and scope in university curricula of special courses, separate topics and questions concerning the issues of trafficking in human beings and exploitation of children¹⁴. A series of study guides and publications on the topic have been prepared.

The degree of importance of institutionalization of the activity, in particular, for prevention work, can be illustrated by the following example. Following the initiative of the State Service for Youth and Sports, UNICEF, international organizations and NGOs, the social campaign “Let’s Do It Together” was launched on the eve of the European Football Championship EURO-2012. One of its directions, “Red Card”, is dedicated to prevention of negative phenomena in the society like discrimination, domestic violence, sexual exploitation of children, intolerance and xenophobia. Both the Office of OSCE Project Coordinator and La Strada were proposing to include counteraction to trafficking in human beings in this list, what in the end was not done. As the representatives of the state explained, as long as the country has no responsible agency of state authority in charge of counteraction to trafficking in human beings, this means there is no such problem. As a result, the campaign’s first wave, which is funded by the state, did not include the topic of prevention trafficking in human beings. It will be included in the second wave to be funded from other sources.

6. PROVIDING ASSISTANCE TO PEOPLE WHO SUFFERED FROM TRAFFICKING IN HUMAN BEINGS

Like in the previous years, providing assistance to those who suffered from trafficking in human beings is still a sphere of responsibility of international organizations¹⁵ and NGOs¹⁶. During

¹¹ http://la-strada.org.ua/ucp_mod_news_list_show_47.html

¹² http://www.la-strada.org.ua/ucp_mod_news_list_show_206.html

¹³ http://la-strada.org.ua/ucp_mod_materials_show_124.html

¹⁴ http://www.la-strada.org.ua/ucp_mod_news_list_show_207.html

¹⁵ Together with the network of partner NGOs all over Ukraine, during the period from January 2000 to September 2011, the IOM re-integration program provided assistance to 7,954 victims (611 — during the 9 months of 2011); this assistance based on individual needs of each victim included legal consultations and representation in criminal and civil legal procedures; medical and psychological help, providing shelter, vocational training, small grants programs for victims of trafficking in human beings, who want to start their own business, as well as other forms of assistance. Since 2002, the IOM has been running the Medical Rehabilitation Center, one of a kind in Ukraine, that provides comprehensive medical services and psychological support free of charge and on the basis of safety and confidentiality. Since 2002 to 2010, more than 1,700 victims used the services of the Center (<http://iom.org.ua/ua/activities/counteraction-to-human-trafficking.html>).

¹⁶ During the period of time from 1997 to 2011, La Strada Center provided assistance to 1,989 persons. During 2011, assistance was provided to 109 victims of trafficking in human beings, violence, including domestic violence, both in Ukraine and abroad, to persons in difficult circumstances, etc. In connection with the develop-

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the 6 months of 2011, the IOM in Ukraine by itself and through the network of NGOs provided assistance to 397 victims (during the year 2010 — to 1,085 victims)¹⁷. Also, during 6 months of 2011, assistance was provided to 47 children (in 2010 — to 123), 26 girls and 21 boys. The types of exploitation of children are listed in Table 1.

Table 1

Type of exploitation	2005	2006	2007	2008	2009	2010	2011
Beggary	7	3	1	4	2	58	16
Sexual ¹	28	46	51	43	31	41	12
Labor	4	1	8	9	12	15	8
Mixed	—	—	—	—	—	5	1
Pornography	—	—	2	—	2	3	1
Criminal activities	—	—	—	—	—	1	2
High risk group of getting involved into trafficking	—	—	—	—	—	—	7

The most popular country of destination in all years of observation was, and still is, the Russian Federation, the second place in the latest years is taken by Poland (in the beginning of 2000 it was taken by Turkey), Ukraine is on the third place¹⁸. The numbers show growth of identified cases of domestic trafficking in human beings (46 persons, according to the IOM statistics in the first 6 months of 2011, 114 — in 2010), as well as the cases of trafficking in human beings, related to labor exploitation (see Table 2 with the IOM data below). Analysis of the statistics shows that every year the number of men who are identified as victims of trafficking in human beings, grows both in ratio and in absolute numbers — 36% in 2010 and 43 — in 2011 (Table 3)¹⁹. In the last years, we can observe cases discovering the victims of trafficking in human beings, citizens of other countries, in Ukraine, which confirms that Ukraine is not only the country of origin of those who suffered from trafficking in human beings, but also the country of destination (8 people in 2010, 9 in 6 months of 2011).

Table 2

Form of exploitation	2004	2005	2006	2007	2008	2009	2010	2011
Sexual ⁵	403	558	597	581	392	397	369	84
Labor ⁵	190	232	320	500	404	337	612	284
Mixed	24	28	15	33	7	23	30	—
Beggary	9	10	5	4	14	16	61	16
Others ⁶	—	—	1	—	3	—	13	13

Table 3

Gender	Number of victims							
	2004	2005	2006	2007	2008	2009	2010	2011
Women	540	713	761	849	625	596	693	227
Men	86	115	176	272	195	177	392	170

ment of informational technologies and expansion of public service announcements online, during 2011, about 1000 consultations were given online.

¹⁷ <http://www.stoptrafficking.org/view.statistics/>

¹⁸ <http://www.stoptrafficking.org/view.statistics/>

¹⁹ <http://www.stoptrafficking.org/view.statistics/>

In the La Strada — Ukraine Center, about 20% of the cases are those of women who emigrated to marry a foreigner, and for varying reasons now need help, in particular help in returning to Ukraine. Problems are varying: they suffer from violence, including cases where husbands take their documents from them and use them as home help; some women are in sexual slavery; and there are a lot of women who cannot return to Ukraine together with their child²⁰.

Among the positive achievements of 2011 is preparation of the draft Decree of the Cabinet of Ministers of Ukraine “On approval of the National Mechanism of interaction for entities conducting activities in the sphere of counteraction to trafficking in human beings”, prepared by the Ministry of Family, Youth and Sports, facilitated by the Office of OSCE Project Coordinator in Ukraine. This document will outline in more detail the powers of the entities, the mechanism of their interaction, procedures concerning organizing assistance for victims, etc. Presently the document is at the stage of follow-up work and adjustment according to the requirements of all relevant structures. It needs considerable follow-up reworking. Yet, as this document is only a draft, which will be amended and adjusted according to the requirements of all relevant structures, presently it is too early to speak about its implementation.

7. INTERNATIONAL COOPERATION

An important event of 2011 was signing in February of the Memorandum of Cooperation in the sphere of counteraction to trafficking in human beings between the Governments of Ukraine and the U.S. Yet, implementation of the Plan on Cooperation between the Government of the United States of America and the Government of Ukraine in the issues of counteraction to trafficking in human beings, according to which both states undertook the obligations to implement and finance activities aimed to stop this shameful phenomenon, is under the threat of being disrupted. The entity assigned responsible for implementation of the Memorandum in Ukraine was the Ministry of Ukraine of Education, Science, Youth and Sports, yet the list of its spheres of competence does not mention counteraction to trafficking in human beings, which was confirmed by the relevant letters in response to the request of the La Strada — Ukraine Center. Ukraine never financed the activities as required by this Memorandum.

After the Council of Europe Convention on Action against Trafficking in Human Beings was adopted, GRETA committee, the regional mechanism for monitoring over the countries' adherence to the Convention provisions, started to work. In spite of having the opportunity, Ukraine did not nominate its representatives to this expert group. Starting from 2008 and until September 2011, 6 meetings of the Committee of the Parties were conducted. Ukraine was represented at 4 of them, by S. Shevchuk (First Secretary of the Standing mission of Ukraine in the Council of Europe) and P. Petrenko (Second Secretary of the Standing mission of Ukraine in the Council of Europe). In September 2011, trying to influence the alarming situation with institutional support of counteraction to trafficking in human beings in Ukraine, and with provision of assistance to victims, La Strada — Ukraine sent letters describing the situation to GRETA group and to the Special UN Speaker for the issues of trafficking in human beings, especially in women and children²¹.

On July 30, 2011, a detailed message was sent to the UN Commission on the Status of Women informing that the problem of trafficking in human beings, and in women in particular, was ignored at the level of national policy of Ukraine²².

²⁰ <http://www.radiosvoboda.org/content/article/24378968.html>

²¹ http://www.la-strada.org.ua/ucp_mod_news_list_show_134.html

²² The administrative reform, disbandment of the Ministry of Family, Youth And Sports of Ukraine, which coordinated the issues of counteraction to trafficking in human beings, absence of activities on this problem in the charters of other central executive bodies, failure to adopt the state program for counteraction to trafficking in human beings, absence of systematic legislation pertaining counteraction to trafficking in human

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8. RECOMMENDATIONS

Recommendations from the previous reports that were not implemented, or were implemented only partly, remain relevant even now. We provide the list of such recommendation and their status in 2011 in Table 4.

Table 4

No.	Recommendations	Status of implementation of the recommendation in 2011
1.	To prepare the system of damages compensation for those who suffered from trafficking in human beings.	Not done
2.	To introduce an effective strategy for counteraction to trafficking in human beings must combine legal measures and law enforcement with preventative, coordinating and supporting measures for victims and potential victims.	Continuing the piloting of the National Redirection Mechanism
3.	To develop and introduce indicators that reflect how often trafficking in human beings occurs in the country, to create statistical database of the victims.	The intentions are declared in the draft State Program for counteraction to trafficking in human beings for 2011–2015.
4.	To amend the Criminal Code of Ukraine in the part of establishing responsibility for using the services of children involved in prostitution, and for making child pornography for one's own needs, as well as its storage and use.	There are proposals in the draft law No. 9540
5.	To expand interaction and coordination of efforts of the government and of the public sector concerning the issue of trafficking in human beings — on the local, regional, national and international levels.	Coordination of activities is insufficient. In 2011, negative dynamics was observed.
6.	To conduct informational campaigns to improve the level of awareness concerning the problem of trafficking in human beings.	The work continues. Yet these topics were not included into the list of topics of the first wave of the National campaign for Euro-2012 “Let's Do It Together”, due to absence of a coordinating body. It is planned to include the topic into the second wave of this campaign.
7.	To support the operation of “hot lines”, to inform potential migrants about the risks associated with crossing the border.	The situation is the same as in 2010. There was no governmental support of hot lines.
8.	To develop criteria for identifying the persons who suffered from trafficking in human beings, with the goal of assigning them a status of victim.	The draft Decree of the Cabinet of Ministers was developed, yet not approved.
9.	To change the procedure of interrogation and court testimony for victims, by means of replacing a personal testimony with a video record of testimony.	Not done

Recommendations as to assistance to victims are in the section on the issues of domestic violence. Taking into account the events of 2011, we add the following recommendations.

1. Founding the policy of counteraction to trafficking in human beings on the international documents, including the most recent recommendations of the UN Committee on the Liquidation of All Forms of Discrimination against Women, using progress indicators and allocating governmental financing.

beings — these issues became the basis for the message to the international institution http://www.la-strada.org.ua/ucp_mod_news_list_show_120.html

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2. Inviting independent experts and the NGOs that work in the sphere of counteraction to trafficking in human beings for participation in developing enactments that regulate operation of the national mechanism for redirection.

3. Continuing the follow-up work and lobbying for adoption of the State Program for counteraction to trafficking in human beings for 2012–2016, adjustment of the developed project and its indicators.

4. Development of drafts laws necessary for harmonizing the legislation of Ukraine into compliance with the Council of Europe Convention on Action against Trafficking in Human Beings.

5. Preparing of the scholarly and legal commentary for the Law “On Counteraction to Trafficking in Human Beings”.

6. Adoption of the standards concerning services in the sphere of counteraction to trafficking in human beings on the national level.

7. Preparing information from NGOs to the UN Committee on the Liquidation of All Forms of Discrimination against Women as to implementation of Clause 33 of the Final notes of the Committee on the results of presentation by Ukraine of the sixth and seventh periodical report in compliance with the UN Convention on the Elimination of All Forms of Discrimination against Women.

8. Preparing information from NGOs to the UN Human Rights Council concerning activities related to counteraction to trafficking in human beings for the second universal periodical review for human rights.

9. Monitoring over implementation in 2012 of the provisions of the Base directions of economic and social development of Ukraine in the sphere of counteraction to trafficking in human beings.

10. Monitoring over implementation of the Law of Ukraine “On Counteraction to Trafficking in Human Beings”.

XXIV. THE RIGHTS OF IMMIGRANTS IN UKRAINE¹

1. OVERVIEW

2011 was the year of Ukraine's intentions to improve domestic legislation regulating the stay of immigrants in the country. The human rights community kept stressing the necessity of such changes and elimination of legal gaps and conflicts in the relevant regulations; however, the steps taken by the government to optimize the relationship model "state/foreigner" are contradictory and ambiguous in terms of the rights of immigrants. The amendments to the acts of legislation, which in 2011 regulated the immigrants' stay in Ukraine, were fragmentary and selective and did not contribute to strengthening the legal protection of foreign citizens against possible corruption in public bodies and arbitrariness of power structures. The initiatives happened to prove that the general vector of Ukraine's immigration policy was gradually but steadily shifting towards strengthening the legal pressure on immigrants and ensuring total control over their stay in the country, which made Ukraine to balance on the brink of breach of universally recognized international norms of human rights and freedom of migrants.

It is likely that this process was influenced by disappointment in some European countries about the principles of state multiculturalism and passive tolerance that during 2011 showed up in public statements of European leaders and in their specific management decisions. However, compared with Europe, the immigration situation in Ukraine is somewhat different, and, currently, the government has no weighty and clearly justifiable reasons for cultivating aggressive awareness towards immigrants. Such actions not only inappropriate but also dangerous, because recently the Ukrainian government, at the instigation of power structures, treats foreigners with significant bias, and the policy of "liberalism with muscles," which is now professed by Ukrainian authorities, traditionally contains more muscles than liberalism.

The human rights activists have repeatedly pointed to the obvious farfetchedness of the attempts of both the government and politicians to regard the entry of foreign workers in Ukraine as a serious threat to national interests, cause of ethnic "dilution" of Ukrainian nation and an important factor in worsening crime situation in the country; there existed no case-based reasoning, while the complete and unbiased analysis of official statistics testified to the contrary.

According to the Ministry of Internal Affairs, as of 01.10.2011 there were 300,142 foreigners in Ukraine. Thus, the percentage of immigrants to the indigenous population is only 0.6, while, according to demographers, the critical mass of immigrants is 10–12% of population.

In general, there are 206,951 resident immigrants in Ukraine, but the majority of them (87%) are FSU nationals, including citizens of Russia, Belarus and Moldova (68%).

The migrantophobia and exaggeration of the threat of stay of foreigners in Ukraine may be exemplified by panic prophecies of some officials and politicians about the hundreds of thousands of illegal migrants *swallowing* Ukraine in 2011 in connection with implementation by Ukraine of its

¹ Prepared by Volodymyr Batchayev, Association of Ukrainian Monitors of Human Rights in Law Enforcement.

agreement with the European Community on readmission. According to the Administration of State Border Service of Ukraine, pursuant to the provisions of this Agreement, the competent authorities of the EU Member States suggested for admission in 2009 712 foreigners, in 2010 398, and for 9 months of 2011 179 foreigners.

The official statistics do not confirm the widespread public opinion that a large number of foreigners, who arrive in Ukraine, remain in the state. According to the Administration of State Border Service of Ukraine, during 9 months of 2011 18,828,993 foreigners and stateless persons (hereinafter — the foreigners) were let in the country. During the same period 18,718,909 foreigners were registered leaving Ukraine.

The statements about the growing volume of illegal migration of foreigners in Ukraine are at variance with the facts. According to statistics of the Ministry of Internal Affairs of Ukraine, the number of illegal immigrants detained for 9 months in 2011 (10922) did not increase and fell down by 3.3% compared to the same period in 2010. The average fullness of temporary detention stations for foreigners maintained by the State Border Service during January-September 2011 amounted to 30-50% depending on the region. The similar situation is with the fullness of MIA special institutions for detention of illegal migrants. The Chamber of Accounts of Ukraine states: "...the capacity of temporary detention centers for illegal migrants is much higher than the actual need for such facilities, the cost of their maintenance, costs of service personnel have steadily increased. Currently there are two guards per one illegal migrant..."²

The statistical data also refute the thesis of arrival in Ukraine of a large number of illegal migrants from Africa, Southeast and Central Asia, which in future intend to get to Western Europe. In January-September 2011, in Ukraine, the detained illegal immigrants made 10922, 88% (9592) of which were FSU citizens, which usually did not use our country as a transit zone to go to the EU countries.

It is noteworthy that, according to official data of MIA of Ukraine, for 6 months in 2011 the law enforcers found 43,458 violations by foreigners of the rules of the host country, or by 4.4% less than during the same period of 2010. The analysis of the origin of foreign offenders of Ukrainian legislation indicates that 80% of them are also FSU citizens.

According to the statistics of the Ministry of Internal Affairs, for the first 9 months of 2011 on the territory of Ukraine foreigners committed 2,989 crimes, i. e. 0.7% of reported crimes in our country (433586). During this same period, the law enforcers collared 191,808 offenders, of which only 1.3% (2436) were foreign nationals and stateless persons. The percentage ratio of foreign criminals to foreign citizens registered with the Ministry of Internal Affairs (those that officially applied for extension of stay in Ukraine, for immigration permits, temporary residence permit in connection with employment, as well as delayed illegal migrants) is as small as 0.8%. The ratio of foreign criminals to the total of foreigners visiting Ukraine in January-September 2011 is even more convincing: 0.01%. Therefore we may conclude that immigrants do not shape the criminal situation in Ukraine.

Relative to the threat of atypical infectious diseases supposedly spread by immigrants: no official statistics confirming this fact in Ukraine was ever published.

Notwithstanding the above data; tampering with statistics (focusing only on the total number of foreign offenders without an indication of their countries of origin, selective publication of data on the impact of immigrants on these or other negative social phenomena, hiding the dynamics of immigration situation), they use media to dump on Ukrainian society overtly xenophobic warnings like "Beware of aliens!" and instill a sense of distrust of immigrants. With the tacit approval of government, they drum into the ordinary citizen's head an artificial negative image of an immigrant: potential offender from a distant land, carrier of dangerous infectious diseases, contender for your job and dwelling, people with incomprehensible and therefore hostile outlook.

Such unreasonable government policy and the actual refusal by the government to combat xenophobia, including printed media, not only spreads all sorts of everyday phobias towards foreigners

² <http://www.ac-rada.gov.ua/control/main/uk/publish/article/16738219>

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from the Caucasus, Africa, Central and South East Asia, but also stimulates discrimination and radical sentiments, pushing the society toward the commission of “hate crimes” against foreigners.

On November 1, 2011 a group of approximately 40–50 young men in masks armed with bats and rods committed mass assault and battery of foreigners in the city of Luhansk. The first object of their attack was a shaurma booth. The hoodlums encircled it and chanted offensive xenophobic slogans, and then entered inside through the broken shop–window, started beating the vendor and destroying property and production equipment.

Then the goons rushed into the campus of Luhansk Pedagogical University and proceeded to dormitories, where foreign students lived, selectively beating non–Europeans on their way. As a result, four foreign students were hospitalized with injuries of varying severity.

However, continuing to justify the need to strengthen the legal pressure on foreigners with the help of already familiar theses about significant number of immigrants coming to Ukraine, possibility of their impact on criminal and sanitary-epidemiological situation in the country (only possible, but not by the influence as such) and artificially blown-up problem of illegal migration, in 2011 the state adopted a number of legal documents, which were widely advertized in the media and pictured for society as a kind of “ring-buoy” against the invasion of foreigners in the state.

2. CONCEPT OF PUBLIC MIGRATION POLICY

The concept of state migration policy was approved by the Presidential Decree No. 622/2011 on May 30, 2011. Certainly, the very development of this concept was important for Ukraine and welcome step forward, as far as there was a long overdue need in an act determining the strategy of the state in relation to migration. The UNHCR noted that the Concept contains important principles of migration and asylum management, and if the concept would be implemented in full, together with the abuse-preventing measures, this document might create favorable conditions for the development of national migration-and-asylum legislation, according to international standards.

The concept rightly indicates that the Ukraine’s migration policy should zero in on the “creation of conditions for the smooth implementation of the rights, freedoms and legitimate interests of workers and their carrying out of obligations required by law” and declares that there is a need to concentrate on a number of issues important for immigrants including as follows:

- Introduction of legislative mechanism of additional and temporary protection of foreigners and stateless persons;
- Determination of immigration quotas in Ukraine, taking into account both current and future demographic situation and situation on the labor market;
- Creation for foreigners and stateless persons lawfully residing or temporarily staying in Ukraine of conditions for free movement and free choice of residence, as well as free leaving of the territory of Ukraine;
- Strict control of racism, xenophobia and religious intolerance, forming tolerant attitude towards migrants;
- Encouraging migrants to rational territorial settlement based on socio-economic and demographic situation in the regions;
- Protection of foreigners and stateless persons in Ukraine, which are trafficking victims;
- Creating favorable conditions for temporary entry to Ukraine for foreigners and stateless persons for tourism purposes, for learning, doing business, etc;
- Ensuring the implementation of internationally recognized principles and norms of international legislation in order to protect refugees and persons in need of additional or temporary protection or asylum in Ukraine, taking into account the principle of non-expulsion;
- Adaptation to Ukrainian society of foreigners and stateless persons permanently residing in Ukraine, as well as persons, who were granted refugee status in Ukraine.

- Raising awareness of law enforcement officers with Ukraine's international obligations concerning human rights.

However, the existing realities of residence of immigrants in our country do not allow to fully share the optimism of the UNHCR on the approved Concept and the expressed reservation "...if the concept would be implemented in full, together with the abuse-preventing measures" becomes especially important in this context.

The obvious drawback is incompleteness of the Concept, including its role of a basic act, which should provide adequate treatment of immigrants and asylum seekers by public bodies and prevent violations of their rights and freedoms, especially by law enforcement agencies. This version of the concept is nothing but "declaration of good intentions", because it does not offer any preventive instruments against corruption, bureaucratic indifference and official arbitrariness, which accompany immigrants after arrival in Ukraine. The above humanistic provisions of the Concept remain a dreamland utopia for foreigners, because in practice they cannot be fulfilled since they contradict the regulations which implement the state strategy of "squeezing" immigrants out from Ukraine.

As expected, the concept makes use of scarecrows of "illegal immigration" as a real threat to national security of Ukraine, although the falsity of such point is obvious. Due to unsound and, to some extent, radical domestic policy intended as a showcase during two last presidencies, in our country there exist two different societies: the Ukrainian-speaking West and Russian-speaking East and South, whose representatives, having one citizenship and living in one country, in fact belong to their own separate groups, have opposing systems of values and treat one another in an unfriendly manner. This is a major threat to the existence of the Ukrainian state and nation, and it is this very problem, and not a limited social influence of a group of immigrants, that should draw attention of the government and politicians.

However, the wrongly placed accents in priorities of strengthening national security led to the fact that the Concept contains an unreasonably large number of provisions aimed exclusively at the set-up of brutal control of immigrants, which can grow into their prosecution. Taking into account the traditional concentration of power and law enforcement agencies of Ukraine on implementation of primarily punitive functions and inherent bias of executive authorities to ensure their performance at any price, this threat is very likely and significant. Moreover, the very message of the Concept intended to combat illegal migration will be used by law enforcement agencies to justify their exerting pressure on immigrants and breach of their rights and freedoms.

Thus, the concept envisages the implementation of the following measures with clearly defined "strong-arm" component:

- Improvement of public authorities' performance in combating illegal migration;
- Strengthening responsibility for offenses related to illegal immigration, and preparing appropriate legislative proposals;
- Ensuring control over migrants entering Ukraine for employment or training;
- Improvement of processing and collecting of statistical information on foreign nationals and stateless persons legally residing or temporarily staying in Ukraine;
- Develop and implement an effective mechanism of monitoring of foreigners and stateless persons arriving in Ukraine in order to establish if they have means to stay in Ukraine and leave its territory;
- Implementation of data-logging concerning foreigners and stateless persons entering Ukraine, especially those who come from the countries that are not covered by visa-free agreements;
- Implementation of data-logging containing biometric info on foreigners and stateless persons entering Ukraine;
- Increasing the effectiveness of border and internal migration control.

Without any doubt, now Ukraine requires the introduction of new managerial decisions aimed both at the unification and improvement of background info on the stay of foreigners on its territory, and improvement of illegal migration control, as a kind of criminal business of transporting people across the border. However, there is a need for balanced decisions and, most importantly,

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balanced legal rules intended to protect the rights of immigrants from possible harassment and pre-determined ways of monitoring of the implementation of such rules. After all, the experience of monitoring of the law enforcement system of Ukraine shows that the Ministry of Internal Affairs, Security Service of Ukraine and Border and Migration Service of Ukraine may interpret the Concept of public migration policy, as an additional governmental “carte blanche” to intensify their already sufficiently aggressive treatment of immigrants. It may look paradoxical, but the adoption of the Concept can trigger new violations of the rights of foreigners in Ukraine, as far as the function of control, coercion and punishment, rather than advice and assistance in adaptation have always been among first priorities of the domestic law enforcement.

3. THE OBSERVANCE OF THE RIGHTS OF REFUGEES AND PERSONS IN NEED OF ADDITIONAL OR TEMPORARY PROTECTION

The Law “On refugees and persons in need of additional or temporary protection” (No. 3671-VI of 08.07.2011) is the legislative act, which is really able to promote the rights and freedoms of immigrants in Ukraine. Among other innovations in the regulation of immigration processes, this very document is the most civilized and humane from the standpoint of international law.

It should be noted that the introduction of legislation permitting in a clear and balanced way all immigrants, who had to leave their country of residence, to realize in Ukraine their right to protection and dignified existence; year by year the paramount necessity of this issue becomes evident. The treatment of refugees by Ukrainian law enforcement agencies has long been based on distrust and prejudice, when the intents of a fugitive immigrant to escape persecution and save their lives upon entering our country are regarded as possible threats to national security and public order. Such identifying of refugees with potential offender, results in numerous violations of refugees’ rights in law enforcement agencies, including the deliberate use of physical violence and imprisonment. And 2011 became no exception to this shameful rule.

According to “Amnesty International”, in March 2011 border guards resorted to raw treatment of 14 Afghan refugees who sought asylum in Ukraine. The immigrants were not given a chance to take a review against a judgment to refuse the refugee status and decision to deport them. The foreigners maintained that they denied the right to use the services of an interpreter and in the process of submitting their applications for refugee status and for deciding on their expulsion, they were forced to sign documents drawn up in incomprehensible language. Some citizens of Afghanistan were not allowed to attend the trial, which considered their case, and all detainees complained that they were raw-treated during their detention and transportation to the city of Kyiv. Three of them resorted to self-injury as a kind of protest³.

On March 2, 2011 “Khimki hostage” Denis Solopov, citizen of the Russian Federation, who was forced to leave Russia because of political persecution, was admitted to Lukyanivka prison in Kyiv. Solopov became a mandatory refugee in Kyiv office of UNHCR, but he was detained near the militia department, where he requested to grant him asylum in Ukraine⁴.

In the same Lukyanivska prison, since the summer of 2010, the jailers keep three citizens of Uzbekistan, which are under threat of extradition and await the decision of the Ukrainian authorities for their extradition. All detainees, upon their arrival in Ukraine, requested political asylum, and maintained that the government of Uzbekistan persecuted them on religious grounds. Official Representative of the UN High Commissioner for Refugees in Ukraine Maxym Butkevych

³ http://newsru.ua/ukraine/17mar2011/begencu_afgan.html, <http://maidanua.org/static/news/2011/1300277606.html>

⁴ <http://www.radiosvoboda.org/video/24213677.html?isArticle=1>

indicates slow progress in the investigation of their cases despite the active work of their lawyers. The Uzbekistan citizens applying for refugee status have their chronic illnesses exacerbated during their detention⁵.

The “Without Borders” Project of the “Center for Social Action” NGO made the statement:

“In Ukraine, the refugees find themselves in a blind alley: they come to Ukraine and observe all norms of Ukrainian legislation, they ask for asylum, report harassment by the authorities of the country of origin and later end up in a prison under threat of extradition to the hands of their pursuers, like it happened with three refugees from Uzbekistan and one refugee from Russia. Two refugees were arrested at their homes, another in the Office of the Service for Citizenship, Immigration and Registration of Persons, and the fourth one was apprehended at the exit from the premises of the migration service when they tried to renew the certificates, as required by Ukrainian legislation. Thus, the Ukrainian authorities deprive refugees of their right to live in accordance with the law: if they attempt to renew their documents, they risk imprisonment and subsequent extradition to their persecutors; if they do not renew their registration, the law enforcement agencies may consider this as a misdemeanor.”⁶

The Law “On refugees and persons in need of additional or temporary protection” may be the new and, compared with other regulations on the matter, the most successful attempt to improve the government’s relationship model “refugee/state.” However, noting in general a more progressive trend in this law concerning the rights of immigrants, it is necessary to point out some contradictions and faults of its individual provisions.

The introduced 5-day period for the immigrant to declare her/his intention to obtain the status of refugee or a person, who requires additional or temporary protection, is obviously too short, as a foreigner comes into the country with unknown structure of public authorities and a rather complicated distribution of the respective responsibilities among them.

Stressing the impossibility of expulsion or forcible return of refugees and persons in need of additional or temporary protection, the law does not impose a similar ban on immigrants who have just applied for obtaining the appropriate status, but the final decision on them has not yet been taken.

The Law does not explicitly formulate the possibility for an immigrant to apply for refugee status or a person, who requires additional or temporary protection, to the law enforcers despite the fact that it is the militia who often detains immigrants carrying out control of the foreigners’ stay in Ukraine. In such cases, the immigrant’s requirements for granting the opportunity to exercise her/his right of appeal to the migration service, the law enforcers do not usually reckon with, but rather try to expel a foreigner from Ukraine as soon as possible.

The law makes it impossible to obtain the status of refugee or a person, who requires additional or temporary protection, for an immigrant, who prior to arrival in Ukraine with the intention to obtain such status, “was in a safe third country”. The too general term “was” creates preconditions for its various interpretations, which, in turn, can lead to unreasonable refusal to grant a foreigner the right to receive protection in Ukraine.

The law provides for the need to familiarize immigrants, affixing their signature, with the decision on their applications, as well as rights and obligations of the person, whose documents were accepted for processing and resolving the issue of recognition of the status of refugee or a person in need of extra protection. However, the law does not prescribe a mandatory participation of interpreter during this important procedure, which, if an immigrant does not speak Ukrainian, turns it into a bureaucratic formality: the foreigner has no idea what kind of document and for what purpose he signs.

The fingerprinting of immigrants, who has turned to migration service with applications for the recognition of the status of refugees or persons in need of extra protection, is also worded in general terms. Consciously or unconsciously, but lawmakers have provided no protection by the Immigra-

⁵ <http://umma.org.ua/uk/news/ukraine/2011/07/18/1457>

⁶ <http://noborders.org.ua/sfery-dijalnosti/bizhenci-ta-shukachi-prytulku/vsesvitnij-den-bizhentsya-po-ukrajinsky/>

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tion Service immigrants' identity data from the use by other agencies, which, taking into account the subordination of the State Migration Service of Ukraine, is likely to lead to the formation of base of fingerprint cards in the Ministry of Internal Affairs, which has been already fingerprinting foreigners in breach of the law of Ukraine "On the militia".

There are also controversial provisions on the procedure of informing immigrants about the decision regarding the appended instructions to refuse to process documents for resolving the issue of recognition of her/his status of refugee or a person, who needs extra protection. Thus, the law does not provide for the need to familiarize immigrants, affixing their signature, with the decision, but only requires the migration service within three working days after its decision to send a foreigner a written notice specifying the reasons for refusal and explaining the procedure of appeal. Taking into account that the term of appeal for immigrants makes only 5 days after the written notice (actually, not from the day of receipt of this message, but from the date of signing by an officer), the real opportunity to hold such appeal is minimized. The same procedure has been established for the immigrant's appeal of the decision about the loss or deprivation of refugee status or a person, who needs extra protection.

Somehow the law allows the migration service personnel to immediately, after applying for recognition of the refugee status or a status of the person in need of extra protection, suppress the immigrant's national passport and other documents with dubious explanation of "for storage."

4. AMENDMENTS TO REGULATIONS IN THE FIELD OF IMMIGRATION

The processes of formation of the immigration legislation of Ukraine in 2011 clearly confirmed the existence of threatening negative growing trend of authoritarian governance that was openly creating convenient and handy legal framework. The current government, positioning itself as a government of "strong arm", keeps changing legislation to periodically increase its influence on society and strictly control all spheres of life in Ukraine. However, the civil society opposes such infringement of the rights and freedoms with dissent and protests against the introduction of government initiatives. Sometimes it makes powers that be to mitigate legal innovations and mute the protests.

Such fluctuations are also present in legislative activity in the field of immigration: last year the main normative act regulating the stay of immigrants in our country — the Law of Ukraine "On Legal Status of Foreigners and Stateless Persons" — was twice changed dramatically, indicating hesitation of the ruling top as to the final official solution of the immigrants' issue.

On April 5, 2011 the Verkhovna Rada adopted the Law "On amendments to some legislative acts of Ukraine on migration" (No. 3186-VI) which became a sort of a landmark document that openly demonstrated the authorities' attempts to solve the problems associated with the stay of immigrants in the country exclusively with the help of the law enforcement agencies. The above act amended the Law "On Legal Status of Foreigners and Stateless Persons" (in redaction of 1994), which did not intend to eliminate legal gaps and problems in building relationships "immigrant/state", but zeroed in on empowerment of public authorities to control foreigners and implementation of coercion and punishment in relation to them.

Thus, Article 25 "Entry in Ukraine" of the Law "On Legal Status of Foreigners and Stateless Persons" substantially, from 6 to 11, increased the list of reasons preventing immigrants to enter Ukraine. Taking into account that the innovations in Article 25 not only set limits for immigrants directly at the entrance of Ukraine but form the basis for the use of these coercive measures such as reduction of stay in Ukraine and expulsion abroad, it is advisable to quote the updated article in full.

ARTICLE 25. ENTRY TO UKRAINE

The foreigners and stateless persons can enter Ukraine upon presentation of passport documents. At the same time the foreigners and stateless persons should receive the official entry visa, unless otherwise provided by legislation of Ukraine.

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The entry to Ukraine may be denied to foreigners and stateless persons:

- In the interests of Ukraine's security or maintenance of a public order;
- If it is necessary to protect the rights and lawful interests of the citizens of Ukraine and other persons residing in Ukraine, public health care and ecological and environmental;
- If applying for entry or at the entrance to Ukraine s/he has submitted deliberately false information or forged or tampered documents, and if the documents do not meet the established standard or belong to another person;
- If at the entrance to Ukraine s/he failed to present a valid passport, visa or other documents required for entry to Ukraine in accordance with applicable law;
- If at the state border gate of Ukraine s/he violated the terms and procedure for crossing the state border of Ukraine, customs regulations, health standards or regulations or failed to comply with the lawful orders or requirements of the State Border Service of Ukraine, customs and other authorities exercising control over the state border of Ukraine;
- If there exist established facts of violation of the laws of Ukraine during her/his previous stay in Ukraine;
- If there are reasonable grounds to believe that s/he has other than stated by him in applying for entry or at the entrance of Ukraine grounds and purpose of entry or failed to provide confirmation on the grounds and purpose of entry;
- If there are reasonable grounds to believe that s/he is a carrier of infectious or other diseases included in the list approved by the central executive body in the area of health care, or arrives from countries with particularly complex epidemiologic situation;
- If s/he enters Ukraine to transit, but does not have proper documentation to enter the country of destination or the next transit country after Ukraine as well as paid tickets from Ukraine to the countries concerned;
- If there are facts of failure to comply with financial obligations to Ukraine, as in relation to the previous deportation, including after the expiration of the ban of further entry into Ukraine in connection with the deportation, as well as monetary penalties;
- If s/he does not have sufficient financial means for the period of intended stay and to return to the country of origin or transit to a third country, or impossibility to receive adequate financial support legally in the territory of Ukraine for citizens of the state included in the list of countries approved by the Cabinet of Ministers of Ukraine and stateless persons residing in the states included in this list. The procedure for confirmation of sufficient financial means to stay in Ukraine, transit through Ukraine and travel abroad, and its size are determined by the Cabinet of Ministers of Ukraine."

With a bit of irony it can be noted that when the foreigners' entry procedure is formulated in one small paragraph and the reasons for the ban in eleven, the article might be better named "Non-entry to Ukraine."

It is noteworthy that the authorized immigration restrictions in the earlier redaction of the law were unspecified, contained inconsistent wording, had no sufficient legal basis for practical application and clearly defined mechanism for the decision and its appeal, which created preconditions for corruption of officers of border service and law enforcement agencies.

The amendments failed to eliminate, and rather expanded the bureaucratic willfulness in deciding "whether to admit a foreigner to Ukraine or not?", because the law enforcers obtained more opportunities to regulate the entry of foreigners into the country at their own discretion, guided by

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departmental or personal corruption interests, while remaining completely unpunished because of the foreigner's inability to lodge a complaint.

For example, under Article 25 the aliens shall not be allowed to enter Ukraine:

"if there are reasonable grounds to believe that s/he has other than stated by him in applying for entry or at the entrance of Ukraine grounds and purpose of entry or failed to provide confirmation on the grounds and purpose of entry."

According to this formulation, the constraints are imposed: firstly, solely on the basis of the assumption of an official; secondly, not for the illegal action committed, but for only a possible intent to commit it. The term "reasonable grounds" is also inappropriate, because the law does not what reason should be considered "reasonable grounds". The wording "failed to provide confirmation on the grounds and purpose of entry" also needs clarification, as nationals of from visa-free countries only inform about the purpose of their arrival in Ukraine directly at border crossings and are not required to have documents confirming their purpose (invitation, standard visa, etc.).

Thus, such an important decision for an immigrant on the possibility of her/his arrival in Ukraine does not depend on legal rules, but only on the personal attitude of the officer the to foreigner or his country of origin, possibly biased or unfriendly. Taking into account the distrust and suspicion of foreigners from the countries of the so-called "unwanted migration" cultivated in defense and law enforcement agencies, it leads to numerous violations of their rights and freedoms.

An excerpt from the interview with the Turkish citizen M.:

"The dirty tricks at Border Crossing in Odesa are a real nightmare. No easy time for visiting foreigners: they make it hot for them. I have been living in Ukraine on legal grounds: I have a residence permit and this summer went to Odesa to meet my daughter. At first I was waiting in my car, and then I decided to go and meet her. It was a good idea, for I saw that the guards did not let her through. I tried to find out why, because the documents were in order, but nobody cared to talk to me; they only said that the reasons for the ban should not be disclosed. I asked them: "You've already let through a lot of people, why do you banish this girl?" Besides my daughter, there were several foreigners stopped at the crossing, all of them Turkish citizens. I was indignant: "No problems with nationals from the U.S. or Germany, why this girl? I am a VIP in Turkey and they respect me in Ukraine. My daughter studied here and now came not to trade somewhere in the market, but to stay for a while with me." Everybody keeps quite, no one wants to talk. If I had called our Consulate, they would have turned my daughter back. But I didn't grease their palm on principle; if I bribed them, they would let her through.

My fellow-citizens know that it is injudicious for a Turkish national to travel to Ukraine through Odesa: they would like to knock a sum at the drop of a hat."

An excerpt from the interview with the citizen of Lebanon M.:

"I landed in "Boryspil" Airport together with my bride, a citizen of Ukraine. She stayed for a while with me, met my parents, now I came to visit her country. The uniformed men stopped me at the checkpoint: no idea whether they were border guards or someone else. No idea why I was stopped; I asked for explanations, but their English was poor, and my Russian was still worse. My girl came over and exchanged a few words with them, and then told me to pay \$50. I gave them to a woman in uniform. I thought it was a kind of fee. Later my bride explained that it was a passing-through sum, although my documents were in order. I began asking questions, but she refused to discuss it. "

Citizen of Georgia K. flew to Ukraine to Boryspil Airport on August 11 on private business, but instead of meeting his comrade, he spent 24 hours in the transit zone of the airport without food, water, and possibility to buy a card for a mobile phone. "He came to us for the first time, and he has no documents from the travel agency or hotel reservation, which is a confirmation of the purpose of stay of a foreigner in Ukraine," explained the checkpoint staffers. The explanation of the foreigner that he planned to stay several days at his friend's premises was not taken into account by the border guards. "I toured all of Europe, my wife is a citizen of the EU, but such attitude is unthinkable. I was told that I had no evidence that I came to Ukraine for tourism," the citizen of Georgia expressed his indignation.

They threatened him with deportation, but released him in 24 hours because the consular office of the Czech Republic confirmed the permanent residence of K. in its country on residence permit⁷.

On September 6, the citizen of Afghanistan N., who arrived in Ukraine to visit his parents, was stopped at passport control at Boryspil Airport together with her husband and small child. The foreigners had Ukrainian visa valid till November 15, return tickets to Afghanistan for September 27, and in the hall of the airport they were awaited by the woman's father, a citizen of Ukraine. The officers kept the family in a small room in the airport transit zone with iron chairs instead of furniture, where foreigners spent the next 72 hours. The citizen N. maintains that she had to use faucet water to dilute child formula food, and due to anxiety her condition deteriorated, and they had to call an ambulance. "The visitors failed to explain the purpose of their arrival in Ukraine and did not have sufficient financial means to stay in its territory," the border guards explained their reasons. Only in 72 hours after application of the Embassy of Afghanistan in Ukraine to the management of border service the retained persons were permitted to enter Ukraine⁸.

The Ministry of Internal Affairs of Ukraine made a trifle attempt to refine the procedure and restrict the entry of migrants into Ukraine by developing its "Instruction in decision-making by the Internal Affairs Agencies of Ukraine on the prohibition to enter Ukraine for foreigners and stateless persons" (approved by the order of the Ministry of Internal Affairs of Ukraine of 07.07.2011 No. 410, registered in the Ministry of Justice of Ukraine 29.07.2011 No. 934/19672). According to this document, the militia imposes such a ban solely on the basis of relevant resolutions adopted by the official of the Ministry of Internal Affairs, which should contain substantiation for making decisions about the impossibility of foreigners' entry in Ukraine. However, the militia once again shows its original interpretation of the term "justification", because the instruction forbids specifying the source of negative information about the foreigner and how such information was obtained. Moreover, in accordance with paragraph 4 of the Instruction, the reason for barring the entry of foreigners in Ukraine may be based on information obtained as a result of operational investigation unsupported by factual evidence from the person, which is an undercover agent or informer. Even the court cannot summon such evidence without proper security clearance.

It is noteworthy that the instruction contains no provisions on the right of a foreigner to lodge a complaint against the ban of entry into Ukraine, and foresees no possibility to obtain a copy of this document, and even an opportunity to review the contents of the resolution to clarify the reasons for the ban. And besides, the maximum possible term of the prohibition to enter Ukraine in 2011 was increased up to 10 years.

The interaction of state bodies in the field of data exchange about foreign nationals, which were not allowed to enter Ukraine, remains ill-conceived. Thus, the Instruction prescribes sending copies of the militia decision to ban entry only to the Administration of State Border Service of Ukraine and Working Staff of Ukrainian Bureau of Interpol, while no copy is sent to the Ministry of Foreign Affairs. The above procedure creates preconditions for that, under certain circumstances, a foreigner having acquired a visa at the consular office of Ukraine can unexpectedly learn about the impossibility of staying in Ukraine after her/his arrival directly at the border checkpoint at the airport. This probability may multiply because the procedure of foreigner's familiarization with the decision preventing her/him to enter Ukraine has not been regulated yet.

Being aware of this possibility, the lawmakers in a rather peculiar way decided to amend the Law "On Legal Status of Foreigners and Stateless Persons" with the Article 1.28 "Return of foreigners and stateless persons who are not allowed to enter Ukraine." Under the provisions of the said article, the foreigner who is denied entry in Ukraine "as soon as possible returns to a country s/he came from, or to the State, which issued the passport, by the same carrier, which carried out her/his

⁷ <http://www.kyivpost.ua/ukraine/article/privet-iz-borispolya-inostrancev-zaderzhivayut-i-diskriminirut-pogranichniki-30206.html>

⁸ <http://www.kyivpost.ua/ukraine/article/privet-iz-borispolya-inostrancev-zaderzhivayut-i-diskriminirut-pogranichniki-30206.html>

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transportation to Ukraine ... The cost of return is covered by the carrier and foreigner. If s/he cannot immediately go back, the foreigner stays at the state border checkpoint of Ukraine until her/his return.” Based on the content, the state not only finds such situation conceivable on its border, but also imposes costs on the foreigner, which were caused by the gaps in Ukrainian legislation.

The article does not specify who and how should create appropriate conditions for immigrants, who were not allowed to enter Ukraine at the state border checkpoint, i.e. provide food, places for recreation, because “the soonest possible return to the state of origin” may take several days.

Commenting on the provisions of Article 25 of the Law “On Legal Status of Foreigners and Stateless Persons” we should but note that they not only set limits for immigrants when crossing the border of Ukraine, but set grounds for registration curtail and deportation of foreigners who legally are already in the country’s territory.

Especially evident is the government’s rejection of the liberal treatment of immigrants in the amendments to Articles 31 and 32 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons”.

Article 31 “Reducing the term of temporary stay in Ukraine” in the new redaction became the main legal instrument of possible influence and pressure exerted by the state on foreigners who are in Ukraine on legal grounds. For evaluation of such innovations, we present both redactions of articles.

Article 31 prior to 2011 amendments:

The foreigners and stateless persons, who violate the laws of Ukraine, if these violations do not call for administrative or criminal liability, may have her/his stay in Ukraine curtailed.

This term can also be reduced if the foreigner’s and stateless person’s reasons for their stay in Ukraine stand no longer.

The decision to reduce the term of temporary stay of foreigners and stateless persons in Ukraine is made by the agencies of the Ministry of Internal Affairs and State Border Service of Ukraine.

Article 31 after the 2011 amendments:

The foreigners and stateless persons have their previously fixed term of stay in Ukraine reduced in case of:

- Violation of the laws of Ukraine;
- If s/he has no reason for further stay in Ukraine;
- If s/he does not have sufficient financial means for further stay and return to the country of origin or transit to a third country or possibility to get sufficient financial means legally in Ukraine;
- If her/his activities in Ukraine could adversely affect Ukraine’s relations with another State;
- If during her/his stay there emerged grounds for barring entry under this Law;
- If a foreigner and stateless person, who had arrived for training or employment, failed to appear at the appropriate institution or place of work at a fixed time and if the causes of failure were not considered valid by an state agency authorized to make decision on deportation.

The decision to reduce the term of temporary stay of foreigners and stateless persons in Ukraine is made by law enforcement agencies, agencies of the state border protection (in relation to persons detained within the border areas controlled by them) without delay after discovery of reasons for this with obligatory indication of the period in which such person shall voluntarily leave Ukraine. This period cannot exceed ten days after making that decision. The decision-making procedure intended to reduce the term of temporary stay of foreigners and stateless persons in Ukraine is defined by the Cabinet of Ministers of Ukraine.

If the decision to reduce the term of temporary stay in Ukraine for foreigners and stateless persons has been made, such person is obliged to appear every day for registration to the decision-making authority, which makes record in her/his passport document.

The comparative analysis of both redactions of the article gives us the opportunity to talk about a radical shift in attitudes to immigration law enforcement. One should take into account that the procedure of reduction of the foreigner's stay in Ukraine is not a means of protection of the state against illegal migration, because this reduction applies only to foreign nationals, who stay legally in our country (illegal migrants do not have registration, which could be cut). Thus, the law enforcement pressure is increasing only on the category of foreigners, which is guaranteed high-level protection of the rights and freedoms according to Article 26 of the Constitution of Ukraine: "foreigners and stateless persons staying in Ukraine on legal grounds enjoy the same rights and freedoms and also undertake the same duties as the citizens of Ukraine."

The new redaction of Article 31 omits the unspecified and ambiguous definition of "may be reduced," which, to some extent, is appropriate and justified, because the wording "may" gave officials the opportunity to decide on foreigners at their discretion, which created preconditions for corruption. However, taking into account the repressive orientation of the article, the introduced concertizing is causing even greater harm to the rights and freedoms of immigrants, as it exacerbates the lack of legal weightiness of its provisions.

For example, the foreigners have necessarily their term of stay reduced for "violation of the laws of Ukraine." However, there is no indication, what legislation has been breached (in this case *legislation* means all laws enacted on the territory of Ukraine); this fact violates the principle that penalty should fit the crime and foresees no alternative, less severe punishment for committing a minor or unintentional violation. Thus, the foreign citizen has his length of stay in Ukraine reduced, for example, for smoking tobacco out of the smoking area or for crossing streets jumping a red signal light. Such legal requirements actually encourage militia officers either to ignore violations by foreigners, including a graft fix, or, conversely, to treat them most harshly.

The article does not clarify how the law enforcement agencies should establish the absence of reasons for a foreigner's stay in Ukraine and whether the term "grounds" may include the goal stated by the immigrant at the entry into the country.

It is not clear by whom and by what evidence the negative impact of a foreigner on Ukraine's relations with another state should be confirmed.

The ability to reduce the foreigner's stay in connection with "any emerging reasons for the prohibition to enter Ukraine in accordance with Article 25 of the Law" infinitely extends the authority of law enforcers because, as noted above, Article 25 adds 11 more reasons to restrict the rights of a foreign citizen to stay in Ukraine, while not requiring the law enforcement agencies to substantiate such reasons.

The final request listed in the article about compulsory daily attendance by a foreigner of the body, which decided to cut her/his stay in the country, and register her/himself limits the right of immigrants to the choice of residence in Ukraine and free movement within its territory. Pursuant to such legislation, the foreigner's stay in Ukraine is cut by a territorial law enforcement agency, which has established the necessary criteria for such action, and not the territorial domiciliary authority, which has prolonged her/his stay in Ukraine. Thus, for example, a foreign citizen lives and has been temporarily registered in the city of Simferopol and in the course of 10 days s/he should every day visit the militia unit in the city of Lviv for registration, because it was Lviv militia which cut his stay in Ukraine as a tourist for crossing the street in a wrong place (Article 127 of the Code of Ukraine on Administrative Offences). So, in some cases, such innovations are unrealizable, but if, at least once, the immigrant fails to visit the militia unit for such registration, s/he, in accordance with Article 32 of the Law of Ukraine "On Legal Status of Foreigners and Stateless Persons", shall necessarily be expelled from Ukraine.

The appropriateness of the daily records in the foreigner's passport is also questionable, because the national passport of a foreign citizen is not a notebook for Ukrainian law enforcement bodies,

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and in some countries, the national passport, after records being done by foreign authorities, is considered as null and void. A kind of registration counterfoil might be a more appropriate place to make notes; an immigrant might keep it in her/his passport to confirm her/his visit to the militia unit.

An excerpt from the interview with the Russian citizen:

“I arrived in Ukraine to visit my relatives. Actually, I was born and grew up here, and then, at the time of the USSR, I entered the Institute in St. Petersburg, where I married and decided to stay. One week after my arrival in Ukraine, I visited my friend. Once we left the house and sat on the bench to drink beer. We were not drunk, behaved quietly, just sat and talked. The militiamen came and told that we were splitting bottles of alcoholic beverages in a public place; we were detained and taken to the district militia officer. They drew a militia charge-sheet on me and my friend; they took my passport and told that I should come for it to the district militia department two days later. When I came to get my document, they told that the term of my stay in Ukraine was cut, and I must return to Russia within 10 days as I have violated the laws of Ukraine. Then showed me a note on it in my Russian passport. They disregarded my explanations that this was a minor domestic offence and I paid a fine; they said I should be also grateful for the fact that I was not forbidden to come to Ukraine in the future. I intended to stay for few months, but now I have to return home. In my opinion, it is an unacceptable practice. “

Article 32 “Deportation from Ukraine” of the Law “On Legal Status of Foreigners and Stateless Persons” was also remade.” The new redaction of this article provides for “necessity” and “possibility” for militia to expel the foreigner from Ukraine. The earlier variant of Article 32 read that an alien “may be expelled,” and this wording, on the one hand, created the opportunity for abuse, since the militiaman could use his own discretion in the case, on the other hand, there remained the possibility to apply another, less severe punishment than expulsion (bringing to book).

Now Article 32 reads:

An alien or stateless person shall be expelled from Ukraine, if:

- S/he committed a crime — after completion of sentence;
- S/he failed to voluntarily comply with the decision to reduce the term of her/his temporary stay in Ukraine during the prescribed period;
- Her/his stay in Ukraine is a threat to national security or public order;
- During her/his stay there emerged grounds for barring entry under this Law;
- If s/he at least once has not complied with the requirement to come daily for registration to the agency that decides to reduce the term of her/his temporary stay in Ukraine due to reasons not recognized as valid.

A foreigner and a stateless person may be expelled from Ukraine if:

- Her/his activities in Ukraine have a negative impact on Ukraine’s relations with another State;
- S/he committed a misdemeanor after an administrative penalty;
- S/he has no legal means of subsistence sufficient to ensure her/his stay in Ukraine and leave Ukraine in the amount determined by the Cabinet of Ministers of Ukraine.

Positively evaluating the intentions of lawmakers to specify the reasons for applying the expulsion procedure to foreigners, one could argue that, unfortunately, these changes are made solely for the purpose of enhancing the powers of law enforcers, and not to eliminate corruption component in their actions and protection of foreigners from bias and partiality of officials when deciding on expulsion.

The inclusion into the Article of requirements for mandatory deportation of a foreigner in connection with “emergence of any reasons for the prohibition to enter Ukraine in accordance with Article 25 of the Law,” in terms of legislators’ superficiality in formulating these grounds and their necessity unproved, actually legalized the possibility of expulsion of aliens using untested, unconfirmed, artificial or fictitious reasons invented by law enforcers.

The provisions of Article 25 in the context of Article 32 led to the emergence of some discrepancies in the interpretation of the question, “When a foreigner’s expulsion is mandatory, and when only possible?” Thus, according to Article 32 the foreigner may be expelled from Ukraine, if “s/he has no lawful means of subsistence sufficient to ensure her/his stay in Ukraine and leave Ukraine.” However, given the statutory joint application of the provisions of Article 25 and Article 32, “if the alien does not have sufficient financial means for the period of intended stay and return to the country of origin,” s/he is expelled from Ukraine without fail.

According to Article 32 of the Law “On Legal Status of Foreigners and Stateless Persons”, for an administrative offence a foreigner can be expelled from the state. At the same time, in accordance with Article 25 of the Law, one of the reasons for the prohibition of immigrant’s entry into Ukraine and thus for her/his mandatory expulsion is to establish “the fact of violation of the laws of Ukraine during her/his previous stay in Ukraine.” The quiriness of this situation is in the fact that for the past administrative offence an immigrant is “necessarily” expelled from Ukraine, and for committing the same offense at present time s/he just “may be” expelled.

An excerpt from an interview with an Israeli citizen:

“During the celebration of the Jewish New Year in Uman, my compatriot was expelled from Ukraine because he was riding on a scooter without a helmet on his head. And the ban is valid for two years to come. For a man of our faith the inability to visit the remains of our tsadik on New Year’s holiday is a real tragedy. Imagine, for example, that a Christian is banned for two years to go to a church on Easter or Christmas.”

It is noteworthy that the detailed grounds for expulsion relate only to the authority of the law enforcement agencies. The Security Service of Ukraine and agencies safeguarding the state’s borders can expel a foreigner on the grounds and in accord with the previous redaction of Article 32 “if the actions of foreigners and stateless persons violate the law on the status of foreigners and stateless persons or contrary to the interests or security of Ukraine or public order.” This fuzzy formulation and use of the term “gross violation” without proper definition permit the officials to conduct deportation of a foreigner without a sufficient justification for the use of coercive measures.

However, there are such improvements as disempowering of the Security Service and Border Guards of carrying out the expulsion of immigrants “when it is necessary for protection of health, rights and lawful interests of the citizens of Ukraine.”

The adopted innovations prescribe that the foreigner-to-be-deported must be banned from future entering Ukraine, while in the previous redaction of the Law “On Legal Status of Foreigners and Stateless Persons” such decision was not mandatory, but only possible and the agencies of internal affairs were authorized to make such decision at their own discretion and taking into account the severity of violations committed by foreigners.

In this case the maximum term of prohibition to enter Ukraine doubled from 5 to 10 years, but no specific criteria for determining the duration of the prohibition (from 6 months to 10 years) were established. So, an immigrant< even a minor offender, not only must be expelled from Ukraine, but also her/his right to enter Ukraine may be limited for a decade to come.

The previous experience of relations of the internal affairs agencies with foreigners permits to conclude that the militia has been given an additional possibility to make selective quoting of entry into Ukraine of certain categories of immigrants, because the law enforcers will establish a maximum period of prohibition of entry for aliens from the so-called “countries of risky migration”, primarily from the Caucasian region, Vietnam, Pakistan, India and others. In addition, the innovation created favorable conditions for abuse of office: the foreign citizens reported cases of extortion of bribes from them to establish a relatively small period of prohibition to enter Ukraine.

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Another proof of the proposed government's strategy to limit the rights of immigrants consists in minimization of the prescribed exit time after the decision on her/his expulsion from Ukraine. Earlier legislation permitted the foreign citizen to stay in Ukraine up to 30 days from the date of such decision, while the new redaction of the Law "On Legal Status of Foreigners and Stateless Persons" brings the exit time down to only 5 days. This term not only complicates the solution of domestic problems of the foreigner associated with the need to leave Ukraine (e.g., sale of property which s/he cannot take with her/him abroad); sometimes it simply cannot be done by the deadline, particularly because of the lack of tickets in the box office for the return trip to the State of residence. The foreigner's non-exit from Ukraine for 5 days is regarded as the non-compliance with the expulsion order and the intention to evade the voluntary departure from the state, and this entails her/his detention, restraint of liberty and forced guarded deportation.

Article 32 of the Law "On Legal Status of Foreigners and Stateless Persons" foresees the right of appeal of the judgment on the immigrant's expulsion, but the new redaction of the article has omitted such important provision, as the suspension of decisions on expulsion in the case of statutory appeal. One should note that in 2011 the Code of Administrative Procedure of Ukraine was amended with Article 183-5 "Peculiarities of proceedings in the case of administrative actions for expulsion of foreigners and stateless persons", which sets a month deadline for trial on appeal against the decision of the immigration law enforcement authorities on his deportation and mandatory presence of both parties at the trial. This situation is at least illogical, since a foreigner has a five-day deadline for leaving Ukraine after the decision on expulsion, while the court may delay the appeal of this decision for a month. Thus, the amendments make the appeal of expulsion decision almost impossible.

The analysis of the amendments made in 2011 to Article 32 of the Law "On Legal Status of Foreigners and Stateless Persons" may lead to a final conclusion that the lawmakers doubled, from 6 to 12 months, the confinement term for foreigners and stateless persons.

Maybe the amendment to Article 32-1 of the Law, which prohibits the deportation of a foreigner to the country where s/he could face torture, hard, inhuman or degrading treatment or punishment types became only positive innovation in the Law "On Legal Status of Foreigners and Stateless Persons" aiming at protection of immigrants' rights without extension of the authority of law enforcement agencies.

The new regulations prescribed in the legislative acts of 2011 imposed stringent control of the entry of immigrants to Ukraine and extended the grounds for their expulsion from the country, as well as combined with increasing administrative pressure on foreigners.

Thus, in 2011 amended the Article 203 of the Code of Ukraine on Administrative Offences "Violation by foreigners and stateless persons of the rules of stay in Ukraine and transit through Ukraine", which was the main lever of administrative influence of law enforcement agencies on immigrants. The lawmakers significantly increased the size of a minimum and maximum fine that may be imposed on a foreigner in accordance with the said Article: the minimum fine increased from twenty to thirty, and the maximum from forty to fifty times the minimum monthly income.

Due to the Law of Ukraine "On Legal Status of Foreigners and Stateless Persons" the general trend of narrowing the rights and freedoms of immigrants in Ukraine can be clearly traced in the departmental normative documents of the Ministry of Internal Affairs. On September 20, 2011 the Ministry of Justice of Ukraine registered (No. 1112/19850) the Decree No. 601 of the Ministry of Internal Affairs from 23.08.2011 "On approval of the Order of consideration of applications for the extension of stay in Ukraine for foreigners and stateless persons." Traditionally for the last regulations of the law enforcement agency the said order exclusively regulates the control of immigrants by the law enforcers, without taking into account their basic needs and leaving mechanisms of protection of foreigners from possible abuses by officials undetermined.

The order has rather complicated the procedure for obtaining a permit for immigrants' temporary stay in Ukraine, especially an expanded list of required documents and significantly higher requirements for their processing.

In accordance with new requirements, an alien must add to his written request to the State Department of Citizenship, Immigration and Registration of Physical Persons of the Ministry of Internal Affairs of Ukraine about the extension of their stay in the country the following documents:

- A copy of pages of the national passport;
- A copy of immigration card;
- A notarized translation of national passport pages into Ukrainian;
- A copy of the passport of receiving Ukrainian citizen;
- A copy of dwelling entitlement, where the immigrant will temporarily stay;
- A notarized statement from the owner of the dwelling (or of all persons registered in it) with the consent to the foreigner's stay;

If an immigrant is received by a legal entity in Ukraine, the specified list should additionally include the certified copy of the extract of Unified State Register and a copy of the order of appointment of employees responsible for processing the documents for foreigners.

It is likely that getting the immigrant to give additional documents was intended to control the corruption of officials of the Ministry of Internal Affairs while making their decision to extend the foreigner's stay in Ukraine; however, due to similar anti-corruption measures in the militia, the extra costs and expenditures on bureaucratic procedures for collecting and processing of all documents will be covered by foreigners and receiving party.

The order number 601-2011 monitors the principle established by the Cabinet of Ministers of Ukraine No. 1074 "On Regulation of Entry of Foreigners and Stateless Persons in Ukraine, their exit from Ukraine and transit through its territory" consisting in the government's preconceived opinion of immigrants from certain countries of the world. Thus, the immigrants from countries listed in Annex 5 of the above rules for extension of stay in Ukraine are required to submit copies of the document that became the basis for the visa and documents confirming the availability of means to cover costs associated with her/his stay in Ukraine. Unlike citizens of other states, whose stay in Ukraine may be extended by receiving their natural or legal persons, the *blacklisted* immigrant must go in person to the militia for consideration of her/his application.

The new Order of the Ministry of Internal Affairs deprives the officers of the district units of the State Department of Citizenship, Immigration and Registration of Physical Persons of the right to decide on the extension of stay in Ukraine of certain categories of immigrants. Now these units can but prolong the temporary registration only of immigrants who arrived in Ukraine with a private purpose and for a period not longer than 180 days from the date of last entry. Therefore other categories of immigrants to extend their stay in Ukraine have to go to oblast centers to the Department units of higher level spending extra time and money.

Moreover, some militia units made it a rule to divest the *blacklisted* foreign nationals of their right to extend their stay in Ukraine at the place of residence.

An excerpt from the interview with a citizen of Azerbaijan:

"I turned to the passport office in Zolotonosha Town, Cherkasy Oblast, with a request to extend my stay in Ukraine, because I have legitimate grounds based on processing my wife's and my documents to obtain permission to immigrate. But the staffers refused to accept documents and said that they had been ordered to send all Caucasian foreigners to extend their registration to the oblast department of citizenship, immigration and registration of persons in Cherkasy. To my great surprise they explained such selectivity by the fact that Caucasian immigrants belonged to a "risk group", because in Ukraine they committed many crimes and were engaged in illegal trade. They immediately apologized and stressed that personally I am not the case, but the order was the order and they had to report to their chief."

The order specifies nine grounds for refusal to immigrants to prolong their stay in Ukraine, some of which, because of their evasive wording and absence of appropriate evidence, enable militia officers to refuse to grant permission to stay in Ukraine to almost any immigrant at their discretion. For example, a foreigner is deprived of prolongation of temporary registration if "there are reasonable grounds to believe that he has other than stated in his appeal reasons and purpose for staying in

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Ukraine.” Thus, the constraints are imposed not for immigrant’s actual violation or non-statutory conditions of entry and residence in Ukraine, but only on the basis of official’s judgments and assumptions about possible insincerity of the immigrant. In this case, nobody specifies what reasons may be recognized as “well-grounded” for such judgment.

The special paragraph of the order gives immigrants the right to appeal the decision banning the extension of her/his stay in Ukraine. However, one cannot use this right in practice: in case of refusal of extension of immigrant’s stay s/he has virtually no time to prepare necessary documents for appeal and trial. In case of non-exit of a foreigner from Ukraine after refusal to extend her/his stay in its territory, s/he is at once recognized as an illegal migrant and expelled from the state.

An excerpt from the interview with an Armenian citizen:

“I arrived in Kyiv to visit my friend. At the same time I wanted to find out whether there are favorable conditions for business in Ukraine, so together with my friend I traveled all over the country. I had no special problems with the militia; however, the patrol, and State Vehicle Inspection often stopped us and checked the documents. Four days before the registration expiration date specified in the registration stamp, I went to the passport department to submit documents for extension of my stay in Ukraine for two months. I was turned down: they just did not accept my documents for consideration. At my request to explain the reason for refusal, they simply replied: “You came on a visit? Three months is enough.” They did not take into account my friend’s explanations that he wanted to extend my stay in Ukraine. The passport clerk grinned and retorted: “A good guest is eager to quickly return home.” I had four days before the registration deadline, and I explained that the refusal to extend the registration in Ukraine was a complete surprise for me and I needed to arrange deals before leaving, including buying a ticket purchase, which is not that simple. I cannot meet the exit deadline; but all was in vain, and they did not prolong my registration.”

It is noteworthy that the decision to deny a foreign citizen in the extension of temporary stay is issued in the form of standard written notification, in which the foreigner is not even informed of the opportunity to appeal this decision in court.

One of the innovations in 2011 was the insurance of the receiving party against loss or damage in the event of a possible expulsion of a foreign citizen.

It should be noted that, according to Article 32 of the Law of Ukraine “On Legal Status of Foreigners and Stateless Persons”, the immigrants-to-be-deported reimburse the costs associated with carrying out this procedure of coercion. If the foreigner has no money to cover these expenses, the state defrays the expenses, which are refunded by receiving natural or legal person who invited a foreign citizen or has taken, as prescribed by law.

Despite the fact that the procedure of refunding of the expenses of the state related to the deportation of aliens was settled by law, in 2011, the Ministry of Internal Affairs of Ukraine instructed its subordinate units of Citizenship, Immigration and Registration of Physical Persons to compel natural and legal entities inviting or accepting immigrants in Ukraine to *voluntarily* insure their responsibility for reimbursement related to the expulsion from Ukraine of a foreigner invited. To carry out such insurance the Ministry singled out a number of insurance companies (“Megapolis”, “VUSO”, “Ukrainian Security Insurance Company”), which, in the case of detention of foreigners for the forced expulsion, shall reimburse the person who accepted the foreigner, the upkeep cost of foreigner in a special institution and the cost of travel documents for his return to the country of residence.

For 9 months of 2011, Ukraine forcibly expelled 1,488 illegal migrants, representing only 2% of foreigners who visited Ukraine during the same period. However, in the units of the Department of Citizenship, Immigration and Registration of Persons every arriving foreign citizen was viewed as a potential violator of immigration law and in each case of natural or legal person’s request to extend the foreigner’s stay in Ukraine they required to buy an insurance policy if the foreigner would be forcibly expelled from Ukraine. Such actions not only humiliated the dignity of foreigners, but also led to unlawful unexpected expenses of the host side, as the sum paid for insurance is much more than the sum paid for the extension of the stay of foreigners in Ukraine.

From the materials of the information and legal resource “First Ukrainian Legal Forum”⁹.

“I was about to prolong my husband’s, a Russian, the term of registration in Kyiv. Earlier in the passport section of Holosiyiv District Militia Station we were given three bills: UAH 17 state due, UAH 54 for unidentified consulting service, UAH 29.90 for the services of Department of Citizenship, Immigration and Registration of Persons. Probably something changed during last six months, because this time there is an additional mysterious bill for UAH 160 owed to the insurance company “VUSO” with the wording “payment under the contract.” Meanwhile we saw no agreement whatsoever. Is it legally and can they deny us registration if we do not pay for insurance? We called the single “VUSO” center and asked our question; we were redirected to the Kyiv office. There ensued an interesting “ping pong” from specialist to specialist: they all listened politely and then sent us to another pro. Actually, we had to repeat our question four times. All specialists, as one man, came to the conclusion: there occurred changes in the Ukrainian legislation concerning the compulsory insurance of foreigners, but no one could name a particular document, under which we had to pay these UAH 160. They stated that “changes were made on May 4, 2011” and nothing more. Where? Who? It’s all very strange and looks like usual extortions...”

From the application of a citizen to the Kharkiv Human Rights Group:

“During the procedure of extension of registration in Kharkiv for my wife, they insisted on insurance. Those present expressed their indignation; nevertheless they paid. I did not pay studied the contract: it read “Agreement of voluntary insurance”; the private company “VUSO” is the insurer. They explained that when a foreigner violates the rules of stay in Ukraine, the insurance company will pay UAH20,000 for her/his expulsion (note: ticket for electric train from Kharkiv to Bilhorod costs UAH6). Now the coolest piece of it: we began demanding reasons for such a forced *voluntary* insurance. The receptionist taking our documents explained that this was the ministerial order. We asked to name the pertinent regulation, the date of signing, but she tried to dodge the question: firstly she said that we’d rather look for this document in the Internet, and then directed us to the management, then she said that she was very busy and suggested to come at the end of the day. It was very frustrating to see people like obedient sheep suffer this humiliation while somebody while somebody reaped his rewards. I did not pay and said that I intend to write a complaint to the public prosecutor’s office.

This story had an interesting sequel. I was accompanied by a man who had already paid for this insurance, but subsequently took an active part in the showdown trying to establish for what and under which document he did pay. Next day an inspector called him and asked to come to him. When the man arrived, he was given his insurance money back and they apologized, because, I think, nobody wants to serve a term.”

Another departmental document of the Ministry of Internal Affairs of Ukraine: Order from 23.08.2011 No. 602 “On approving the procedure for processing and issuing a permit for temporary residence” permitted militia to limit the rights of labor migrants.

It should be noted that in recent years, under the pretext of the need to protect the interests of Ukrainian labor market, the government of Ukraine has been gradually but consistently introducing measures intended to complicate the employment of immigrants in the country. Currently, the employment of labor immigrants is subject to regulations approved by the Enactment of Cabinet of Ministers of Ukraine No. 322 from 08.04.2009 “Procedure for issuance, extension and cancellation of permits for the employment of foreigners and stateless persons” which, in comparison with the previous procedure, approved by the Cabinet of Ministers of Ukraine No. 2028 from 01.11.1999, significantly complicated the procedure for obtaining such a permit requesting additional documents. At the same time, the fees for processing applications for work permit for an immigrant increased from ten free-of-tax minimum incomes (UAH170) to four minimum wages (from 01.10.2011 it makes $985 \times 4 =$ UAH 3,940). Moreover, this charge is to be paid for consideration only, and the later decision may turn down a work permit.

The new Order of the Ministry of Internal Affairs, even if the immigrant has a job opportunity permit issued by the job center, establishes additional requirements for the receipt of a sojourn

⁹ [# post557950](http://urist.in.ua/showthread.php?p=557950)

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permit, including bringing to the militia of additional papers about the legal person employing the immigrant and personal data on the physical entity, the authorized representative of the party receiving the immigrant.

Moreover, now the militia is authorized to deny immigrants to obtain sojourn permit or revoke it on the basis of their own, and therefore possibly biased opinion about the foreigner or her/his country of origin. Such motives for limiting rights of immigrants to work in Ukraine as “the employment of the immigrant is contrary to the legitimate interests of citizens”, “the actions of the foreigner are a threat to public order,” according to the order of the Ministry of Internal Affairs, do not require furnishing evidence, and the wording “the facts of violation of Ukrainian legislation during the previous stay of the immigrant in the country” does not meet the principle of making a penalty fit a crime, as an immigrant can be denied a residence permit even if s/he crosses the street in a wrong place.

The government’s adherence to the policy of distrust and constant pressure on immigrants always ran into withering criticism from the side of human rights organizations. In view of this and being aware of the obvious irrationality of such innovations in the country prior to Euro 2012, the lawmakers adopted a fundamentally new, more progressive Law of Ukraine “On Legal Status of Foreigners and Stateless Persons” which is relatively humane toward immigrants.

5. PRELIMINARY ANALYSIS OF THE NEW LAW “ON LEGAL STATUS OF FOREIGNERS AND STATELESS PERSONS”

The new Law of Ukraine “On Legal Status of Foreigners and Stateless Persons” (No. 3773-VI) came into force only on 25.12.2011, and new practices based on it will be significantly affected by subordinate legislation, which at the end of 2011 were not yet worked out. Therefore now it is appropriate to briefly review the main achievements and shortcomings of the new law, and the contradictions that arise from its introduction.

The main positive innovation consists in partial abrogation of repressive rules adopted in April 2011. Thus, in accordance with the provisions of the new law, the foreigners cannot enter into Ukraine not for committing a violation of the law during her/his previous stay in the state, but only in the case of failure to comply with a court decision on the imposition of administrative penalty for this violation.

If the competent authorities decide on forcible return of a foreigner to the country of residence, s/he will have not five, but thirty days to exit Ukraine and the forced return is not necessarily accompanied by a decision to ban entry to Ukraine in the future. In addition, the law significantly, from ten to three years, cuts the term of prohibition to enter Ukraine for foreigners who have committed the attempted illegal border crossing.

Unlike the previous law, the new one does not contain a detailed list of principles intended to reduce the immigrant’s stay in Ukraine, but stipulates that such a reduction may take place when a foreigner loses ground for further stay in the country. Thus the law abrogates the rules of mandatory reduction of foreigner’s registration for committing even minor offences, late arrival to the place of study or work, or through recognition of a foreigner’s activity as such that may worsen Ukraine’s relations with another state.

The new law introduces a radically new procedure of “voluntary return” to the alien’s country of origin, which, by its nature, is not a coercive action, but an aid rendered at the request of the immigrant and with the assistance of state authorities, international organizations and NGOs.

The law clearly defines the impossibility of expulsion or forced return of immigrants to the countries where their life or freedom is threatened, where s/he may face death penalty, torture or cruel treatment.

An important innovation consists in expanding the list of categories of immigrants who are eligible for a permit for temporary residence, and clarification of the order of confirmation of

foreigner's material well-being, which is one of the necessary conditions for a positive decision on the possibility of her/his stay in Ukraine.

Undoubtedly, these changes deserve merit, but at the same time, it should be noted that the new law fails to eliminate all risks of violations of human rights and freedoms of immigrants.

First of all, unlike the previous version, the adopted law does not contain a separate chapter on fundamental rights and freedoms of foreigners with articles on the rights of immigrants to work, education, health care, social protection, housing, etc.; it only indicates that the "foreigners and stateless persons staying in Ukraine on legal grounds enjoy the same rights and freedoms and also bear the same responsibilities as citizens of Ukraine, with the exceptions established by the Constitution, laws or international treaties of Ukraine". This rejection of a more detailed list of the rights of aliens is impractical because the volume of rights available to an immigrant depends on the status of her/his stay in Ukraine. For example, to work or engage in other employment activities on the grounds and in the manner prescribed for the citizens of Ukraine have the right only the foreigners residing in its territory, while other categories of foreign nationals must obtain the permit from relevant authorities. The right to education equal with the citizens of Ukraine is also guaranteed only to foreigners who permanently reside in Ukraine, while other immigrants pay for their education under a separate procedure. The absence in the new law of clear regulation of the rights and freedoms of foreigners with regard to the status of their stay in the country, of course, complicates the mechanism of realization of these rights.

Once more the legislators evaded specifying grounds and clarification of the procedures of applying coercion by the law enforcement agencies as a punishment of immigrants. Thus the new law creates the conditions for removal of the very important reason for violation of human rights and freedoms of foreigners in Ukraine: officials may go on making decisions at their own discretion, from the standpoint of subjective evaluation of the alien and her/his actions, on prohibition of the foreigner's entry into Ukraine, conduct forcible return or expulsion justifying such decision by general wording like "in order to protect the legitimate interests of persons living in Ukraine," "in the interests of public order", "need to protect the health of the citizens." The law has also preserved the rule of possible detention and forced deportation of a foreigner from Ukraine only under the assumption that he intends to avoid leaving the state after the decision to return to his country of residence has been made.

The new law permits immigrants to appeal against the decision concerning her/his forcible return or expulsion in court, but such appeal shall not suspend implementation of these procedures.

The new law does not specify the grounds for refusal in the extension of foreigner's stay in Ukraine. Today, these grounds are determined by the order of the Ministry of Internal Affairs, whose position is too rigid and does not comply with the new law.

It should be noted that in the nearest future the implementation of the Law "On Legal Status of Foreigners and Stateless Persons" will be complicated because it is not adapted to a number of regulations, including legal documents of law enforcement agencies.

But one of the main threats for the implementation of humanitarian provisions of the new law is the closely defined circle of its executors, because the effectiveness of any legal act primarily depends on the state of the agencies responsible for implementation of its norms in everyday life. In Ukraine, the central executive body responsible for the government policy on migration is the newly created State Migration Service (SMS). The analysis of the full powers of this service and its activities suggests that the last year's reform of immigration laws was nothing but another attempt to collate non-collatable: to guarantee civilized relations of state with the immigrants, while retaining the priority role of power and law enforcement agencies in building such relationships.

6. STATE MIGRATION SERVICE OF UKRAINE

Ukraine has long needed such institution; however the proposed official format of the newly created service has failed to satisfy the human rights community. Instead of the agency independent of the Ministry of Internal Affairs, civil and transparent in its activities and carrying out duties

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non-typical of the law enforcement and power bodies related to migration issues and unite the fragmented power of several authorities working with the foreigners in Ukraine, they created another oversight body for foreigners, a kind of MIA “subsidiary”.

The Decree of the President of Ukraine dated April 6, 2011 No. 405/2011 approved “The Statute of the State Migration Service of Ukraine”, according to which the service operates in accord with the orders of the Ministry of Internal Affairs, its activity is directed and coordinated by the Minister of Internal Affairs, which not only forwards the Head of the SMS and approves the heads of its territorial units, but also deals with reorganization of central office departments and units of migration service, delegates to its board the representatives of the Ministry of Internal Affairs, considers the proposals of SMS on formation of public policy on migration, approves annual work plan of the State Migration Service and oversees its execution. The personnel of the SMS Workers have specific authority and can use force and specific means in the cases and manner prescribed by the Law of Ukraine “On the Militia”.

In fact, instead of creating a new civilian agency, which would be able to reasonably resolve problems associated with immigration of foreigners in Ukraine, the Presidential Decree only boosted the potential impact of the Ministry of Internal Affairs on migration policy in the state. Clearly, the effectiveness of the new agency can show only with time, but already there are reasons to argue that the activities of Ukrainian State Migration Service will focus not on humanitarian missions, such as matters of social adaptation of immigrants and enforcement of their rights and freedoms by the state, but will resort to power and punitive principles of law enforcement agencies with typical rigid attitude toward immigrants.

Certainly, in many European countries the migration service also reports to the Ministry of Internal Affairs or is closely associated with it. However, in the case of Ukraine such experience can hardly be recognized as optimal, because the Ministry of Internal Affairs is not a body of general internal policy, but a tool for fighting crime and a means of law enforcement with its own narrow objectives and priorities. The human rights activists have repeatedly noted, that as a method of combating illegal migration the Ukrainian militia widely uses measures both to reduce the total number of immigrants in Ukraine, and to carry out a sort of selection, when aliens from so-called risk-migration area (the Caucasus region of the FSU, Africa, Southeast and Central Asia) are denied extension of registration, deported from Ukraine, and their right to move freely across Ukrainian territory is restricted and so on. As a subordinate of the Ministry of Internal Affairs, the State Migration Service shall also do the same and will never become a protector of the rights of immigrants and refugees.

Thus, the analysis of the changes in national legislation on immigration shows that in 2011 the government actually refused to back the national legal regime for the stay of foreigners prescribed by Article 26 of the Constitution of Ukraine, in which the aliens had practically the same rights, freedoms and responsibilities as citizens Ukraine, and chose restrictive and coercive measures regarding immigrants.

These changes have not only eliminated, but significantly increased the already wide range of violations of human rights and freedoms of immigrants in Ukraine, including the segment of corruption of civil servants.

In 2011, thanks to legislative innovations, the law enforcement agencies got more opportunities to exert legal pressure on foreigners, which process could not be considered a “weighted immigration policy.”

For 9 months of 2011, the militia registered 65,384 foreigners; during the same period, they brought to book 43,458 foreign nationals for violation of stay in Ukraine. Thus, 66% of our guests turned out to be violators of state laws of Ukraine, and such balance became a striking illustration of the repressive character of this legislation.

What is the reason for such aversion to foreigners? It should be noted that the leaders of European countries constantly demand from the Government of Ukraine to take over the control of migration processes in the country pointing to the inability of Ukraine’s accession to the European community without improving the immigration rules. Such requirements are clear and fair, because

a certain number of immigrants traverses Ukraine while going to Western Europe illegally. Currently, the Ukrainian government is doing its best to show the European Union its desire and ability to combat illegal migration, which is easiest to do, on the one hand, introducing exponentially hard laws, and on the other, constantly demanding that the law enforcement agencies make progress, which demonstrates the effectiveness of the government in this direction.

However, the above statistics show that seemingly significant number of foreign offenders is formed not by migrants from problem countries in Africa, Southeast and Central Asia, which are not welcome in Europe, but by FSU citizens (88% of detained illegal immigrants), who, having arrived in Ukraine, have no further intention to get to Western Europe and constitute no menace to it. However, the rights of this very category of foreigners are massively violated in Ukraine for the welfare of Europeans promising visa-free travel, investments and so on.

Moreover, the “state phobia of migrants” in Ukraine has its financial background: in order to combat illegal migration the Government of Ukraine and law enforcement agencies get ample budgetary appropriations.

“The European Union has allocated €30 million to address the issues of illegal migrants, strengthening national policy on migration and construction of seven temporary accommodation centers and two centers of detention for migrants over the next two and a half years in the context of the readmission agreement between the EU and Ukraine”¹⁰.

Obviously, the law enforcement agencies are directly interested in the creation in the Ukrainian and European societies of the image of large-scale illegal migration of foreigners in Ukraine, because the large sums of money are allocated to counter this negative phenomenon. However, the verdict of the experts of the Chamber of Accounts of Ukraine on the efficiency of the draft on funds for these purposes by the Ministry of Internal Affairs is shocking.

The report of Acting Head of the Chamber of Accounts of Ukraine Yaremenko O.S. to the Head of the Verkhovna Rada of Ukraine Lytvyn V.M. (letter dated 17.10.2011, reference number 02-1865) reads:

“We have established that economically unjustified managerial decisions on the organization of combating illegal migration, creating inefficient and money-losing interim custody premises for foreigners and stateless persons (hereinafter: ICP) led in 2009–2010 and first six months of 2011 to the misappropriation of funds by the Ministry of Internal Affairs of Ukraine to the tune of UAH 2,041,900 and ineffective use of budget funds to the tune of UAH 24,978,000, or about every sixth hryvnia out of allocated for these purposes UAH 160 million...

The delay of the liquidation of the State Department of Citizenship, Immigration and Registration of Physical Persons by the officials of the Ministry of Internal Affairs led to further squander of budget funds for its maintenance and disruption of the system of migration management.

At the same time on the organization of the State Migration Service of Ukraine, which was twice created and liquidated during 2009–2010, the budget spent over two million hryvnias...

The simultaneous operation of two agencies in combating illegal migration bears heavily on state budget and increases the risk of further inefficient use of public funds.

Despite the annual reduction of filling of the interim custody premises, the project capacity of which was well above real need, the cost of their maintenance and labor costs of maintenance staff was constantly growing. As a result, the number of maintenance staff at the interim custody premises per one illegal migrant in the last two and a half years has grown from 1.5 to 2.4 persons and expenses of institutions per illegal worker from UAH 9,149 to UAH 22,636...”

¹⁰ <http://karpatnews.in.ua/news/32257>

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7. CONCLUSIONS AND RECOMMENDATIONS

Every country has the right to determine for itself the level of trust to foreign nationals, which is reflected in the regulations of this country. However, the basis for the introduction of policy in relation to immigrants should include objective assessment of immigration, demographic and economic situation in the country built on analysis of relevant statistical data, ongoing monitoring and forecasting of the dynamics of processes. In 2011, the government of Ukraine has departed from these principles and established the unreasonably strict legal rules regulating entry and stay of immigrants in Ukraine, legitimized a significant narrowing of rights and freedoms of foreigners, created additional security agencies to control their residence in the country. These processes are obvious indicators of growth of the “state phobia of migrants” in Ukraine.

The propaganda of such policy of “active distrust” to immigrants put on a wide scale in the media backed by the government agencies (above all by law enforcers) was one of the factors increasing the level of xenophobia in Ukrainian society: about 8% of the population of Ukraine are extremists in relation to other ethnic groups, including 1%, which is about 400,000 people, are ultras. 9% of respondents believe that Ukraine should never allow the accommodation of other races and nationalities, and 19.4% would not admit non-Europeans from poor countries (the results of the survey conducted by the Kyiv International Institute of Sociology).

The recommendations contained in the report “Human Rights in Ukraine: 2009-2010” remain relevant today. The Cabinet of Ministers of Ukraine, Ministry of Internal Affairs, State Migration and Border Guard Services of Ukraine have to immediately focus on the creation of a new departmental database of documents that, firstly, have to clarify the regulations of the new Law “On Legal Status of Foreigners and Stateless Persons” and, secondly, to ensure the functioning of the State Migration Service not only as the controlling body for the stay of immigrants in the state, but also as the state guarantor of their rights and freedoms in Ukraine. In particular, there is a need to develop new departmental instructions detailing the procedure for making and implementing decisions on the prohibition of entry, forced return and expulsion of foreigners from the country with a special section on granting the realization of their rights and freedoms in the implementation of these procedures of coercion; initiate the development and adoption of a legal act to safeguard the rights of asylum seekers, who cannot officially get refugee status in Ukraine, and to determine the order of their temporary legalization in the state, prepare and send to local militia departments the Guidelines on checking the legality of stay in Ukraine of asylum seekers with the attached samples of documents, which this category of foreigners should have in order to obtain permission to reside in Ukraine, and take other measures. Another important task should include adequate training of the personnel of State Migration Service in order to familiarize the trainees with Ukraine’s international obligations on human rights in the field of migration and ensure their strict implementation in daily activities.

XXV. THE RIGHTS OF THE SERVICEPERSONS¹

1. SOME GENERAL PROBLEMS

There were no radical positive transformations of the Armed Forces and other military units in 2011. Neither military service nor the quality and ensuring of the rights and freedoms of servicepersons underwent significant changes. We observe that the powers that be hardly pay attention to well-founded proposals intended to improve legislation designed to ameliorate the legal status of servicepersons. In particular, this is confirmed, by the fact that the recommendations of the human rights organizations report “Human Rights in Ukraine: 2009–2010” were not accounted for. Therefore, these recommendations remain topical.

On the face of it, given the fact that Ukraine proclaims itself a constitutional state, it must take all measures to fulfill the requirements of its own Constitution. In the context of the analyzed problems, we give main consideration to Article 17 of the Basic Law, which clearly determines that the defense of Ukraine and the protection of its sovereignty, territorial integrity and inviolability are entrusted to the Armed Forces of Ukraine (part 2), while the state provides social protection of citizens of Ukraine who serve in the Armed Forces of Ukraine and other military formations, as well as their families (part 5).

The logic of these standards indicates that Ukraine as a sovereign and independent state undertakes a commitment to consider the defense, sovereignty and territorial integrity as a priority and places the responsibility on the Armed Forces of Ukraine for their ensuring; in order to guarantee the appropriate level of service and proper carrying out of their constitutional tasks the befitting social protection of servicepersons is introduced. Moreover, given that by virtue of the principle of equality (Article 24 of the Constitution), under which a person is recognized in Ukraine as the highest social value, will apply to servicepersons as well. However, as practice shows, the state’s attitude to these important constitutional provisions, including the twentieth year of national independence, has failed to take shape.

First of all we should pay attention to troop cutback policy in Ukraine. The fact is that despite the rapid development of technology, emergence of modern weapons, automation and robotization of different types of work, the servicepersons will go on occupying the central place in the military organization of any country. Therefore the radical reduction biases to the worse both the efficacy of the Armed Forces, and social stability in Ukraine.

Thus, according to the Law of Ukraine “On the Strength of the Armed Forces of Ukraine for 2005”² the Verkhovna Rada of Ukraine in accordance with its constitutional authority approved the total strength of the Armed Forces of Ukraine as of 30 December 2005 as 245,000 persons includ-

¹ This section was prepared by Associate Professor of the Chair of International Law at the V.N. Karazin Kharkiv National University, Candidate of Legal Sciences Yevhen Hryhorenko.

² On number of the Armed Forces of Ukraine in 2005: Law of Ukraine from March 17, 2005; No. 2489-IV // *Vedomosti of the Verkhovna Rada of Ukraine*. — 2005. — No. 20. — p. 275.

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ing 180,000 servicepersons, according to the law of Ukraine “ On the Strength of the Armed Forces of Ukraine for 2006”³ as up to 221,000 persons, including 165,000 servicepersons, according to the Law of Ukraine” On the Strength of the Armed Forces of Ukraine for 2007”⁴ the Verkhovna Rada approved the total of 200,000 people, including 152,000 servicepersons, and the Law of Ukraine “On the Armed Forces of Ukraine for 2008”⁵ established the strength of the Armed Forces of Ukraine on December 31, 2008 up to 191,000 persons, including 148,000 servicepersons. As regards this year, according to the Law of Ukraine “On the Strength of the Armed Forces of Ukraine for 2011”⁶ dated May 12, 2011, No. 3312-VI the strength of the Armed Forces of Ukraine as of 31 December 2011 amounts to 192,000 people, including 144,000 servicepersons. In 2012, they are going to proceed with cutting the strength of the Armed Forces of Ukraine down to 139,000 persons. It should be noted that the President of Ukraine has already signed the Law of Ukraine No. 3742-VI “On the Strength of the Armed Forces of Ukraine for 2012”, according to which the further cutback will make 8000 persons in 2012, including 5,000 servicepersons⁷.

In this context, it should be noted that current strength of the Armed Forces of Ukraine is far below the number of law enforcement officers (about 295,000 persons, according to official data⁸). Certainly, nobody questions the fact that the proportion must be in favor of the Armed Forces of Ukraine and not the militia (there are apparent staffing shortages especially in operational units, investigation officers in law enforcement agencies, not all positions of district inspectors are staffed, etc.). These figures only show that against the background of so many law enforcement officers they should not radically cut the strength of the Armed Forces of Ukraine. This indicates the existence of risk to increase social tension, emigration of retired servicepersons, enlisting for illegal armed formations, loss of prestige of military service, instability in military communities, inability to perform complex tasks vested in them. Furthermore, this ratio may also affect the authority of the state as a whole.

Naturally, the military service is a very complex process involving a whole set of different actions and necessary conditions. They make for the maintenance of military units in order and military discipline, morale of servicepersons, training exercises and rising combat skills and professionalism, providing security, including the preservation and building of personnel’s health, crime prevention and other important steps taken by the state, command, and individual servicepersons.

However, not all measures are taken properly and achieve a positive result, which negatively affects the process of military service and fulfillment of assigned tasks. The most adverse circumstances are as follows: acts of harassment among servicepersons, humiliation, improper forthputting, as well as insufficient funding of military organization, which adversely affects the provision of social protection and the rights and freedoms of servicepersons, battle exercises and improvement of their professional skills to name a few. All these aspects are significant not only in the context of ensuring the combat readiness of the Armed Forces of Ukraine and other military formations, but also the rights and freedoms of servicepersons, social stability in 2011 and for many years to come.

Presently the major problem of Ukrainian military organization consists in the fact that no real steps are taken to proceed to exclusively contractual military service. The feasibility of rapid

³ On number of the Armed Forces of Ukraine in 2006: Law of Ukraine from December 22, 2005; No. 3284-IV // Vedomosti of the Verkhovna Rada of Ukraine. — 2006. — No. 16. — P. 135.

⁴ On number of the Armed Forces of Ukraine in 2007 : Law of Ukraine from September 19, 2006; No. 154-V // Vedomosti of the Verkhovna Rada of Ukraine. — 2006. — No. 45. — P. 435.

⁵ On number of the Armed Forces of Ukraine in 2008: Law of Ukraine from February 12, 2008; No. 125-VI // Vedomosti of the Verkhovna Rada of Ukraine. — 2008. — No. 11. — P. 109.

⁶ On number of the Armed Forces of Ukraine in 2011: Law of Ukraine from May 12, 2011; No. 3312-VI // Official Review of Ukraine. — 2011. — No. 42. — P. 1708.

⁷ The strength of the Armed Forces of Ukraine in 2012: 8,000 persons less // <http://www.unn.com.ua/ua/news/07-10-2011/490966/>

⁸ Today Head of MIA Personnel Department Major General Yuriy Kazanovsky and his first deputy Major-General of Militia Olexandr Guida have held a briefing on “Reforming MIA educational institutions and experimental personnel training. // <http://www.mvs.gov.ua/mvs/control/main/uk/publish/article/497611>

transition to contractual military service was included into our previous report “Rights of People in Ukraine: 2009–2010”⁹. Despite the declaration of intentions in this direction, the state fails to take real and effective steps. In October–November 2011, the regulation of the Cabinet of Ministers of Ukraine No. 818 of August 3, 2011 determined the number of draftees as 26,600, and recruitment cost as \$1,715,700. According to the explanatory note to the said regulation, the amount of recruitment cost per 1 draftee makes Hr 64.50 (excluding allowances for meals and transportation of recruits).

However, the issue of financing of the Armed Forces of Ukraine in general, backing of social protection of servicepersons looks almost critical. The Law of Ukraine “On the State Budget of Ukraine for 2011” of 23 December 2010 No. 2857-VI¹⁰ allots UAH 214,000 for the upkeep of military leadership and management of the Armed Forces of Ukraine, Hr 9 mln. for the upkeep of the contingent of the Armed Forces of Ukraine, UAH 148,000 for communication, creation and development of command posts and automated control systems, UAH 900,000 for medical treatment, rehabilitation and sanatorium-and-spa treatment of the contingent, UAH 10,000 for mobilization and recruitment to the Armed Forces Ukraine and other military formations, Hr 313,000 for reformation and development of the Armed Forces of Ukraine, UAH 570,000 for purchasing and upgrading of weapons and military equipment for the Armed Forces of Ukraine, UAH 535,000 for housing development (purchase) for servicepersons of the Armed Forces of Ukraine, UAH 62,000 for working-life and fire-and-explosibility control at arsenals, bases and depots of arms, missiles and ammunition of the Armed Forces of Ukraine. These estimates bring out systemic problems in the Ukrainian army, lack of funds for army reformation and crisis management.

2. THE PROBLEM OF THE ACTS OF HARASSMENT AMONG SERVICEPERSONS IS A GROSS VIOLATION OF HUMAN RIGHTS OF SERVICEPERSONS AND UNDERMINING OF FIGHTING EFFICIENCY OF MILITARY UNITS

The acts of harassment among servicepersons humiliating servicepersons, infringing on the order of subordination and violating military ethics and courtesy are the most dangerous phenomena which significantly affect fighting and operating efficiency of military units, ensuring of rights and freedoms of servicepersons, as well as social stability. As a result the servicepersons lose motivation for military service and quality performance of their duties, which, of course, affects the unit, where they undergo military service.

This undermines discipline, morale and ability of a unit to carry out a task. As a result, it falls out of military formations assigned to ensure national security of Ukraine. Many authors rightly indicate that the violation of statutory rules of conduct undermines the unity and team-spirit triggering formation of conflicting microgroups, which complicates management. In many cases they lead to violations of daily routine, failure to carry out tasks and frustration of other plans. If the victim is on duty, violence against him can lead to other dangerous consequences¹¹.

Moreover, abuse of a serviceperson, his humiliation, systematic beatings, other kinds of violence demoralize his/her personality, affects not only his/her further service and his/her life upon discharge from the army, as well as use of such “methods” to educate other people. Many young people have passed through the harassment “school”, returned to civic life with criminalized or

⁹ The substantiation of rapid transition to contractual military service was included into our previous report “Human Rights in Ukraine: 2009–2010”.

¹⁰ On the state budget of Ukraine in 2011: Law of Ukraine from December 23, 2010 No. 2857-VI // *Vedomosti of the Verkhovna Rada of Ukraine*. — 2011. — No. 7–8. — P. 52.

¹¹ Karpenko M.I. Criminal responsibility for violations of the statute rules concerning relations among servicepersons (criminal and criminology research) — M.I. Karpenko / ed. by V. K. Matviychuk: monograph. — Kyiv: KNT, 2006. — P. 64.

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victimized consciousness or with persistent criminal patterns of communication, create substantial layer of criminal social relations, bringing elements of “organized violence” to their families and environment, bringing up their children with “negative experience” in mind¹².

This problem needs special attention, because quite a large number of such servicepersons after their discharge from the Armed Forces or other military formations go to work for the internal affairs ministry transferring “the acquired knowledge, skills and abilities” into the field of law enforcement. Both practice and monitoring of harassment in the law enforcement agencies¹³ testify that the situation in this area is critical.

The members of the Kharkiv Oblast Union of Servicepersons’ Mothers, in their turn, believe that “young men become convinced after army that if you were humiliated and even beaten, then you can normally behave along these lines. They transfer this confidence into their civilian environment at work, relationships with friends, and family.”¹⁴ All this can be considered as additional threat to Ukraine’s national security (security of person, society, and state) triggered by improper organization of military service.

Moreover, this situation distorts legal consciousness, loss of confidence in law, order and legality, and ultimately it undermines the authority of military forces and government in general, reduces respect for it. Therefore they miss the purpose of recruitment: preparing to defend his/her Motherland (Part 2 of Article 1 of the Law of Ukraine “On Military Duty and Military Service”¹⁵).

The thing is that a citizen seeing service under such conditions, although s/he masters certain skills, will find it difficult to associate the state with the Fatherland, because during the period of service it failed to create for such a citizen not only appropriate but also elementary safe conditions for her/his life and health. Due to a given reason, such citizen is unlikely to deliberately go, if necessary, to defend this country, and will do it only under threat of punishment (Article 336 of the Criminal Code of Ukraine “Avoidance of mobilization”¹⁶) and without full commitment of efforts. Thus, bullying negatively affects the motivation of servicepersons, significantly degrades the functionality of military units and military formations, and distorts the social nature of military service. In addition, according to criminologists, these crimes are constantly changing and becoming more cynical, which leads to an increase of combat losses¹⁷.

For example, the judge advocate’s office in Simferopol garrison in July 2011, during the procurator’s inspection of servicepersons’ life-and-health protection in one unit of the Ministry of Defense of Ukraine deployed in the Autonomous Republic of Crimea, found numerous cases of harassing incidents among servicepersons. In two cases proceedings were instituted according to paragraph 2 of Article 424 of the Criminal Code of Ukraine. In the first case the junior sergeant harassed and beat a subordinate serviceperson for refusing to bring two bottles of beer, and in another case the junior sergeant, wanting to demonstrate his physical superiority and advantage of his official position, repeatedly beat three subordinate servicepersons¹⁸. Unfortunately, in practice, in the Ukrainian army such cases remain mostly latent, no proceedings are instituted, no investigations conducted, guilty persons remain unpunished, and faults are never redressed. While rare criminal proceedings show the glaring cynicism of such crimes.

¹² Ibid.

¹³ See, e. g.: Monitoring illegal violence in the MIA departments in Ukraine / KHISR. — Kharkiv: Prava ludyny, 2010 — 192 p., Monitoring illegal violence in the militia — 2010. Results of sociology polls. — Kharkiv: Prava ludyny, 2011. — 208 p.

¹⁴ Monitoring violations of rights of servicepersons. — Kharkiv.: Folio, 2004. — P. 16.

¹⁵ On Military Duty and Military Service: The Law of Ukraine from March 25, 1992 No. 2233-XII // Vedomosti of the Verkhovna Rada of Ukraine. — 1992. — No. 27. — P. 386.

¹⁶ Criminal Code of Ukraine: Law of Ukraine from April 5, 2001 // Verkhovna Rada of Ukraine. — 2001. — No. 25–26. — P. 131.

¹⁷ Criminology: General and Special Parts: textbook. — Kharkiv.: Pravo, 2009. — P. 266.

¹⁸ Proceedings were instituted in two criminal cases of harassing among servicepersons // http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=96190

The danger of harassment among military and systematic humiliation of servicepersons goes up due to the fact that on duty these persons are constantly exposed to danger, including their own lives and health, because it's in the very nature of military service.

In this case, the state must create all conditions to eliminate all out-of-service dangers, and the rights and freedoms are properly guaranteed. This obligation of the state should be considered absolute, because if under risks associated with military service the serviceperson will harassed with implication of additional dangers, s/he will not attend to her/his duty, while trying the darndest to protect their lives and health.

3. INCREASING COMBAT SKILL, LEVEL OF TRAINING AND PROFESSIONALISM OF SERVICEPERSONS AS AN IMPORTANT LINE OF RESPECT FOR THEIR CONSTITUTIONAL RIGHTS

Another very important aspect of proper military service and protection of rights and freedoms of servicepersons consists in permanent increase of combat skill, level of training and professionalism of servicepersons. These problems fully apply to human rights of servicepersons, firstly, because the Constitution guarantees the right to development of individual serviceperson (Article 23 of the Constitution) and to education (Article 53 of the Basic Law) and, secondly, it allows servicepersons to master skills to carry out military duty with maximum guarantees for their lives and health, because while on duty s/he may need to use sophisticated weapons and equipment in a dangerous situation. Weapons mastery, keeping them serviceable, clean and ready for use is the responsibility of every serviceperson and a guarantee of fulfilling their duty and protection of their lives and health. The ILO Recommendation concerning vocational guidance and training in human resources development from June 23, 1975 No. 150 draws particular attention to this problem. Specifically, it states that policies and programs of vocational guidance and training should be designed to protect workers from hazards in the workplace through high-level instruction in the rules of safety and occupational health as part of any profession or trade¹⁹. Unfortunately, domestic legislation pays no attention to this aspect. Therefore, the ILO recommendations containing provisions to protect contingent from danger in their branch through high-level instruction in the rules of safe handling and use of military equipment, weapons, as well as safety and hygiene as a part of military training in any profession or trade should be included into the laws of Ukraine "On the Armed Forces of Ukraine", "On Military Duty and Military Service", "On social and legal protection of servicepersons and their families," and the Regulations of the Armed Forces of Ukraine.

To achieve the above goal the servicepersons should be trained in skillful use of military equipment, weapons, etc. as well as ways to improve their combat skills and professionalism, organize and conduct military training, advance in education and training, because one cannot obtain knowledge once and for all. The importance and specificity of such training require significant resources, which are always scanty.

For example, during the judge-advocate's-office control checks of sufficiency in relation to the Constitution and laws of Ukraine on combat efficiency and combat readiness of military units of the Air Force of Ukraine there emerge serious violations of the law stemming from inadequate financial and logistical supply and from irresponsible attitude to their duties on the part of servicepersons. There are only 32% of serviceable aircraft in the Air Force of Ukraine; in some military units this figure is even less. In addition, the combat training quality is of special concern because of the lack of necessary practical flights. In these units 23% and 5% of crews are ready to carry out combat missions under daylight and night conditions under simple weather conditions, under intricate me-

¹⁹ ILO Recommendation concerning vocational guidance and training in human resources development from June 23, 1975 No. 150 // International law on the protection of labor, the ILO Convention and Recommendations. — Kyiv, 1997.

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teorological conditions 10% and 5%, and under reduced visibility only 1% and 0.5%²⁰. No better is the situation in other formations. Unfortunately, as things go, there is almost no change for the better in this area.

Both training and combat efficiency drills are underfunded; besides, the combat efficiency is frustrated by the use of military equipment and personnel to perform various jobs that have nothing to do both with combat training and duties of military units. There are many episodes when commanders conclude *agreements* with various individuals and private businesspersons, according to which the enlisted persons perform various contract works (loading / unloading, waste disposal, land development, repair of buildings, apartments, etc.). Sometimes commanders at various levels use enlisted persons as unskilled labor for their own benefit. It happens that military officials use assigned vehicles for purposes not related to military service. This significantly demoralizes contingent, undermines military effectiveness and readiness of military units, violates the rights and freedoms of servicemen, because vehicles and other resources are used for private purposes, and servicemen are distracted from the tasks assigned to their units.

For example, in 2007, as a result of inspections for compliance of military officials with the Law of Ukraine “On Corruption Control” the judge advocate’s offices prepared and sent to court 259 protocols on corruption of military officials. The vast majority of these violations consisted in the use by commanders of subordinate enlisted persons for out-of-duty purposes and for their own personal benefit. In addition, the judge advocate’s office sent to the court over 1,000 criminal cases with a guilty verdict, including over 300 cases related to economy crimes and bribery²¹.

However, such statistics only partially reflects the real state of things, because quite a large number of such crimes and corruption are not detected by law enforcers. Not all violations are reflected in official statistics (remain latent). And the data obtained for analysis are only partial and are often related to the level of conviction, and not the level of criminality²². However, according to criminologists, even the level of criminal record for committing service crimes remains dangerously high, and in relative terms is growing²³. Such crimes significantly undermine combat effectiveness of troops and significantly reduce the credibility and confidence in the military service in the eyes of society and servicemen themselves, which damages the process of service and observance of rights and freedoms of servicemen.

4. SOCIAL PROTECTION OF SERVICEPERSONS

The level of social protection has a dramatic impact on proper military service and fulfillment of duties by every serviceman, realization of their constitutional rights and freedoms. If legal social guarantees for servicemen are not provided and their constitutional rights and freedoms are violated, it inevitably negatively influences the level of morale and confidence in their military future. As a result the quality of their performance diminishes, as well as their health, confidence in the future, and sometimes it leads to mental disorders and other negative consequences. Creating appropriate conditions for military service will contribute not only to more conscientious performance of military duties, but also will encourage enlistment in Ukraine with draftees meeting the highest standards for such persons.

²⁰ Luzan L. Ensuring combat readiness of the Air Forces of Ukraine / L. Luzan // Bulletin of the prosecution. — 2003. — No. 1 (19). — P. 83–84.

²¹ O. Medvedko. On the eve of Ukraine’s Armed Forces / O. Medvedko // Law of the military sphere. — 2007. — No. 12. — P. 3.

²² Criminology: General and Special Parts: tutorial / IM Danshin, V. Holina, M. Valuysky et al., For the Society. V.V. Holina. — 2nd ed. revised. and add. — Kharkiv: Pravo, 2009. — P. 264.

²³ Ibid., P. 266.

However, social protection of servicepersons is unsatisfactory, which is reflected in the Law of Ukraine “On Fundamentals of National Security of Ukraine”²⁴. In these documents the legislator considers the unsatisfactory level of social protection of servicepersons, servicepersons transferred to the reserve, and members of their families as main real and potential threats to Ukraine’s national security and stability in the contemporary society in the military sphere and security of the state border (Article 7 of the Law.)

The analysis of this norm allows to conclude that the state recognizes that presently the social protection of persons within the military or retirees and their families is unsatisfactory and such social security creates threatens national security and social stability. Therefore, this state of social protection of servicepersons significantly affects social security of our country and society. The importance of the said security is of major importance as our country, among others, aims to become a social state. This goal is of great significance for our state today.

The social security as a part of national security provides for social protection of the most vulnerable and disadvantaged groups of population (children, pensioners, invalids, etc.) as well as standard resources for subsisting. At the same time, the national social security provides protection for indigent sections of the population (needy due to physical, mental, age, or any other factors).

Of course, the servicepersons do not belong to the category of needy population who on their own cannot ensure a decent existence. Moreover, in order to be enlisted, you have to be physically qualified²⁵. To this end you have to be examined by military medical commission, which is also a special problem of draftee’s human rights. At the same time, the analysis of actual situation of servicepersons permits to conclude that they are no less dependent on national social protection. The sources on psychology make us believe that “during the reformation of the Armed Forces of Ukraine, redesign of Ukrainian army and their dynamics the servicepersons and their families become a social group in tough living conditions. This situation is conditioned by the specific professional activities related to military service, and a number of current negative trends in military and social environment.”²⁶

The same is confirmed by the analysis of relevant legislation. So, the art. 1 of the Constitution of Ukraine proclaims our state a social one²⁷, and according to art. 3 of the Basic Law of Ukraine, an individual is the highest social value. According to the constitutional principle of equality (art. 24 of the Constitution of Ukraine) the citizens have equal constitutional rights and freedoms and are equal before the laws, i. e. these same norms, considering a person the highest social value, apply to the servicepersons as well.

Also in accordance with part 5 of art. 17 of the Constitution of Ukraine, the State ensures the social protection of Ukrainian servicepersons and their families, and in accordance with art. 9 of the Law of Ukraine “On social and legal protection of servicepersons and their families”²⁸ the state guarantees the financial and other support to the extent that stimulates the interest of citizens in military service. The current legislation provides an extensive system of social rights guaranteed by the state for servicepersons and their families. The increased attention of the legislator to social protection of servicepersons and their families is also caused by the fact that the cash allowance

²⁴ On social and legal defense of servicemen and their families: The Law of Ukraine from December 20, 1991 No. 2011 with alterations introduced by the Law of Ukraine from November 3, 2006 No. 328-V // *Vedomosti of the Verkhovna Rada of Ukraine*. — 2006. — No. 51. — P. 519.

²⁵ The existing military medical commissions present a separate problem of securing the draftee’s human rights.

²⁶ Oleksyuk N.S. The role of family in providing military capabilities of the Armed Forces of Ukraine / N.S. Oleksyuk // *Psychological Aspects of National Security: Abstracts of the Second International Scientific Conference*. — Lviv: Lviv University of Internal Affairs, 2008. — P. 153.

²⁷ The Constitution of Ukraine adopted by the fifth session of Verkhovna Rada of Ukraine on June 28, 1996 // *Vedomosti of the Verkhovna Rada of Ukraine*. — 1996. — No. 30. — P. 141.

²⁸ On social and legal protection of servicepersons and members of their families: Law of Ukraine from Dec. 20, 1991 No. 2011 with amendments introduced by the Law of Ukraine from Nov. 3, 2006 No. 328-V // *Vedomosti of the Verkhovna Rada of Ukraine*. — 2006. — No. 51. — P. 519.

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and clothing allowance are usually the only sources of livelihood for servicepersons and quite often for their families as well. Therefore, the state has assumed full responsibility for their full and comprehensive material security. Accentuation of the duty of the state to guarantee the social and legal protection not only of servicepersons but also of their families (part 5, art. 17 of the Constitution of Ukraine²⁹) is essential for military service, because the serviceperson's family is an important stabilizing factor, and violation of human rights of family members is, in fact, a violation of the rights of servicepersons adversely affecting their morale.

However, there are plenty of problems in this area, especially concerning inadequate budgeting by the state of the entire structure of military organization which is bringing forth a number of negative factors affecting social protection of servicepersons and their families and overall social and military security of our state. The Law of Ukraine "On the State Budget of Ukraine for 2011" of 23 December 2010 No. 2857-VI³⁰ contains the expense item on the maintenance of the Armed Forces of Ukraine to the tune of UAH 9 mln., UAH 900,000 for medical treatment, rehabilitation and sanatorium-and-spa treatment, UAH 535,000 for house making /purchase for the Armed Forces of Ukraine.

In fact, it is a topical question because such social protection may lead and lead to mass discharge from military formations, which in turn can lead to social tension and other negative consequences.

At the same time, it is not only the lack of funding for a particular year creates a difficult situation in the field of social protection of servicepersons, but legislation in this area as well, which was adopted at the dawn of independence of Ukraine and weathered unchanged through twenty years of our state. Thus, the Law of Ukraine "On social and legal protection of servicepersons and their families" is hopelessly outdated and hampers reforms of military branch. The shortcomings of this law trigger complicated legal conflicts in various areas of social protection and realization of the rights and freedoms of servicepersons.

And the right to freedom of conscience is no exception. Thus, according to paragraph 3 of article 6 of the said Law, the persons whose religious beliefs prevent carrying out of conscription service, have a right to alternative service in accordance with the Law of Ukraine "On alternative (civilian) service." Thus, the right to alternative service in the context of the provisions hereof may be realized only by those people who are being enlisted, while contract service envisages no such right. But what is to be done if the religious beliefs of servicepersons were formed already during military service. In our view, the right to freedom of conscience in the military service should be considered much broader and include all cases when religious beliefs emerged in the process of military service. The law should provide for the case that if religious beliefs arose during the conscription service, a serviceperson must be discharged from military service and sent to alternative (non-military) service. As for those who carry out military service under the contract, the acquired beliefs should be a sufficient ground for termination of contract for military service.

Moreover, such a narrow and one-sided view of the law on alternative service mentioned Law, as well as insufficient development of relevant constitutional provisions creates other problems in this area. It should be noted that the humanization of Ukrainian legislation was aimed at creating conditions under which every citizen would be able to fulfill her/his responsibilities. In this regard, paragraph 4 of art. 35 of the Constitution of Ukraine maintains that no one can be relieved of her/his obligations to the State or refuse to fulfill laws on religious grounds. If carrying out of military duty is contrary to religious beliefs, the performance of this duty should be replaced by alternative (non-military) service.

It looks like this provision actually helps a citizen of Ukraine who has religious beliefs and is subject to conscription for military service not to avoid it, but instead s/he will have an alternative (non-military) service. However, there emerge legal conflicts arising from insufficient regulation of constitutional issues related to alternative service, which leads to misconceptions about it among

²⁹ The Constitution of Ukraine adopted by the fifth session of Verkhovna Rada of Ukraine on June 28, 1996 // *Vedomosti of the Verkhovna Rada of Ukraine*. — 1996. — No. 30. — P. 141.

³⁰ On the State Budget of Ukraine for 2011: Law of Ukraine from Dec. 23, 2010 No. 2857-VI // *Vedomosti of the Verkhovna Rada of Ukraine*. — 2011. — Nos. 7-8. — P. 52.

citizens subject to conscription and having relevant religious beliefs, and developers of normative legal instruments which does not help to realize legal guarantees of fulfilling this duty.

So, the above constitutional provisions do not clarify the legal nature of alternative service, and therefore it is mostly treated as the right to alternative service. Such understanding has led to the situation when the Law of Ukraine “On alternative (civilian) service” regarding it as a right does not establish legal responsibility for avoiding it. The said responsibility is not included either in the Code of Ukraine on Administrative Offences, or the Criminal Code of Ukraine. The only possible sanction for those servicepersons who evade alternative service or violate other requirements (part 2 of art. 8 of the Law) is as follows: “If a citizen evades alternative service or performs other actions mentioned in the first part of this article, the commission may reverse its decision to send him to an alternative service, about which it is within five calendar notify the citizen and military commissariat days in writing, and then the citizen is subject to conscription for military service on ordinary terms.”

But the problem is that such citizen cannot perform military service (this is contrary to her/his beliefs); therefore s/he will tend to shy away either from military service as such or shirk her/his duties. This sanction is based on misconceptions about alternative service exclusively as civil rights. The law is a measure of possible behavior, and therefore the citizen realizes it at her/his own will. S/he has a choice: not only to realize or not realize this right, but also, when s/he begins to realize it, s/he can at any time withdraw from further realization. This is the basis of the law on alternative service. Therefore we think that the provisions of the Law that the citizen, in case of avoiding non-alternative service, is to be drafted on general basis are absolutely unacceptable. We think that in this case the indiscipline of the citizen cannot outweigh his convictions, and therefore the law should include other penalties for evasion of alternative service, since the presence of such sanctions, in our opinion, distorts the very idea of alternative (non-military) service.

The inadequate funding and outdated legislation go along with irresponsible attitude of officials to the problems of social protection of servicepersons. For example, the Headquarters of the military advocate’s offices of the Prosecutor’s General Office of Ukraine inspected the legality of public purchases of accommodations for servicepersons in Feodosiya and urban village Shchebetivka (ARC). The inspection established that due to abuse of power by officials of the Crimean Capital Construction Board of the Ministry of Defense of Ukraine for the benefit of private companies during 2008-2010 the defense agency spent about UAH54mln. to purchase 190 apartments and registered them in the offices of technical inventory as public ownership under the Ministry of Defense. However, the servicepersons cannot move into these apartments because they do not meet sanitary and technical standards for premises³¹. The criminal proceedings were initiated on February 28, 2011 on grounds of crime under part 2 of art. 364 of the Criminal Code of Ukraine. It should be noted that such cases repeatedly complicate the already difficult situation with implementation of requirements of paragraph 5 of art. 17 of the Constitution of Ukraine.

5. CONCLUSIONS AND RECOMMENDATIONS

The problem of the rights of servicepersons was and remains urgent in 2011. The initiated domestic reforms almost completely ignore the issue of functioning of the Armed Forces of Ukraine and other military formations. These negative examples of adverse service realities lead to the conclusion that they arise primarily due to improper organization of this service and indifferent and irresponsible attitude of various officials and the state as a whole. It affects public underfunding of the Armed Forces of Ukraine and other military formations, as well as tells on government’s inability to ensure law and order in the country as a whole, and in military organization in particular. Next

³¹ The apartments purchased for servicepersons failed to meet sanitary and technical standards // http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=67307

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to nothing is done to improve legal culture of both citizens and servicepersons; therefore the level of such culture is quite low, including the military officials.

The state exists against the backdrop of permanent political confrontations; in the meantime the military organization is treated primarily in terms of influence of various powerful political entities. The desire for redistribution of powers, including control of the armed forces and other military formations, during which the Constitution of Ukraine and the current legislation are ignored, does not improve legal culture and sets a negative pattern of disobedience. This affects a number of constitutional norms, which are intended to guarantee high social status for servicepersons.

As a result, the military service does not only fulfill its social purpose, which is primarily to ensure national security, but quite often is a security challenge violating human rights of servicepersons and unallied contingents. Therefore, there is a justified question: is the state entitled to press citizens into conscription service, if it is unable to create basic conditions for a feasible service, which does not endanger the state, society and individuals, including those who are in the Armed Forces and other military formations.

The above confirms that the proper military service management is particularly important. One cannot tackle all problems in the branch at once; to this end the state has to undertake a range of economic, organizational, legal, ideological measures to overcome negative factors affecting military service. Moreover, it is necessary that the provisions of part 5 of art. 17 of the Constitution of Ukraine that the state provides social and legal protection of servicepersons and their families are clearly and fully realized. But tangibles alone will not improve service management. The entire array of legislation should be reviewed for compliance with the rights of servicepersons. In addition, they need to develop respect for military service, servicepersons, work up the prestige of military service, extend abilities of military, and promote their proper rest possibilities, which will increase the authority of military organization and its tackling of constitutional issues.

Thus, the recommendations of 2009–2010 should be emended with as follows:

1. Change the public attitude to financing, organization and operation of the Armed Forces and other military formations, as well as issues of rights and freedoms of servicepersons and their families. It is necessary to understand that the Armed Forces carry out constitutionally important tasks supporting not only the existence of Ukraine as a sovereign and independent state, but also social stability.

2. To revise military legislation in terms of its conformity with the Constitution of Ukraine, including its second section.

3. Use the ILO recommendations and amend the laws of Ukraine “On the Armed Forces of Ukraine”, “On Military Duty and Military Service”, “On social and legal protection of servicepersons and their families,” Regulations of the Armed Forces of Ukraine and add provisions on the protection of servicepersons from hazards on the site of service through high-level instruction in the rules of safe handling and use of military equipment, weapons, safety requirements and health regulations as a part of military training of any profession or trade.

4. To amend art. 6 of the Law of Ukraine “On social and legal protection of servicepersons and their families” with provisions, under which the right to freedom of conscience includes not only the right to alternative service of draftees and believers. The law should provide that if religious beliefs arose during conscription service, a serviceperson must be discharged and sent to alternative (non-military) service. As for the contract service, the emergence of beliefs during military service shall give sufficient grounds for termination of the contract for military service.

5. Amend part 2 of art. 8 of the Law of Ukraine “On alternative (civilian) service” intended to annul the provisions under which the citizen in case of failure to carry out alternative service is subject to conscription service on general grounds. A different type and extent of legal liability should be imposed.

XXVI. PRISONERS' RIGHTS¹

1. SOME GENERAL DATA

This chapter addresses some issues, related to observance of the rights of the prisoners in the institutions under the auspices of State Penitentiary Service of Ukraine (hereinafter — SPSU) — pre-trial detention centers (hereinafter — PTDC) and correctional facilities (CF). Under the SPSU² data, as of 01.12.2011, 154 111 individuals are held in the 184 penitentiary facilities; 38 156 of them are held in PTDC (5079 — for pre-trial investigation, 18 250 — for trial investigation (before the sentence). 114 651 individuals serve their term in 143 correctional facilities, including 6 855 individuals in 9 general regime facilities of minimum security level for men; 5 991 individuals in the 12 facilities for women; 35 790 — in 35 institutions of medium security level for the persons convicted for the first time; 44 211 — in 42 facilities of medium security level for the persons, convicted several times; 4 295 — in 9 facilities with maximum security level; 1 033 individuals — in the 7 alleviated regime facilities with minimum security level; 4 932 persons — in 23 correctional centres; 2 889 individuals — in 6 medical institutions (besides, 2 706 individuals are kept in 16 medical institutions within the system of penitentiary facilities and PTDC); 1 304 minors are held in 8 educational/correctional facilities. 12.6 thousand persons out of the the general number of convicts are convicted for the term more than 10 years; 1 764 individuals serve life term; 1 017 individuals stay under arrest.

Comparison of these figures with respective figures from the last year shows that the quantitative data, concerning the institutions under SPSU auspices, remained almost unchanged. However, the public opinion and interest towards this area of public life increased substantially, due to the arrests of the former governmental officials and leaders, mass media attention to the issues of prisoners' rights, a number of decisions, made by the European Court of Human Rights, with regard to the violations (including the systematic ones) of the Convention for the protection of human rights, committed by Ukraine.

Currently, a number of topical questions are on the agenda:

Is it expedient to hold in custody such high numbers of people?

Why the courts are abusing their right of detention, while the preventive measures are being chosen?

Why the prisoners, held in PTDC, and innocent until the court's verdict comes into force, under the constitutional principal of presumption of innocence, are kept in worse conditions, than the inmates of prisons?

What should be done to change the situation for the better?

In this chapter we shall try to provide answers to these and other question.

¹ Prepared by Andriy Didenko, KhHRG coordinator.

² http://www.kmu.gov.ua/punish/control/uk/publish/article;jsessionid=C357C4185EF3776ACCBCB83D1B03B800?art_id=95284&cat_id=95260

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2. PUBLIC CONTROL

As has been stressed in previous reports, the facilities under the auspices of SPSU remain closed for the society at large, while the system of prisons, as an institution of enforcement remains probably the only public structure unchanged from the Soviet times. The staff, therefore, is tempted to commit abuses and violations of the inmates' rights, thus creating obstacles for the exercise of the rights and lawful aspirations of the latter. Let's remind that as early as in 1987 Ukraine ratified the UN Convention against torture and other cruel, inhuman or humiliating treatment and punishment; on 16.01.1998 — it ratified the European Convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment, having thus become a party to these treaties. Besides, the Supreme Rada of Ukraine ratified the Facultative Protocol to the said UN Convention³, while on 22.06.2006 the President of Ukraine signed the law on ratification of the Facultative Protocol.

Five years passed, the leadership of the country changed, but Ukraine never managed to meet its international obligations. On May 25, 2011 the UN Subcommittee on prevention of torture submitted its preliminary observations, based on its first visit to Ukraine (May 16–25, 2011) to the Government of Ukraine⁴. The Subcommittee delegation was supported by the UN office in Ukraine. The Subcommittee mandate allows it to visit respective institutions and to give recommendations to the authorities with the goal of implementing efficient preventive mechanisms to eliminate torture and bad treatment of prisoners and people in custody.

At the national level, the National Preventive Mechanism (NPM) is supposed to be the body in charge of torture prevention. Ukraine has undertaken the obligation to set up the NPM within one year after the Facultative Protocol to the UN Convention on preventing torture comes in force. However, this body has not been set up in Ukraine till now.

Over the last years proposals on legal basis, underlying the NPM formation in Ukraine, were prepared on the Ministry of Justice and public initiatives. The draft laws stipulating Ukraine's compliance with international requirements in the context of conditions and principles, set up by the Facultative Protocol to UN Convention on preventing torture, were elaborated. First of all, the setting up of the NPM should be defined by the law. Second, the NPM is created as an All-Ukrainian network of civil society members with certain competences, specifically, with the mandate to visit any penitentiary facilities without restrictions or special permits. Third, the NPM should become an instrument of preventing illegal violence, promoting openness and transparency of the penitentiary system, as well as collaboration with authorities for joint resolution of the problems related to human rights violations. Fourth, this network shall be independent and not accountable to any of the governmental bodies. As to the term "place of detention", it was supposed to cover the facilities, where a person is kept in custody or in a prison, or is placed into a public or private institution under arrest or custody; the person cannot leave the facility on his/her own free will, without permission from the court, administrative or other body⁵.

However, the initiatives on the NPM setting up in accordance with the law were neglected both by the Parliament and by the President. Nevertheless, on the Ministry of Justice's initiative once again, under Presidential Decree of September 27, 2011 Commission for preventing torture was set up "with the goal of facilitating Ukraine's fulfilling of obligations undertaken in line with the Facultative Protocol to UN Convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment, in accordance with p. 28, part I art. 106 of the Constitution of Ukraine". Under the Regulations for the Commission for preventing torture, it is a "standing, consultative and advisory body under the President of Ukraine..."⁶

³ <http://www2.ohchr.org/english/law/cat-one.htm>

⁴ <http://khpg.org/index.php?id=1306399882>

⁵ <http://khpg.org/index.php?id=1318519641>

⁶ <http://www.president.gov.ua/documents/14032.html>

Although the newly-formed Commission has a lot of public organizations' representatives as its members⁷, it is hardly possible to expect that the Commission can substitute the NPM and ensure the Ukraine's adherence to its obligations. "Decision on the NPM organizational structure is a prerogative of Ukrainian government, nevertheless, the NPM should be set up with due consideration of the respective provisions of the Facultative Protocol. The mandate, terms of reference and independence of the NPM operation must be strictly spelled out in the law and implemented in reality. The NPM should be provided with human and financial resources, needed for its efficient and multifacetous operation all over Ukraine" — stressed Mr. Evans, the Subcommittee Head and leader of the Subcommittee delegation.

3. RIGHT TO CORRESPONDENCE

Article 8 of the Convention reads: "Everyone has the right to respect for his private and family life, his home and his correspondence." Under the article 31 of the Constitution of Ukraine "everyone is guaranteed the confidentiality of correspondence, telephone conversations, telegraph and other communications. Exceptions can be defined by the court only in cases, stipulated by the law, with the goal of preventing criminal activities or finding out the truth in the course of criminal investigation, if other means of obtaining information are unavailable". Correspondence procedure for the persons in custody and convicts is regulated by provisions of the article 13 of the Law of Ukraine "On Prior Imprisonment", article 113 of Criminal and Executive Code of Ukraine, Order of the State Department of Ukraine for enforcement of punishments No. 13 of 25.01.2006 "On Approving the Instruction concerning the perustration of prisoners' and PTDC inmates' correspondence", pp. 4.7. and 4.8. of the Departmental order No. 192 of 20.09.2000 "On Approving Normative and Legal Acts of the State Department of Ukraine for enforcement of punishments, concerning the treatment and behavior of the persons in custody and in PTDC" and p. 43 of the Departmental order No. 275 of 25.12.2003 "On Approving the Internal Regulations for Penitentiary Facilities (with amendments).

Under the aforementioned legal acts, correspondence, sent by persons in custody or convicted of crimes, is to be perustrated by the facilities' administration, with the exception of correspondence, addressed to the Supreme Rada Ombudsman on Human Rights, European Court of Human Rights and other respective bodies of the international organizations, to which Ukraine is a member or participant, to plenipotentiary representatives of these organizations, to prosecutor and defence attorney in the case, who acts under article 44 of the Criminal Proceedings Code of Ukraine. Mail, sent by persons in custody or convicted of crimes, to the aforementioned entities, is not subject to perustration and is to be sent out to a given address within 24 hours. We believe that the list of correspondents, to whom persons in custody or convicted of crimes can send non-perustrated letters, should be broadened. It should include the court, particularly when actions or inaction of the facility's administration is appealed, or when the legality of the imposed disciplinary measures is questioned. Appeals to the national and international human rights organizations should be sent out without perustration either.

However, even within the framework of legislation in force, the quoted legal and normative acts cannot ensure the right of persons in custody or convicted of crimes to send mail without obstacles, especially, when actions or inaction of the administration in PTDC or correctional facilities, or legality of the imposed disciplinary measures is in question. The procedure for sending out correspondence is as follows: if an individual is in a PTDC or correctional facility cell, the mail is handed to an officer on duty of the said facility to be sent out. If an individual has been convicted and serves the term in either PTDC or in prison, the mail is put into the mail-box, which is to be checked on daily basis by facility administration. The date of sending and registration number (of the official let-

⁷ <http://www.president.gov.ua/documents/14191.html>

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ters) is entered into the respective mail-log. In both cases, however, whether the mails are given to an officer on duty or thrown into the mail-box, there is virtually no tracking mechanism to establish either the fact of sending a letter or the date of its sending out by administration in compliance with the deadlines, let alone the fact that the mail was not perustrated. That's why the facility administration can arbitrarily decide which letters would be perustrated, when they should be sent out, and whether they are worth sending out at all. Besides, lack of due registration of the outgoing mail, i.e. with date and registration number, under which it was accepted from the prisoner by the official staff of the facility, makes it impossible to track down the procedure of its sending out.

Therefore, the facilities under SPSU must have a mail-log for all the correspondence received from the persons in custody or convicted of crimes, to reflect the date and registration number of all the letters.

4. RIGHT TO MEDICAL ASSISTANCE

Right to medical assistance is an inalienable right of any person, regardless of the place where the person is. It is particularly important for the people in prisons, who are unable of exercising their right themselves. A prisoner is under the governmental control and cannot freely choose the place of stay, the manner of treatment in case of disease, a doctor or a medical institution to go to for examination and treatment. All these issues are defined by the state and it is the state's responsibility to ensure the availability of the necessary required and adequate medical assistance in case of prisoner's falling ill. Medical care in this case should be free of charge and the quality of medical services should be sufficient.

Individuals, held in PTDC before the court's verdict comes into force, should be granted the same access to medical services as free people. We observe, however, that prisoners in PTDC cannot get medical care even in the scope, offered to the convicts, with respect to whom the court's verdict has come in force. An abuse of the right to arrest is a persistent problem of Ukrainian courts. It was to these violations of the Convention that the European Court of Human Rights referred in its rulings on *Kharchenko vs Ukraine*, *Davydov et al. vs Ukraine* and others. The Court specifically stressed the abuse of the right to arrest by Ukrainian courts. Pre-trial detention can be used only as an extraordinary measure, — argues Thomas Hammerberg, the EC Commissioner for Human Rights. He stated his position at the meeting, organized by “Ukrainsky tyzhden” magazine together with “Ye” bookshop⁸.

“People in pre-trial detention are treated as convicts. This is wrong. We should apply to them the presumption of innocence principle. In Europe, for example, this measure is used rarely, and only in situations when an individual should be “at hand” for further investigation”, — said European Commissioner. He also stressed that Ukrainian penitentiary system should be more humane to give people chance to improve. Besides, the prisons should provide high quality medical care for its inmates. “Depriving an individual of freedom, no one has the right to deprive him/her of health”, — argues Hammerberg.

Under part 2 of the article 84 of the Criminal Code of Ukraine “ an individual, who after committing a crime or after the verdict, was taken ill with another serious disease, which prevents him/her from serving the term, can be excused from the penalty or from serving the term. In passing respective decision the court takes into account the gravity of crime, nature of ailment, convict's personality and other issues, pertaining to the case”. This provision, however, covers only the convicted persons, with respect to whom the verdict has come in force. As to the persons, detained preventively, this provision does not apply until the individual is found guilty or innocent by the court. The examination of criminal proceedings in the Ukrainian courts shows, however, that a person can be detained for many years without final court's decision. There have been cases when

⁸ <http://www.khpg.org/index.php?id=1322140395>

a person was held in custody for up to 12 years, without a chance to be excused, if need be, from penalty on health grounds. The persons, who are not convicted, but held in custody, also have no access to specialized and adequate medical care in the specialized SPSU hospitals, due to the fact that no valid verdict was passed in their cases.

If appropriate medical care cannot be given in SPSU facility and a person has to be transferred from PTDC to a civil clinic, a new problem arises. Under the State Department of Ukraine for enforcement of punishments order No. 6 of 2000 persons, accused of crime and held in custody, sent for treatment or examination to a civil hospital, should wear handcuffs 24 hours a day to prevent their potential escape. (!). Handcuffs are used as a safety measure with regard to persons in custody, who behave inadequately, provoking conflict or by their actions pose a threat for the facility personnel. Handcuffs are used for certain short periods of time, till the prisoner calms down. Handcuffs fall under the category of special measures, used as safety measures “to stop physical resistance, violent actions, outrageous behavior, overcome counteractions against legal demands of administration, if other methods failed to ensure the execution of its duties”. It means that if a prisoner broke the disciplinary rules, he will be penalized by wearing handcuffs, e.g. for two hours, only if he poses a threat for the environment; in all other cases of disciplinary infringements alternative (non-specialized) methods of influence shall be used against him. If a person is transferred for treatment to a medical facility not subordinate to SPSU, he/she is penalized by wearing handcuffs for indefinite period of time. It means that specialized safety measures are used against sick people, who did not commit any disciplinary infringement.

68-years old professor Temchenko was held in custody in Kryvy Rih PTDC for 20 months, despite the fact that his health condition could be described as critical. Several medical experts gave their official evaluation of Temchenko's health, and, based on their conclusions, the European Court in its ruling insisted on urgent measures to be taken, in compliance with regulation 39 of the European Court Regulations. It stated that Temchenko had to be immediately hospitalized in a specialized clinic for adequate professional medical care. Instead of being treated in a medical facility, Temchenko was held in PTDC only because the court hastened to satisfy the prosecutor's office insistent request for preventive measure in the form of detention in custody. Neither prosecutor's office nor the court paid any attention to the fact, that Temchenko was an elderly person, suffering from lethal diseases and posing no threat to the society, as he was accused of an attempted bribe-taking and dismissed from official position. When Temchenko's condition deteriorated dramatically, he was taken to intensive care unit of the city hospital or in-patient clinic and held chained to a bed by handcuffs for 24 hours.

Anatoliy Georgiyevich Temchenko is a doctor of technical sciences, professor, member of Mining Sciences Academy, former Rector of Kryvy Rih Technical University. For his activity he was awarded the State Prize for Science and Technology and honorary title “Honored Public Education Specialist of Ukraine”, he has a number of awards and medals. All that did not help in saving him from inhuman treatment.

Thus, we are dealing with situation when, on the one hand, the European Court, in compliance with instruction 39 of the European Court Regulations recommended, that Ukraine takes urgent measures to immediately hospitalize the patient, while, on the other, the state neglected the request. Even if Temchenko, hypothetically, would have been transferred to a specialized medical institution (in this case, the M. Strazhesko Cardiological Institute under AMS of Ukraine), it wouldn't have resolved the problem.

Therefore, a person in need of medical assistance and appropriate conditions for treatment is subject to violence, manifested in the use of special measures — handcuffs — for an indefinite time period. The European Court ruling in the case “*Okhrymenko vs Ukraine*” unambiguously qualified putting handcuffs on sick people as prohibited behavior. “The Court believes that keeping the claimant handcuffed cannot be justified by safety considerations, and taking into account his health condition, it was inhuman and humiliating treatment. Hence, the article 3 of the Convention was violated”.

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Here is another example. Kyiv resident Serhiy Karpynenko was detained in December 2009 for alleged group assault in the Botanical garden. Serhiy claimed that he had been beaten, while staying in the militia station. On 10.04.2010 Karpynenko was taken from PTDC No. 13 to the city emergency hospital, where a number of surgeries were performed on him, including the spleen removal and lungs' surgeries. The surgeon commented that according to injuries' condition, they were sustained two days prior to the patient arrival in the hospital. It is in line with Serhiy's testimony that after the court hearing he was taken to Shevchenko raion Militia Department, where he had been beaten by five people. In the last months of his life Serhiy developed lungs' tuberculosis, because he was kept in a cell with an inmate, who suffered from the open form of tuberculosis. Karpynenko died on November 7, 2011 at the age of 27. Death certificate did not show the cause of death. Both Serhiy and his attorney several times submitted a motion to court, requesting the substitution of the custody with a written undertaking not to leave the city, on health reasons. However, despite the obvious fact that in this case custody was unnecessary and, moreover, irrelevant, as Karpynenko posed no threat to the society and needed immediate medical professional help. The prosecutor's office and court remained unflinching. As a result, a human life was lost, the officials stayed outside of this and not a single one of them was charged as culpable of the pointless death of 27-year old man.

Access to medical care, including a free choice of a doctor, is one of the minimum standards, defined by the European Committee against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, of the persons detained in PTDC. The European Court position is clearly spelled out in a number of rulings, specifically, in the cases "*Kucheruk vs Ukraine*", "*Yakovenko vs Ukraine*" and others: failure to provide timely and adequate medical care is considered inhuman and degrading treatment and violates the article 3 of the Convention. The European Convention is a part of national legislation of Ukraine. However, failure to provide medical care for the detainees is systematic and frequent violation in Ukraine. It is manifested mostly in high-profile cases within the focus of public attention, e.g. the case of ex-Minister of Interior Yuriy Lutsenko.

In our previous reports we always stressed the need to make medical institutions and specialized clinics independent from SPSU and subordinate to the Ministry of Health. Currently the personnel of these medical institutions is considered military staff, with military ranks, subordinate to SPSU and guided by the higher-in command orders' and not by the Hippocratic Oath.

5. TORTURES AND CRUEL TREATMENT

In our previous report we mentioned the European Court ruling in the case "*Davydov et al. vs Ukraine*" of June 1, 2010, in which the Court found Ukraine guilty of violating article 3 of the Convention on material and procedural merits. The matter in question concerned the beating up of the inmates of Zamkovy correctional facility No. 58 in Izyaslav, Khmelnytskyi oblast' on May 30, 2001 and January 28, 2002, by the commandoes of the Departmental special unit in the course of drills and searches in the facility.

On January 14, 2007 almost all the inmates of Izyaslav facility No. 31 went on hunger strike (over 1200 people), protesting against arbitrary imposing of disciplinary measures, beatings and humiliations, committed by staff, bad food and inadequate medical care. On January 22 special unit commandoes, masked and ready for action, entered the facility. They beat severely over 40 inmates, brought to the headquarters for that purpose. Those were the prisoners who submitted prisoners' demands to the commission. More details on the case can be found in the 2007 Report. Respective appeals to the European Court were recognized as acceptable, passed communication with government in 2011 and are awaiting their consideration on the merits.

The illegality of the unit, which is used to conduct searches in the penitentiary facilities and to cruelly penalize the inmates, was stressed by us many times in the annual reports of the NGOs, the latest of which covers the years 2009–2010. The Registration of the Departmental Order, under which the special unit operated, was invalidated by the Ministry of Justice. The unit, however, still

exists in the form of regional joint units of quick response, made up of SPSU staff in a given region. The complaints on beatings, performed by these units, still arrive.

On May 6, 2011 several unidentified sources informed us, that the commandoes of such a unit, deployed at the Simferopol PTDC premises, have beaten the inmates. The scope of reprisals, numbers and names of the victims remained unknown while human rights activists have been trying to identify them, despite the difficulties and obstacles in obtaining and verifying this information. The information service of SPSU advised that the commandoes were acting within the framework of "Shield" operation. It is also possible that PTDC inmates, suffering from tuberculosis, made a video-clip, demonstrating the conditions of their imprisonment, which was later made public. The latest developments in Simferopol PTDC make one worry for the fate of the individuals who made the video. What happened to them after the horrendous conditions of sick inmates' existence were made public? What is their present condition? Have any disciplinary measures been taken against them? And whether the special units are really used for inmates' beatings?

On July 5, 2011 after the lunch the special unit commandoes organized another mass beating of the prisoners, this time in Dnipropetrovsk⁹ correctional facility No. 89. The facility personnel supported, and, probably, actively participated in the beating. We are talking about PSD major Valentyn Lehkobyk, in charge of the area, where prisoners serving life term are kept; area of heightened security, cell-like premises and disciplinary lock-up; PSD lieutenant Andriy Khomenko, in charge of internal security of the facility, head of the department Olexandr Nasevich, PSD lieutenant-coronel Ihor Martynov, an acting superintendent of the facility. Severely beaten inmates included Yuriy Kaluhing, serving life term, Olexandr Dzesiv, Hrohory Ursul, Serhiy Tymoshenko. Anatoliy Pohorelov, Mykhaylo Dudnyk, Roman Bondarenko, Olexandr Isakov, Andriy Kostetsky, Vadym Kutlayev, Olexandr Ryzhykh, Vyacheslav Mushynsky, Olexandr Heraskin, Volodymyr Stoyan, Dmytro Romanenko. The Prosecutor's Office refused to file a criminal case, despite obvious evidence of the crime and bodily injuries of 19 inmates, registered by expert medical analysis. It means that there are no instruments for efficient investigation at the national level.

Therefore, despite the European Court ruling in the case "*Davydov et al. vs Ukraine*", which condemns the facts of mass beatings and bullying of people with the help of special unit soldiers, conclusions of the international experts of the UN Committee on preventing torture, the European Committee on preventing torture and other cruel, inhuman or humiliating treatment and punishment, world community, condemnation of such actions by Ukrainian public, SPSU continues to use the special units for mass beatings and bullying of prisoners.

6. LEGISLATIVE AMENDMENTS

On September 16, 2010 the President signed the Decree approving new Provisions on Pardon Procedure. This act, as opposed to the previous version, narrowed already limited chances of using the institution of pardon. The new provisions literally from the first paragraph contain new rules of granting pardon. Paragraph 2 defines the mechanisms for pardon, e.g. substituting life term for the imprisonment for the term not less than 20 years. This norm, introduced into provisions, reflects p. 2 of the article 87 of the Criminal Code of Ukraine on the minimum term, starting from which the convict, sentenced for life, acquires the right to submit petition for pardon. However, the new Provisions contain another clause, which narrows significantly the categories of eligible subjects and the very opportunity to submit a petition for pardon. Paragraph 6 of the Decree states that the petition for pardon of convicts, who failed to improve, or have served less than half of their sentence, as well as petitions of the persons, convicted for most hideous crimes, can be satisfied only under the circumstances warranting particularly humane treatment.

⁹ <http://www.khpg.org/index.php?id=1311269383>

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Attentive analysis of this paragraph¹⁰ shows that pardon without any restrictions can be granted only the following provisions are met:

- a person was convicted for the crimes of negligence (with the exception of negligent grave offense), or for the minor or medium offense;
- the convict has to show intention of improving;
- the convict should serve at least half of the sentence, defined by the court.

These criteria, therefore, seriously restrict the chances of release under pardon, as two of the aforementioned conditions should be present at once. First, the offenses should be minor or medium, and, second, the convict should have served at least half of the sentence.

It is noteworthy that the previous version of the Pardon Provisions was more loyal to the prisoners. Respectively, paragraph 6 mentioned two categories of the convicts who could petition for pardon: those who have chosen to improve and have served a significant part of the sentence (probably, less than half, after all); and those who were sentenced for major offenses and have served half of the sentence. The first category seems less available for the prisoners, as a convict could have expected to be released on pardon only on the basis of particularly humane treatment. We believe that it is nonsense, as the aforementioned conditions testify that a prisoner has stopped being a threat to society, and, thus, it's no longer expedient to have him/her in custody. Therefore, exclusion of the said norm from the Pardon Provisions can be regarded as positive.

As to the second category, the situation is different. Under the previous provisions, the chance of release on pardon was really limited for the persons, who posed serious threat for society. A person, convicted for very grave offense, and has served less than half of the sentence, had to remain imprisoned for a much longer period, than other convicts. Under article 12 of the Criminal Code of Ukraine, the crime is considered particularly grave, if it entails imprisonment for more than ten years, or life imprisonment. That is, restriction of the possibility of release on pardon seems logical and understandable.

Unfortunately, the new Provisions cannot be characterized as either logical or understandable. As stated above, the prisoner, petitioning for pardon, must be convicted only for medium or minor offense, and also have served half of the sentence, defined by the court. Under article 12 of the Criminal Code of Ukraine, it means that a person has to be convicted for the term no longer than 5 years, and, respectively, serve at least 2.5 years. Establishing the convict's intention of improving becomes an additional factor. By the way, this criterion is not spelled out in the acting legislation and is, therefore, highly arbitrary. However, it is the cases of this nature that are called exceptional and calling for particularly humane treatment by the legislator. It is obvious, though, that a person meeting all the criteria poses much lesser, if any, social threat. Hence it is not clear why the legislator introduces such severe restrictions on the access to pardon institution for relatively dangerous convicts. Besides, having met similar criteria (crime of negligence, medium or minor offense, having served half of the sentence, intention of improvement) a prisoner gets a chance of release on parole. This measure is more operational, available and acceptable for the majority of the convicts, than petitioning for pardon. With this restriction the legislator deprived a significant number of prisoners of the chance to petition for pardon on the grounds of need for "particularly humane treatment", as they could do a year ago.

By the way, increasing the "threshold" for the convicts' pardon makes it even more improbable for the persons serving life term. These persons can submit petition for pardon after twenty five years of imprisonment, and, obviously, they do not fit into the category of those petitioners, whose petition can be considered without any additional requirements or evaluations. Some provisions of the new Decree, dealing with certain additional criteria when considering the possibility of granting pardon to a prisoner, also seem bizarre. In particular, the Provisions read that "sincere remorse, active participation in the crime discovery, behavior and attitude to work prior to imprisonment..." All these "criteria" are contrary to the doctrine of criminal and criminal/executive law, because they are to be taken into account by the court at the time of passing verdict, as such that can affect

¹⁰ <http://www.khpg.org/index.php?id=1298992497>

the scope of penalty, to be applied to the convict. Therefore the penalty defined by the court is in itself the “measure” of a person’s repentance, assistance in the crime discovery etc. The court in its verdict takes all the circumstances into account and reflects them in the penalty measure chosen. Thus, taking into account the same factors, which were already considered by the court in its ruling, at the time of considering the issue on granting pardon, seems unreasonable, as it duplicates the court’s functions.

One of the principles, underlying criminal/executive law, is the possibility of reforming and resocializing of the prisoner. The idea of penalty is to change a person for the better. A lot of norms in the criminal/executive law are based on this principle. That’s why including such “criteria” as repentance, assistance in crime resolving, behavior and moral character of a person prior to conviction into the Provisions manifest lack of trust towards Ukrainian model of criminal/executive system on the part of the state. If the system functions efficiently and lawfully a person can become more positive and socially welcome.

All these provisions, on the one hand, are of doctrinal nature, as they change the very concept of pardon. On the other hand, however, these doctrinal changes deplorably manifest that the access to pardon becomes more and more obstructed for the convict and that pardon institution is focused, first of all, at the persons, who pose insignificant threat to the society. A unique chance of getting out of the prison, i.e. legal pardon (with no restrictions to its use as its main characteristics), in our country becomes completely unavailable for the majority of prisoners.

The Law of Ukraine No. 4025-VI of 15.11.2011 “On Introducing Changes to article 155 of Criminal Proceedings Code of Ukraine on improving the procedure of taking a person in custody” stipulates that “Custody as preventive measure can be used in criminal cases which under the law entail a penalty in the form of imprisonment for a term more than 5 years, if a milder preventive measure cannot be used”. However, under the legislative amendments, taking into custody can be used also for medium or minor offenses. There are six exceptions. For example, if a person is suspected of committing two or more deliberate offenses, or the convict evades the justice or court hearing, or fails to comply with such a preventive measure as personal bail, or when the facts of the suspect’s, convict’s or defendant’s influence on the parties to the case are established¹¹.

7. RIGHT TO DEFENCE

Under article 63 of the Constitution of Ukraine the accused has a right to defence. According to p. 2 article 8 of the Criminal/Executive Code of Ukraine right to legal defence is one of the convicts’ rights. Article 110 of the Criminal/Executive Code of Ukraine reads that convicts are allowed to have a meeting with an attorney to get legal assistance. These meetings, on attorney’s request, can be confidential.

On October 28, 2011 an attorney for Ukrainian Helsinki Union on Human Rights Oleh Levitsky intended to see in private his client P., sentenced to term in prison, whose verdict has come into force. P. serves his term in the correctional facility No. 70 of maximum security level in Berdychev, Zhytomyr oblast’. Meeting had to take place within the framework of criminal process with the goal of discussing the defence strategy, and, specifically, appeals against the rulings of first instance and appellate courts. However, the facility administration denied the attorney a lawful meeting with his client. The administrator gave technical reasons of the refusal: the facility, allegedly, does not have rooms designated for attorney-client meetings. O. Levitsky was offered to use a room for short-term visits and to talk to his client through the glass on the intercom system¹².

¹¹ <http://www.khpg.org/index.php?id=1298207421>

¹² <http://www.khpg.org/index.php?id=1320944999>

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Thus the administration violated the convict's right to legal assistance. Why? The question is not easy to answer. However, all the complaints coming from the inmates of this prison and addressed to public organizations, point at one and the same person — first deputy superintendant of the facility No. 70 Salyuk. His cruelty and sadistic inclinations have become proverbial. They say that Salyuk personally meets new contingents of the prisoners, beats and abuses them. We cannot either confirm or refute these allegations, as penitentiary institutions remain closed for the general public.

On November 1, 2011 Supreme Specialized Court of Ukraine for criminal and civil claims satisfied Mr. Levitsky's motion on granting continuance in P.'s criminal case, as serious violations of the defendant's right to defense occurred in the appeal process. Court hearing was rescheduled for November 15, 2011.

On November, 11, attorney O. Levitsky made another attempt to see his client P., serving his term in Berdychev facility No. 70. However, despite all the developments, described above, attorney was denied confidential meeting with his client by the facility administration. Besides, the administrators suggested that Levitsky should pay 2 UAH for a short meeting with his client. For the sake of the client's well-being attorney had to pay this amount.

8. RECOMMENDATIONS

It is expedient to:

1. Complete the process of making SPSU subordinate to the Ministry of Justice, in compliance with PARE Resolution No. 1466 (2005).

2. Carry out comprehensive analysis of the acting criminal and criminal/executive legislations and their application with regards to their compliance with international standards.

3. Amend the Concept of Reforming criminal/executive system harmonizing it with the Concept of Reforming the criminal justice system; involve broad range of experts for discussions and amendments, introduce outside evaluation of the Concept and public discussion over it.

4. Nullify provisions of the Departmental normative and legal acts, which violate human rights.

5. On the basis of the new Concept of Reforming criminal/executive system devise a draft law on changes and amendments to the Criminal and Criminal/Executive Codes in compliance with the international standards, draft law on changes and amendments to the law "On Public Criminal/Executive Service", draft law "On Disciplinary Status of Public Criminal/Executive Service of Ukraine", draft resolutions of the Cabinet of Ministers of Ukraine "On the Order of Personnel Serving in the Public Criminal/Executive Service" and "On the Order of One-Time Monetary Compensation in case of injury or death of criminal/executive service staff and payment of material damages incurred while in active service".

6. Review the duties and legal foundations of the special units' operation within the system, avoid using them for searches and other activities inside the facilities.

7. Elaborate and implement mechanisms and procedures for efficient and quick response to the facts of human rights violations in the penitentiary system institutions, jointly with leading human rights organizations.

8. Devise constitutional proposal for establishing jurisdiction in court's consideration of the prisoners' complaints as to the actions or inactivity of the correctional facilities' administrators.

9. Develop and implement mechanisms and procedures for the visits to the correctional facilities in compliance with the Facultative Protocol to UN Convention against torture.

10. Support introduction of other public control mechanisms in monitoring the operation of correctional facilities.

11. Implement an efficient system of complaints filing; put an end to the practice of penalizing prisoners, who complain against the actions of facilities' administrations.

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12. Compile an exhaustive list of disciplinary violations leading to disciplinary penal measures.
13. Study thoroughly all the cases of potential corruption among the system staff, made public the agency's position concerning proved corruption cases.
14. Introduce research programs and projects, including the human rights organizations' projects in regard to the prisoners' rights and criminal/executive system as a whole.
15. Increase public awareness concerning the penitentiary system and institutions' operation, the status and problems of the agency; set up press-service under each oblast' Department.
16. Make medical institutions subordinate to the Ministry of Health.
17. Ensure observance of the right to defence with respect to inmates of prisons, including confidential meeting with an attorney.

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