THE PRESIDENTIAL ELECTIONS – 2004 IN UKRAINE

A HUMAN RIGHTS PERSPECTIVE

KHARKIV HUMAN RIGHTS PROTECTION GROUP

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This book is devoted to the 2004 Presidential Elections in Ukraine. The texts are original articles, reports, public statements and personal appeals, all written in direct response to the events unfolding in the months preceding the elections and during the «Orange Revolution». They provide insight and analysis into the human rights issues which came to the fore and prompted an unprecedented affirmation by millions of Ukrainians of their fundamental rights, including the right to choose their own leaders.

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INTRODUCTION

From the end of October 2004, Ukraine and its «Orange Revolution» were on the front pages of newspapers all over the world. Some of the reasons – the sheer scale of the election fraud, the peaceful, yet determined and undaunted crowds of citizens on Independence Square in Kyiv and in most Ukrainian cities who stood day and night in freezing temperatures to defend their right to freely choose their President, the stand of the Supreme Court – all these could be explained by people who, some weeks earlier, might have had difficulty locating Ukraine on a map.

One of the aims of this selection of articles, reports, public statements and personal addresses is to place the two-month sensation within a broader context, to understand how and where the processes began which were to develop into the «Orange Revolution», what the issues involved were and how the monitoring of human and civil rights violations and appeal to internationally recognized standards were vital in ensuring the victory of these principles.

A further aim, however, is, as the last article suggests, to ensure that lessons are learned and that the momentum and will for constructive, democratic change do not wither into habitual cynicism. A list of most urgent changes is suggested.

One particular aspect given considerable attention is the package vote' of 8 December which pushed through some fundamental constitutional changes on the back of electoral reform vital for the fair running of the re-run of elections on 26 December. The articles, written by lawyers in the field of constitutional law, explain the background, the concerns repeatedly expressed by human rights groups, and reservations as to the motives of those who were so eager to rush through these changes.

We present here, in chronological order, responses and analyses from human rights organizations, lawyers, activists, including former prisoners of conscience, of the events and their legal, political and social implications. We have provided the texts in the form originally published, which makes some degree of repetition inevitable – after all, most of those writing were directly involved in protecting victims of political repression and ensuring maximum publicity, here in Ukraine and abroad, of the situation, and they needed to respond swiftly.

A translation of the Supreme Court Ruling which declared the results of the second round null and void is also given. It can be seen from this text and from the reports before it that much of the information provided by the Kharkiv Human Rights Group and other human rights organizations monitoring the elections formed the basis for the Supreme Court's decision.

While graphic details illustrating the nature of the vote-rigging, unashamed manipulation and persecution by State bodies abound, it was not our intention to simply provide more personal reminiscences and / or shocking tales. We hope rather to demonstrate the fundamental human rights issues which many Ukrainians have become fully aware of for the first time and have understood are worth defending, to highlight the activities of the many Ukrainian human rights groups and groups of young activists throughout the country who were determined to assert the right of Ukrainians to their own democratic choice and to reject a corrupt and rotten regime which had proved its political, economic and moral bankruptcy, and, finally, to warn of possible dangers if we assume that victory once achieved, will stay in our grasp without further effort.

Kharkiv Human Rights Protection Group

ON THE ELECTION CAMPAIGN IN KHARKIV AND THE KHARKIV REGION

The Kharkiv Human Rights Protection Group (hereafter KHRG), in conjunction with the Institute of Mass Information and the International Centre Against Censorship «Article 19» are carrying out monitoring of the media and of the election campaign. We present here the first public statement of the Kharkiv Group.

The first stage of the Ukrainian Presidential election campaign is behind us: the nomination and registration of candidates, the formation of electoral districts and district electoral commissions. Voter lists are currently being compiled, the election campaign, and the collections of signatures in support of candidates are under way.

Taking stock of events during the first six weeks of the campaign in Kharkiv, it seems safe to predict that the elections of 2004 are likely to break all records in a whole range of indicators: the amounts spent on the election campaign, the use of State powers to exert all kinds of pressure on voters to support «the single State candidate» – Prime Minister Viktor Yanukovych, the use of «dirty electoral technology» against main opponents, the unequal access of candidates to the mass media. The scale of combined actions aimed at securing the victory of the «single State candidate» is staggering. The city and region are flooded with billboards and huge posters with slogans like: «Kharkiv and its regions for Yanukovych». The same slogans can be found in minibus-taxis, cars, shops, etc. One has the impression that whole districts are for Yanukovych, as if they had held some kind of referendum. There are endless public events with petitions being signed in support of Yanukovych. «Sportsmen for Yanukovych», «Scientists for Yanukovych», «Educationalists for Yanukovych» – one can't but recall that Comrade Stalin also held the title of «Best Friend» to al groups in the population.

Going around flats has also taken on a mass character: one has the impression that the set aim is to visit every home in Kharkiv and the registers, to ascertain whether residents plan to vote for Yanukovych and to collect as many signatures in his favor as possible.

We have observed the following activities.

1. The conducting of a «sociological survey» as to who people are planning to vote for. Such «surveys» are supposedly being taken by the district executive committee, but the women collecting the information ask people to give their surnames, name and patronymic, explaining that they will lose their jobs if they don't give the district executive committee the relevant lists.

2. Signatures in support of Yanukovych from city residents in their own homes are being collected on petition sheets[1] where the name of the person gathering the signature is not given. Sometimes these sheets carry a number for the district or institution, for example, we saw a sheet with a hand-written 'cap' «district 1B, Academy of Municipal Economics». Very often these signatures are collected by employees of municipal housing offices or by teachers.

3. Signatures are collected in business enterprises, institutions and organizations, in particular, those of the state sector. The heads of factory workshops and of departments simply demand that their employees add their signatures. Doctors do the same of patients who have made appointments to see them, etc.

Clearly, the organization of such «surveys» and collections of petitions would be impossible without the use of State executive powers, despite the fact that this is specifically prohibited in the law on Presidential Elections. This is especially clear to see during public events, such as the political rally and concert in support of Yanukovych on Wednesday 14 July at 5 p.m. on the central square of the city which gathered, according to various estimates, from 50 to 100 thousand people. The latter did not hide the fact that they had been told to attend by their immediate bosses. Similar political rallies were held in several district centres of the region.

At the same time one observes activities consistently carried out on a mass level and aimed at discrediting the main opponents of the «single State candidate», in particular, Viktor Yushchenko.

We can confirm that the following took place.

1. Distribution on a massive scale to people's letterboxes of leaflets, giving no indication of their source, but with offensive content about Yushchenko and members of his team, accusing them of corruption, pro-nazi convictions, Russophobia, antisemitism, etc, as well as of fake campaigning material with details apparently indicated, for example a letter, supposedly from Oleksandr Moroz[2] to voters suggesting that Yushchenko was selling out Ukraine to Russia.

2. Provocative invitations calling people in Kharkiv to non-existent meetings with Yushchenko – these were noted in Dergachy and Valki districts. It is typical that, according to the press service of the Kharkiv regional headquar-

[1] These lists of signatures were required in the first instance to provide the number of supporters needed to register a presidential candidate, however their role in influencing voters was doubtless also a consideration (*translator's note*)

[2] Oleksandr Moroz, from the Socialist Party, at that time, also a Presidential candidate (*translator's note*)

ters of «Our Ukraine»[1], no local newspapers nor television channel have been prepared to provide information about such provocations, citing as their reason a verbal order; our monitoring of local media has also not found any mention of such instances, except from the party press of «Our Ukraine».

3. Campaigners from «Our Ukraine» have been regularly threatened or detained while distributing campaign material. Some of them have lodged complaints about unlawful activity with the Prosecutor's office or the court.

Looking at the local mass media, one can draw the conclusion that the mass media are either totally supporting «the single State candidate», presenting all his activity in a positive light, or do not want to touch the election campaign at all. Thus, on the television channel «Simon», after a direct report about the political rally of 14 July, for about three weeks there has been no subject related to the elections at all. At the same time, any criticism whatsoever of members of Viktor Yanukovych's team is extremely risky. After publication in the newspaper «News from Chuguyev», № 32 from 7 August of an article by a local council deputy, Viktoria Tokar, about campaigning for Yanukovych by officials of the district executive committee during working hours, the editor of the newspaper, Yury Chumak, was removed from his post, and later asked to resign «at his own request».

Thus, all promises from the State powers to hold honest and open elections have, as expected, proved empty. The beginning of the election campaign already shows flagrant violations. Unfortunately, there is little opposition to these violations, the approaches to law enforcement bodies are few, rather than on a mass scale, and the lack of media coverage of these violations leaves those responsible unpunished. If this situation does not change, we can expect a further escalation of administrative pressure on voters and on the teams of opposition candidates.

10 August 2004

[1] «Our Ukraine» is the election bloc of Victor Yushchenko (*translator's note*)

VIOLATIONS OF CIVIL RIGHTS AND FUNDAMENTAL FREEDOMS DURING THE ELECTION PROCESS: A SUMMARY OF REPORTS FROM HUMAN RIGHTS ORGANIZATIONS

Volodymyr Yavorsky

During the presidential election campaign there have been many cases where voters' rights, other civil rights and fundamental freedoms have been violated. In a large number of cases in Ukraine there is no effective legal protection against such violations.

During this election campaign we have seen pressure exerted on voters on a mass scale. Such practice leads to a rising atmosphere of fear and lack of freedom in society and limits the human right to free choice.

In particular, administrative pressure is being applied in state and municipal institutions and organizations: the heads of factory workshops and departments are demanding from their subordinates that they put their signatures on candidates' sheets. Doctors ask patients who have come for an appointment to sign these sheets, teachers are forced to visit the parents of their pupils, employees of municipal housing offices visit the inhabitants of flats within their jurisdiction, etc.

Employees are coerced into going to political rallies and meetings in support of the presidential candidate Viktor Yanukovych. An example would be the political rally and concert in support of Yanukovych held on 14 July on Kharkiv's central square, where, according to different estimates, there were between 50 000 and 100 000 people. Those present did not even conceal the fact that they had been forced to come to the rally by their immediate superiors. Such political rallies have been held in several district centres of Kharkiv region.

There have been cases where people were dismissed because of their political views. A teacher, for example, from Kharkiv region, lost her job after attending a forum of educationalists, organized by «Our Ukraine».

For many people occupying managerial positions in State executive bodies or bodies of local self-government, whether or not they retain their jobs has been made dependent on the outcome of the election campaign, and this is a major factor in the widening practice of exerting administrative pressure on voters.

In a large number of cases, whether people's rights, in particular, social and economic rights, are implemented hinges upon their level of political activeness and support for the State candidate.

Numerous instances have been noted where false or offensive material has been disseminated about Presidential candidates, with the law enforcement bodies taking no measures to either find those responsible, or to put a stop to such illegal activity. Over a period spanning several election campaigns there has not been one court sentence in cases involving the dissemination of false information, by means of fake newspapers, leaflets, or by producing them without indicating their source or publisher.

The right to peaceful assembly is also being violated on a mass scale. Courts ban political rallies, demonstrations, and pickets, usually with no grounds, and in several cases the police have stopped them taking place without a court warrant which is in violation of Article 39 of the Constitution of Ukraine. For example, on 30 August in Odessa region (Kominternivsky district) a political rally was broken up by the police without any court order banning it.

There have been cases of administrative or criminal investigation by law enforcement bodies of campaigners from opposition candidates' teams, which have been carried out without any regard for the numerous violations of procedural legislation. This is a violation of people's right to freedom and security of person.

For example, the police have, on a mass scale and throughout Ukraine, been stopping buses and taking necessary documents away from drivers taking people to political rallies in support of Viktor Yushchenko.

Campaigners, particularly of opposition candidates, have been regularly threatened or detained while distributing campaigning material. Several of them have complained to the Prosecutor's office or to the court about these illegal actions.

Another instance of persecution for political activities was seen in the Chernihivsk region. On 21 July, in the Pryputsk district department of agriculture and food production, a state institution, a representative of «Our Ukraine», M. Kiryeev, found a campaign stand in support of Viktor Yanukovych, this being an infringement of Article 64 of the Law of Ukraine «On the Ukrainian Presidential elections». Conflict arose which M. Kiryeev says led to his being beaten up by representatives of the regional team of Viktor Yanukovych. Human rights groups have learned of another incidence of conflict between the teams of presidential candidates Viktor Yanukovych and Viktor Yushchenko on 27 July. In the evening of that day, the nationwide mass media circulated information that there had been an attack on the regional centre of the presidential candidate Viktor Yanukovych, and that the police had announced that they were looking for three participants in the conflict, who were all representatives of the regional

headquarters of Presidential candidate Viktor Yushchenko (V. Labazov, V. Manko and M. Kireev). The latter found out about this only from the news broadcasts of central television channels.

The next day, V. Labazov, V. Manko and M. Kireev, all assistants to State Deputies of Ukraine, who of their own will arrived at the local police station, were questioned. After the interrogation, still in the police station, V. Labazov, who is the head of the regional election headquarters, was taken into custody and charged until Article 296 of the Criminal Code of Ukraine (hooliganism). In connection with a sharp worsening in V. Lazarov's state of health as he was being detained, he was taken, under guard, to a hospital where he was diagnosed as having had a mild stroke (given a medical condition of chronic hypertonic illness and ishchemic miocardia). Yet, despite a significant deterioration in his state of health, exacerbated also by the hunger strike he declared when detained, he was taken to a temporary detention cell.

In violation of the demands of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as a number of Ukrainian legislative norms, a lawyer was only allowed to see the accused on 2 August. On 6 August a hearing took place of the Pryputsk district court of the Chernihivsk region, during which the court issued a warrant for the arrest of V. Labazov and for his detention in a pre-trial detention centre. According to information we have received from M. Kiryeev and V. Labazov's mother, during the hearing there were several excesses, which suggest a biased attitude to those detained and the infringement of the right to a fair trial.

Human rights activists are in possession of material (both printed, and recorded using technical devices), which provide evidence that V. Labazov's actions were in no way criminal, that he, together with V.P. Manko and M. Kiryeev, was only trying to establish that an infringement of Part 15 of Article 64 of the Law of Ukraine «On the Ukrainian Presidential elections» had taken place. They themselves called police officers to the place of the conflict, expecting an impartial attitude to the situation and the taking of a protocol record of the infringement. The outcome of such law-abiding actions proved to be the launching of criminal proceedings on a charge of hooliganism, a court order to hold V. Labazov in a pre-trial detention centre, and the demand that V.P. Manko and M. Kiryeev give a written undertaking not to leave the area. At the same time, neither the law enforcement officers nor the court were at all interested in the actions of an employee of the headquarters, Y. Khodyuk, who during the argument inflicted light bodily injuries on V. Labazov which are recorded in a medical report. The Chernihiv Appeal Court decreed that V. Labazov be released from custody and sign an undertaking not to leave the city, however the criminal charge against him is still under investigation.

We consider that the actions of the law enforcement bodies and the court in relation to B. Labazov are in violation of the demands of the European Con-

vention for the Protection of Human Rights and Fundamental Freedoms and of the Constitution of Ukraine. In view of this, we believe that the «Labazov case» is of a political nature and is an example of persecution for one's political activity.

There have also been cases of unlawful searches. In Kirovohrad, for example, on the pretext of checking the premises after receiving information that it had been mined, the police carried out a search and removed documents from the election campaign headquarters of one presidential candidate. In Kryviy Rig the premises of the campaign headquarters of the presidential candidate, Oleksandr Moroz were searched for 8 hours.

Such unwarranted actions are facilitated, among other factors, by the shortcomings in Ukrainian criminal procedure legislation. This may become significantly worse if the Draft of the Criminal Procedure Code is passed, since the latter substantially decreases guarantees of protection of rights and freedoms during pretrial investigation even in comparison with existing legislation, and does not comply with European standards in the field of protection of human rights and fundamental freedoms.

Given all this, the reaction of «Our Ukraine» and of other participants in the election process to cases of secret surveillance and other flagrant violations is inadequate. 92 complaints to the Central Election Commission (CEC) constitute an extremely small figure, especially given that it would be hard to expect any prompt, effective or impartial review from the CEC (as it stands on 14 August). We consider that these participants in the election process are neglecting such means as lodging complaints in the court about unlawful activity or the lack of activity of State executive bodies and bodies of local self-government, and of their officials, the grounds for which in all of Ukraine are ample. The courts should be inundated with such complaints, yet this is not happening. There are several reasons for this.

During the Presidential election campaign, many human rights activists have encountered the problem of illegal actions carried out by State executive bodies and bodies of local self-government. Human rights activists have attempted to have them recognized as illegal as they clearly violate the Law of Ukraine «On the Ukrainian Presidential elections». However, Ukrainian courts have begun to turn down these complaints, since, on the basis of this election law, one can only complain about the actions of participants in the election process, and State executive bodies are not participants.

For example, on 20 July 2004 the Leninsky district court in Luhansk suspended proceedings in a case based on a complaint from C.G. Dyakov that the activities of the Head of the Luhansk regional administration O.S. Yefremov, the Head of the Luhansk regional council V.M. Tikhonov, the press service of the Luhansk regional administration, were violating the rights and procedure of equal pre-election campaigning opportunities. The court justified its deci-

sion on the grounds that the above-named were not participants in the election process, and the law on presidential elections makes it possible to complain about the actions or the inaction only of participants in the election process.

In another decision of the court in response to complaints from human rights activists about illegal actions by State executive bodies and bodies of local self-government (their direct participation in the pre-election campaign), it was ruled that these actions were not carried out during the fulfillment by them of their official duties, which is an obvious twisting of legislative norms and of the principle of rule of law.

A similar shortcoming of court proceedings is the inability, in accordance with the Civil Procedure Code, to demand at the same time both moral compensation and material damages, caused by the actions or inaction of State executive bodies. The situation is also complicated by the fact that the time limits for considering appeals are often not kept to and appeals are quite simply often not considered before the end of the elections. In this way, the purpose of the judicial protection loses all meaning.

All of the above shows that judicial protection has remained of little effect during the election campaign. This is explained, on the one hand, by shortcomings in the law on the Presidential elections, and, on the other, by the fact that courts use any possible grounds for turning such complaints down or for dragging out their consideration. Citizens are also constantly being intimidated by State executive bodies and by law enforcement agencies, as a result of which they do not wish to actively defend their rights.

The removal of the right of civic organizations to have their observers at the elections is of concern.

Discrimination based on citizenship, used by the CEC in its practice of refusing to register Ukrainian citizens as observers for international organization, is also unwarranted.

4 September 2004

KHARKIV. THE LAW OF UKRAINE «ON THE UKRAINIAN PRESIDENTIAL ELECTIONS» IN THE CONTEXT OF THE ACTIVITY OF THE MASS MEDIA AND THE DISSEMINATION OF CAMPAIGNING MATERIAL

THE KHRG ELECTION CAMPAIGN MONITORING GROUP

An assessment of how the Law «On the Ukrainian Presidential elections» is being implemented in practice forces us to note the large number of violations to the norms of this law, with effectively total absence of any punishment for the violations.

Under such circumstances threats of punishment from outside the legal framework to those who do, nonetheless, attempt to implement the law, can logically be anticipated.

As regards the Mass Media, they are also subject to such pressure, primarily from State executive bodies, while in Kharkiv and Kharkiv region, also from the bodies of local self-government, which is a violation of Paragraph 2 of Part 4, Article 3 (*Equality of rights and opportunities for participation in the election process are assured): 2) the prohibition on interference by State executive bodies and bodies of local self-government in the election process, except in situations allowed for by this Law)* and Paragraph 1, Part 2 of Article 11 of the Law (*the election process is carried out on the basis of i) legality and the prohibition on interference by anyone in this process.*

Although Part 1 of Article 60 stipulates that pre-election campaigning using means of mass media of all types of property is carried out observing the principle of equal conditions and according to procedure, set out by this Law, it is even now, before the end of the pre-election campaign, possible to state that the principle of equal opportunities at these elections is being violated, as are a number of norms of the Law. Together with this, the use of printed publications of bodies of State power and of local self-government for pre-election campaigning in favor of one of the candidates also contravene Paragraph 2 Part 4 of Article 3 and Paragraphs 6 & 7 of Part 2 of Article 11 of the Law (*The election process is carried out on the basis of … 6) the freedom of pre-election campaigning, equal opportunities for access of presidential candidates to the mass media; 7) the impartiality of executive bodies, bodies of local*

self-government, business enterprises, institutions and organizations, their directors, other officials and functionaries, with regard to candidates to the post of President of Ukraine.)

In publications issued by bodies of local self-government in Kharkiv and Kharkiv region, addresses made by the Prime Minister to citizens have frequently been published which do not fall under Part 3 of Article 58 since they are not official announcements about the activities of presidential candidates connected with their fulfilment of official duties, foreseen by the Constitution of the Ukraine or Ukrainian legislation, and since they carry photographs.

In addition, such practice directly violates Part 4 of Article 64 which states that State and municipal forms of mass media, their management and staff, and employees in creative posts during the election campaign are not allowed to campaign for or against presidential candidates, assess their election manifestos or give them preference in any form in their material and programs, not otherwise stipulated in agreements made in accordance with the demands of Part 9 of Article 61and Part 6 of Article 63 of this Law. In the case of any violation by them of this requirement, the activity of these forms of mass media, may on the request of the Central Election Commission (hereafter CEC) or the appropriate Territorial Electoral Commission, be temporarily suspended by decision of court.

Despite the fact that the municipal mass media in Kharkiv and Kharkiv region have, in their material, repeatedly shown preference for Viktor Yanukovych, the CEC has not deemed it necessarily to suspend their activities.

Furthermore, as a form of indirect campaigning from bodies of State power, one can also view the announcement to pensioners from the State Pension Fund about an increase to their pensions, which in particular states: «The Government of V. Yanukovych (*our underlining*) has taken the decision to set pension payments at the level of the minimum living wage.

One should note that while Article 6 of the Law, allows for the holding of free elections and for ensuring conditions for people to freely make their own choice, and prohibits deception as a means of exerting influence on voters' position (Part 2 of Article 6) and while Part 4 of Article 13 positively obliges the mass media to cover the course of the election process objectively, during these present elections all of the above have largely remained noble wishes, and those who violate such norms (whether a presidential candidate or the mass media), effectively face no consequences at all.

Part 2 of Article 6 also prohibits the use of violence, threats, bribery, or other actions which may hinder the free forming and free expression of the will of the voter.

Yet there have been cases of threats directed against private businessmen who had placed campaigning material in support of Viktor Yushchenko in their shops.

One of the most telling examples of the actions of State executive bodies, directed at hindering the free development of voters' opinion, was an event which occurred on 11 September 2004 on the road leading into Kharkiv from the direction of Kyiv. At approximately 20.30 at a control point of the State Automobile Inspection (SAI) «Pesochin», officers of SAI stopped a vehicle transporting the print run of the weekly «Without censorship». The real reason for the measure was a photograph in the newspapers where a poster of Viktor Yanukovych was photographed through the bars of a fence. After lengthy discussion and appeals, the vehicle and print run were returned only in the morning of the following day.

Threats of dismissal from work have been used to force state sector workers (doctors and teachers) to distribute campaigning material for Viktor Yanukovych, as well as to carry out so-called surveys and discussions, the purpose of which are to persuade those targeted to vote for Yanukovych, and also to give them 'voters' orders'. There have been cases when campaigning material for Viktor Yanukovych has been circulated by employees of post office departments.

One of the aspects of the use of the mass media during the elections is linked with the authority of the Central Election Commission (CEC) to carry out educational work dedicated to the Presidential elections (Paragraph 7 of Part 2 of Article 25), however this work is practically not carried out. In connection with this, it is perhaps worth mentioning that the CEC has no interest in ensuring that citizens are informed about the principles and procedure for holding elections, their role in the life of society and of the State, the procedure for voting, the rights and obligations of voters, and also, the prime importance of which has been seen in the course of this electoral campaign, mechanisms of control over adherence to legislation for presidential elections in Ukraine. In turn, the lack of awareness or weak understanding by citizens of the specific features of legislation on presidential elections creates the conditions for possible election fraud.

Part 1 of Article 58 stipulates that election campaigning may be carried out in any form and using any means which do not contravene the Constitution of Ukraine or Ukrainian legislation. However, we have information suggesting that police officers in Kharkiv have, on many occasions, detained people distributing forms of mass media and campaigning material in support of the presidential candidate Viktor Yushchenko, on the pretext of checking the source information of the given material, then after some time released them.

Although Part 8 of Article 59 of the Law sets out that local authorities, and bodies of local self government should, not later than one hundred and twenty days before the elections, provide space and prepare stands and notice boards in public places for election campaigning material, in Kharkiv there are virtually no stands and notice boards specially installed for the elections, on

which, in accordance with the principle of equal opportunities, presidential candidates could put their campaigning materials.

As regards pre-election televised debates (Article 62 of the Law) between candidates to the post of President of Ukraine, it is obvious that the excessively large number of candidates (including 'technical' candidates who have no chance of even getting their registration fee back[1]) would make such debates on the conditions stipulated by the Law (in particular, the limitation of the number of participants) of no interest to either television organizations or television and radio audiences.

There is extremely wide-scale preparation and distribution of printed election campaigning material, which does not contain information about the institution having printed it, its print run or information about the people responsible for the issue (in contravention of Part 7 of Article 59 of the Law: printed pre-election campaigning material must contain information about the institution having printed it, or an indication, that the printing was carried out using the property of the corresponding Presidential candidate or of his or her party, its print run, and information about the people responsible for the issue, while Part 16 of Article 64 prohibits the dissemination of material in which the above information is not given). This regulation remains largely on paper and achieves only a situation whereby those people responsible for the issue, at best, try to conceal the very fact of it having been printed. In Kharkiv and Kharkiv region cases where such printed material has been disseminated are quite common. Some of these contain calls supposedly from their opponent inciting people to inter-ethnic hostility and war propaganda which violates Part 3 of Article 64 of the Law. However, even in those cases, when the people who prepared and distributed such material have become known to State executive bodies, no action has been taken against them. Thus, for example, on 18 August 2004, in Kharkiv, campaigners from the regional headquarters of Viktor Yushchenko discovered leaflets pasted around with a nationalist-fascist content, discrediting Yushchenko, and detained, together with the police officers on duty nearby, those responsible. There was no information about the print run, the publisher or the person in charge. As became clear later, these people had been hired by a campaigner from Viktor Yanukovych's headquarters (official identification document No. 505.)

It must, therefore, be acknowledged that the level of implementation of the Law of Ukraine «On the Ukrainian Presidential elections», in particular with regard to the activity of the mass media, the preparation and dissemination of campaigning material, is extremely low. In our opinion this is connected with several factors:

[1] All candidates had to pay a registration fee (of around half a million hryvnias) which was refunded if the specific candidate gained 7 % of votes or more. (*translator's note*)

1) the use by the candidate from the State powers of State administrative resources (executive bodies and bodies of local self-government), the involvement of employees of the state sector in the dissemination of his campaigning material;

2) the dependence of the mass media on their owners;

3) the existence of a large number of declarative regulations and the lack of adequate mechanisms for ensuring liability for infringements of the Law's regulations;

4) open disregard by executive bodies (and their officials) of the requirements of the law, and selective application of the law only to opposition candidates.

25 September 2004

SO ARE THE POWERS REALLY NOT ABLE, AND THE MASSES TRULY NOT WILLING?

Myroslav Marynovych

October has arrived – the month we use in talking about a revolution. Even when the final act is played out in November. They're saying that movements of troops have been noticed in Ukraine – only this time, of course, the post office and telegraph won't be taken, but protected. The vows by those who hold the reigns of power that in Ukraine they won't permit a Georgian variant of events, are an indirect acknowledgment that we are standing on the brink of revolution. In any case, those in power can clearly feel the earth burning beneath their feet. Those who in their lives had to study the theory of revolution according to Lenin know that a revolutionary situation arises when «the powers cannot live by the old rules, and the masses don't want to». Is it possible to find verification of this theory in the example of today's Ukraine?

It seems that the signs that the regime is experiencing its death throes are by now obvious to everybody, and the daily escalation of hysteria from the state powers and criminal violence intensify the sense not so much of fear, but that the end is in sight. Of course, the powers 'cannot', because in the state-social sectors the inertia of obedience and discipline is always present. However, I am convinced that the majority of people in these sectors are simply waiting for a good moment to sprint from a sinking ship. For the regime, the only solution would be to use savage punitive measures to try to prevent a chain reaction of insubordination. However in this very point we see the Achilles heel of evil. For a heightening of repressive measures, while having a temporary effect, only strengthens the impression that the end is near.

The political processes in Ukraine have ceased to be purely political and have taken on a typical criminal character. And although in its day the Soviet State did everything to send through their camps virtually all the population of that giant state, they could still not succeed in inculcating their criminal logic. The desperate self-defence of the regime is driving them into a dead end: in October – November people will not so much choose the best of a wide choice of candidates, as defend themselves against the criminalization of the whole country. The regime has forgotten Mephistopheles' bitter discovery that he is the

force which, while always seeking evil, unexpectedly does good. The election campaign which began with lively discussions about the qualities of particular candidates, through the will of the regime has turned into a battle between good and evil, a competition between the logic of politics and the logic of a criminal penal zone. As an old supporter of Viktor Yushchenko, I would just like to acknowledge the good service of the pro-regime political technologists in employing such tactics to attempt to discredit their main opponent.

The regime, it would seem, is burning all its bridges. Several months ago the discussions in the press about a possible agreement between Yushchenko and Kuchma to give the latter immunity seemed entirely realistic: it was well-known that Yushchenko was determined to avoid an escalation of political tension. Today, after the poisoning of Viktor Andriyevych, such options have lost any sense. The regime itself has, with its own hands, molded out of Yushchenko a warrior, and has thus itself discredited its own propagandistic clichés as to his indecisiveness and political limpness. Even former skeptics from the opposition camp are forced now to ask themselves whether it is legitimate to use a term like 'weakling' about a man who has endured such an incredible terror campaign to discredit him and now a threat on his life as well. Let mothers and wives ask themselves whether they would agree to let their loved ones continue an election campaign under such brutal conditions, as have Yushchenko's mother and his often insulted, but never degraded wife – Katerina. One can only bow in deepest respect before the heroism of this family.

Obviously, not all the regime's moves have been failures. Certainly, enlisting a «Halychyna[1]» force in the campaign on Yanukovych's side has been an undoubted success for the pro-regime political technologists. And if the change of orientation of Vasyl Baziv or Hanna Stetsiv provoked more jibes from people in Halychyna than real despair, then the transformation of Taras Chornovyl[2] hit much harder. His impassioned speech (on Channel 5) against the background of the recent egg spectacle[3] was particularly depressing. One feels sorry for the chap. Dreaming of making a name for himself as an independently thinking state figure, worthy of the highest posts, all he proved was that he still remains a political infant, who just can't find a worthy way out from his father's shadow, even though he had begun to shine with his own light. And Ukraine just can't seem to escape the fatal inevitability of all these father and son crises of identity. (As for any attempts to use my name for Viktor Yanukovych's bene-

[1] Halychyna is Western Ukraine, considered staunchly pro-Yushchenko. The people mentioned became open advocates for Yanukovych. (*translator's note*)

[2] Taras Chornovyl, son of a famous and respected dissident, unexpectedly changed political affiliations and eventually became a key spokesperson for Yanukovych. (*translator's note*)

[3] «On 24 September, in western Ukraine, Viktor Yanukovych was struck in the chest by an egg. Despite having no apparent injury, he was hospitalized for some hours» (from the OSCE/ODIHR Election Observation Mission Final Report) (*translator's note*)

fit, I trust this article will be convincing response). In the above-mentioned parade of Halychan servility there is, however, one positive side: it provides a good cure for the chronic «piedmontism» of people from Halychyna.[1]

In speaking of a premonition that the end is imminent, I do not wish in any way to minimize the threat which faces Ukraine. In 1991, it was largely the well-known administrative team «Vote for independence and for Kravchuk» whom we had to thank for Ukraine's independence. Yeltsin's Russia then seemed too revolutionary to serve as a refuge for the Ukrainian elite. However independence, achieved with the blessing of the State powers, can perish too by its hand. I have long dreamed of a time when the President of Ukraine, going to a meeting with the President of Russia, will put on a tie. All of these 'meetings without ties' could, if we don't watch out, mean that Ukraine will end up «without its last shirt». The sale of Ukrainian interests has long slipped out of the control of either parliament or of society, and therefore the regime can try to continue its existence only by relying on a 'stable' Russia, which so efficiently defeated its own hostile opposition. However all this inevitably brings the Ukrainian regime to the development of precisely the revolutionary situation, which it is trying to frighten its people with today – the threat of a state of emergency, civil war, etc (as far as I know, this was in fact one of the variants for the development of the election battle in Ukraine drawn up by Russian political technologists.) In any case, I am not prepared to believe that the ruling elite, however events develop, is even considering the possibility of handing over power and standing before inevitable judgment. Therefore, wanting to live according to the old rules, the regime is, with its own hands, making the old ways impossible.

Let us analyze the second part of Lenin's formula for revolution, namely: do the masses really not want to live by the old rules? It looks as through it's possible to talk about us all with, at once, sympathy and reproach. Today the people have gone quiet, hoping for the salvation of a secret ballot booth and transparency of ballot boxes[2]. Therefore, while this hope remains, there will be no revolutionary situation. Well then, God grant that the West will be able to force our regime to not manipulate the voting too much. However, I fear that fate is preparing bitter disillusionment here also. Yanukovych spelled out his attitude to people with blunt clarity at a rally in Rivne: «Continue crawling» People whose silence is interpreted as crawling will not be given the opportunity for normal expression of their will. Therefore it is possible to predict

[1] Without going into historical detail, this is referring to the attitude held by some in Halychyna that specifically they should be the spiritual and political leaders of the new Ukraine. (*translator's note*)

[2] This may seem illogical, but there were reasons why it seemed to many safer to have transparent ballot boxes: one can see, for example, that ballots have not been put in earlier, in bulk, etc (*translator's note*)

with a great degree of likelihood that the regime will in this case also create a pre-revolutionary situation.

However, I fear, nonetheless, that there are a lot of people in Ukraine who, while no longer wanting to live by the old rules, are not ready to live in a new order. The fact that the regime is again playing the Ukrainian East off against the «Bandera-supporting»[1] West shows that this trick still brings results. They say that even in Norilsk Ukrainians (mainly from Halychyna!) are frightened that Yushchenko will win, because they think that this will lead to borders being closed with Russia. My fellow Ukrainians just can't fathom what one Russian understood very well recently: today the Ukrainian opposition is fighting for the future not only of Ukraine – the fate of Russia is also on the line. For it is only Ukraine (we will not consider the Baltic States here) that has developed enough native backbone to not give in to the cemetery-like «stability» of the Putin model. It is specifically Yushchenko who provides a real chance for relations with Russia to some day take on a civilized form. In other words, Great Ukraine needs to go through a certain psychological shake-up so that stereotypes so dear to the heart prove their total impotence.

Our people have also not fully understood the obvious fact that they too bear not a small degree of guilt for the present moral degradation of the regime. The regime takes from us precisely as much freedom as we will hand over. The regime becomes corrupt precisely to the degree that we ourselves feed corruption. The regime plays on our small-minded stereotypes only as long as we cherish them in our hearts. These are axioms of conscious civic life that the Ukrainian nation just cannot cope with. We will not change our government until we change ourselves. It would be good if we understood that precisely now, when we are trying with some effort to change a government that in part we let get so out of control.

Following the death throes of the regime, the majority of people are concerned to not get under their feet, and not to plunge with them into the abyss. The people do not indeed want to live by the old rules – a first round would really be quite sufficient for making the will of the people clear on this score (obviously on condition that the elections were fair) However it is equally obvious that the people do not want to sacrifice themselves as before. There will be no revolutionary situation, therefore, so long as people retain the illusion that they can hide from a criminal world behind their own four walls. The majority of us today are only capable of watching on as the priests of power ever more forcefully push Yushchenko on to the altar of the State Moloch. In the same

[1] Stepan Bandera, one of the leaders of the «Organization of Ukrainian Nationalist» which fought against Soviet rule (during WWWII .against Nazism also) Most of his supporters were from Western Europe. In Soviet times, he and the UPA were consistently presented as fascists and traitors. (*translator's note*)

way we sat and did nothing when from that sacrificial stone flowed the blood of journalists and other «dangerous elements». However, paraphrasing the well-known saying: «A Ukrainian will tolerate any unjust treatment up to a point». The regime cannot stop – as we have already said, it must resort to terror because otherwise a chain reaction of insubordination will be triggered off. However this reaction will begin regardless, because just as inevitably, people's fear will reach the point of «critical mass», and the people's sense of injustice will overflow. Therefore we again have the same fatal truth: the regime is with its own hands creating a revolutionary situation.

During my student days the lecturers of historical materialism assured us: «Every social order prepares its own gravediggers».

3 October 2004

COMMENTARY OF THE KHARKIV HUMAN RIGHTS PROTECTION GROUP ON THE ELECTION CAMPAIGN

As has already been noted in the Ukrainian media, the presidential election campaign of 2004 has been marked not only by savage, even extremely savage confrontation between candidates from different political groupings, but by the appallingly low moral standards of behavior of current executive authorities.

It is not only, however, a question of the notorious State administrative resources, the unashamed coercion, pressure, or intimidation of the population, which can hardly be considered mere election campaigning «for» and «against». Pressure and intimidation are nothing new for the Ukrainian voter. In Soviet times, coercion was standard. Dissidents were force-fed in Soviet psychiatric hospitals, the Ukrainian population is now being force-fed pre-election billboards with Viktor Yanukovych. It is not difficult to foresee that the reaction to the information force-feeding will be the same as the tube forced into the stomachs of Andrei Sakharov or Petro Grigorenko. «You can't force love», – the Russian proverb says, so the state authorities might even be pitied.

Of greater importance in the current election campaign is the obvious ethical confrontation between the state authorities and civic society, moreover, the confrontation is not so much on the level of political opposition, as of that of moral revolution. Once again, in the mood of the country one can feel the breath of the «Prague Spring», drawn out during the Velvet Revolution. The masses don't want to live by the old rules; those in power want to, but don't seem to know how.

In this connection, V. Lefevre's socio-psychological theory about «the logic of conscience» comes to mind. According to the well-known western academic, the Soviet establishment clung to the slogan: the end justifies the means; all that serves to bring about the victory of communism is moral. In those times, Stalin's well-known joke «How many divisions does the Pope have?» could actually seem witty.

Yet soon, despite hundreds of divisions and the iron discipline of communist ranks, the wit himself was, all the same, flung out of the communist mausoleum. The emotions of life overcame the rationality of order. The divisions were scattered on the fields of history, as Engels' ashes over the sea, while the Pope's realm continues to thrive. And the contemporary movement «Greenpeace» is

influential because its sole weapon is its ethical force. In the present circumstances in Ukraine, ethical force is also used by Viktor Yushchenko.

Thus, the confrontation between Yushchenko and Yanukovych is not as much a battle between those in power and the opposition, as a confrontation between the politics of a state bureaucratic machine and common sense; between hypocrisy and openness; between the «paradoxicalism» of Dzhangirov-Korchinsky-Pikhovshek[1] and intellectual honesty; between bureaucratic ethos and people's freedom.

At one time the political scientists V. Pareto and G. Moska, on the basis of a wide range of historical material, showed that all political elites without exception are doomed to degradation. The most striking aspect of their descriptions is the logical pattern for the dying out of political classes. Morally bankrupt elites resort to any means of self-protection: they call in the military, hire spies, bribe or blackmail people. However the internal decay cannot be averted, and with time, speaking metaphorically, the entire fresco in the palaces of the elite turns into the portrait of Dorian Grey…

Something similar is happening today with the Ukrainian post-communist regime. Despite all official, ideological and rhetorical layers on the background of our independence, the image of the present executive powers is ever more reminiscent of a fake icon, «old writing» with fresh paint on a murky palate. An overview of motives and actual patterns of behavior of the regime are more reminiscent of Yaruzelsky and Ceausescu, than of Lech Walęsa and Vaclav Havel. The parallels if we speak of victims are also undeniable: our Georgiy Gongadze, their Yan Palach and Jerzy Popełuszko…

Thus it is no surprise that the political elite seem to be losing their healthy vigor. A number of tactical information failures are now being added to the strategic flops seen in «Referendum – 2000» and «Constitutional reform – 2004». Whether this really augurs the failure of the regime's candidate as well, we will not make any forecasts here. Whether contemporary Ukraine becomes more and more like Mordor in Tolkien's work, or «Animal Farm» as in George Orwell's vision, also remains an open question.

In this sense, however, one recalls the entirely unambiguous and quite recent statement by Viktor Medvedchuk in an interview: «Yushchenko will not be President». Considering the later development of events that we are all familiar with[2], it would be interesting to know what that statement really reflected: a passionate hope, subtle intuition or a specific plan?

10 October 2004

[1] Dzhangirov-Korchinsky-Pikhovshek – in fact, three different people, all television presenters, who on an apparently educated level followed the 'party line'. The first two produced a program called 'About that', which many called 'Five Minutes of Hatred', recalling in this George Orwell's '1984' (*translator's note*)

[2] The author is probably referring to the systematic attempts to discredit Yushchenko and to ensure he did not become President. (*translator's note*)

APPEAL OF THE UKRAINIAN HELSINKI UNION OF HUMAN RIGHTS

To: The UN Working Group on Enforced or Involuntary Disappearances
The UN Committee against Torture
The European Committee for the Prevention of Torture (CPT)
International Human Rights Organizations

The Presidential election campaign under way in Ukraine has been marked by grave violations of fundamental human rights and freedoms. Recent events demonstrate that the Ukrainian authorities have resumed persecution of independently minded people, using law enforcement agencies as a tool of political struggle.

Law enforcement agencies are employing considerable resources to intimidate citizens supporting the opposition and to fabricate criminal proceedings against activists of opposition movements.

On 16, 17, and 18 October 2004, police officers carried out unauthorized searches on the premises used by youth civic information campaign «Pora!» («It's time!»), «Studentska Khvylya» («Student Wave»), «Studentske Bratstvo Lvivshiny» («Fraternity of the Lviv Region»), and the National University «Kyiv-Mohilevska Academy.» Earlier, searches had been carried out in several regional headquarters of opposition Presidential Candidates. The searches were conducted under far-fetched pretexts, such as search for explosive devices or examination of anonymous information claiming that those organizations were involved in terrorist activities. Several activists of those organizations were detained throughout Ukraine. Most of those detained were released in a few hours. According to them, during the interrogations, they were questioned about the contents of distributed publications, critical to the current authorities.

During the search of a Kyiv office of the All-Ukrainian youth civic information campaign «Pora!» police officers allegedly found an explosive device. This was used as grounds for taking Yaroslav Godunok, the tenant of the premises and a member of the opposition «Ukrainian People's Party», into custody. It is extremely doubtful that the explosive device ever existed or belonged to the organization, because it had not been found during an earlier close search with the use of a police dog and in the presence of State Depu-

ties. The device was found only when the police officers remained alone in the room, where the previous search had failed to discover anything. This indicates a very high likelihood that the explosive was deliberately planted by law-enforcement agencies. There were also 3 tons of literature in support of the opposition in the room which was sealed off after the search. Although only that rather questionable evidence had been found, the All-Ukrainian organization was publicly proclaimed a paramilitary formation and accused of terrorism. On these grounds, a large number of its representatives have faced persecution.

A press conference was held the next day at the Office of the General Prosecutor, where conclusions as to the possible complicity of the political opposition in the terrorist acts were made public. In this way, the Office of the General Prosecutor is not only breaching the presumption of innocence of those who are being charged. The reckless disclosure of the «confidentiality of investigation,» disclosure of which is a criminal act, demonstrates that the activities carried out by the law enforcement agencies in this instance are aimed not at maintaining law and order, but at providing compromising information for the benefit of certain political forces.

Most Ukrainian TV channels are producing their news programs in accordance with press releases issued by the state authorities (so called «temnyky»[1]). The published «temnyky» demonstrate that the State authorities are trying to create in society the impression that the activities carried out by youth opposition organizations «Pora!» and «Chista Ukrayina» («Clean Ukraine») are of a terrorist nature.

We are receiving information from all regions of Ukraine that the Security Service of Ukraine are summoning activists from those organizations for questioning. These are predominantly young people who have never before been implicated in any illegal activities.

It is becoming a routine practice of the law enforcement agencies to detain scores of public activists during visits by Viktor Yanukovych, Presidential Candidate and Prime Minister, to various regions of Ukraine. According to our information, over the last two days, October 18 and 19, during his visits to Chernihiv and Poltava, 17 people, who have taken part in distributing printed materials critical of the Prime Minister, were detained.

In most cases, during the detention, no detention protocols are compiled. The detained activists are advised to stay away from politics. In some cases, threats have been made that grounds will be found for bringing criminal charges against them. For instance, in Chernihiv, Oleksandr Kovalenko, a member of «Pora!» was detained and accused of dealing in counterfeit money. Others

[1] «temnyk» from the word for «theme» or «topic» (and from the word for «dark») – these were the instructions given journalists as to how to cover those subjects which were 'permitted', and which subjects were to be ignored entirely. (*translator's note*)

were threatened that they would be charged with stealing mobile phones or with rape.

On 19 October a new wave of detentions of activists of the information campaign «Pora» took place in Chernihiv. During a search of the premises of one of the activists, an explosive device, as well as counterfeit money, was found. In this, according to a lawyer, there were repeated and flagrant infringements of the requirements of the Criminal Procedure Code for carrying out such investigative activities. Moreover in all cases nothing else was found to prove that the explosives belonged to those detained.

We believe that such synchronized, systematic and mass actions by Ukrainian law enforcement bodies would be impossible were they not sanctioned by those in control at the Ministry of Internal Affairs, the General Prosecutor's Office and the Security Service of Ukraine.

We consider that the practice of mass and synchronized short-term detention of representatives of the opposition, lasting up to 72 hours. (until the deadline for bringing a formal charge), has nothing in common with the holding of free elections, is incompatible with the principles of democracy and must be stopped forthwith.

The above facts, in our opinion, unequivocally demonstrate that the activities carried out by the Ukrainian law enforcement agencies clearly constitute political persecution of civic activists, have no basis in law and are in conflict with the premises of the International Covenant on Civil and Political Rights (CCPR) and European Convention on Human Rights and Fundamental Freedoms (ECHR).

We appeal to international organizations to officially warn the government of Ukraine that it is inadmissible to violate human rights in order to achieve political aims.

We appeal to international and foreign non-governmental organizations to support the joint actions carried out by Ukrainian human rights organizations to defend the rights of those who have become victims of arbitrary detentions, arrests, and other forms of political persecution carried out by Ukrainian law enforcement agencies.

21 October 2004

AN OPEN LETTER TO PARENTS, GRANDPARENTS AND THEIR GRANDCHILDREN ON THE PERSECUTION OF YOUNG SUPPORTERS OF THE OPPOSITION IN UKRAINE

«Now you'll dig your own grave!» – this was what they yelled while beating an activist of the young opposition movement, Pavlov, whom they had taken away in their car by force. Pavlov had only been taking a photograph of the notorious events on Podol' with the so-called «discovery» of explosives which the police had themselves planted. The office was rented by the youth organisation «Pora» It is specifically against young people that law enforcements agencies and youth structures artificially created to act as provocateurs direct their efforts (sometimes with real students, but more often with professionals who are, or pretend to be, a specific kind of mob with fascist leanings, ready to crush and destroy everything that a fairly high-standing official may point their way). The polite formulation would be the use of administrative resources, however, for any normal psyche, not suffering from a distortion of concepts, it is the banal old criminal element in the hands of immoral people.

Up till now it has all been limited in the main to beating up, with or without the involvement of these provocation groups. Searches and relentless, arbitrary and gruelingly long interrogations are carried out on a mass scale throughout Ukraine. With cynical, shamelessly unlawful maximum intimidation of young people supporting the opposition and their parents, threatening to launch criminal proceedings against them on charges of terrorism if they don't step into line.

The circle of hatred is closing in on itself. Those who in their hatred of people began terror attacks against the Tsar, have today arrived at terror effectively against their own children. Lord, how little those in power here have changed: the same intimidation, the same immoral and basically illegal groups of provocateurs! And all so as not to allow a civic organization to really form itself. They say that these violations of the law are controlled by the powers at a high level. Perhaps in truth controlled today and administered in doses, but remaining immoral and illegal nonetheless. In this way the regime makes itself illegal, illegitimate. The crimes of the regime against the individual and

against the law turn inevitably into crimes against human values and against humanity. This is something we all need to remember clearly.

Are not the present words about digging graves similar to those shouted by bestial Gestapo officers to the innocent victims of their national-religious-racial hatred at Babi Yar? The same words were used by NKVD officers in Bykivnya and not only there, constantly using a gun as their 'convincing argument; at the slightest flicker of criticism of the class-religious-national hatred they were trying to inculcate. At least one of us heard such words in a Novosibirsk prison at the end of 1978 from a local KGB man, on hearing of a complaint to the Prosecutor about people being held for a long time not in a cell, but in a so-called «glass». «Ha, you want observance of the law! I'll take you out now and shoot you. I've killed thousands like you, and no problems» – bellowed at that time an open Ukrainophobe. «Hit the «khakhly»[1] – bellowed his followers in the law enforcement agencies of supposedly independent Ukraine, dispersing with batons a peaceful religious process of Ukrainians on Sofiyskiy Square[2]. And no problems! The hatred of the authorities of a supposedly new State for its own citizens has in no way decreased, if anything it has even intensified. Since a new generation has had time to rise up, a generation that doesn't want to live any longer in an atmosphere of lies and hatred, in an atmosphere of cynical lawlessness, where society has foisted upon it the principles of a cattle farm. It seeks to affirm: «We are people, not dogs!»

We will not go into the particular shades of hatred of the authorities towards Georgiy Gongadze – anti-Ukrainian, anti-Georgian, anti-American, and, simply, anti-journalist, if journalism becomes the embodiment of honesty and courage. And what words did he hear from his executioners, before they cut off his head, carrying out a death sentence or simply anticipating the as yet unarticulated wishes of those who had ordered the terrible crime. A death sentence passed in absolute lawlessness, in criminal fear of exposure and secrecy. A death sentence passed by people who, from the heights of their position, look down on others with disdain, calling them 'scum'. By those who have transformed the entire law enforcement system of the State into a system to defend and keep them in power contrary to the will of that same «scum», so despised by the authorities.

The situation with all hated people is ultimately simple – outer hatred directed at others is a mirror reflection of their own inner inadequacy. If

[1] An offensive word used about Ukrainians. (*translator's note*)

[2] In July 1995, the funeral of Patriarch Vladimir turned into an unpleasant squabble between different branches of the Orthodox Church as to where he was to be buried. (*translator's note*)

this person is not in power, then it's not such a problem, but he is, then he invariably becomes a frightening social monster, extremely dangerous for neighbouring countries, and for all humanity. Hatred on any human level, every kind of hatred, directed at people on whatever grounds, has always been and will be a terrible obstacle on the road to civilized development of humanity.

Then, what do such hate-ridden creatures care about humanity? All leaders and criminal bosses are always solely preoccupied with themselves, indifferent to the real problems of the States they govern, to the problems of the actual people in them, and couldn't care less about the civilized development of humanity. It is precisely our thoughtless lack of concern that makes it possible for them, having tricked the most credulous, to soon drive the others into their cattle pen of hatred.

Today, for example, they cannot hope to con us with some supposed incompatibility of freedom and democracy with the Orthodox Church. The number of credulous fools will decrease, if it is even decreasing in the Muslim world despite the supposedly unprecedented clash of civilizations. Nor can this universal move towards democracy be stopped by any morality-denying, anti-civilization mobilization of fundamentalists. Neither old, nor new, neither here, nor there. The driving-force for all social innovation has always been and will always remain youth, especially students.

Obviously today we can still not be certain that the parents of those young people in opposition now will support the initiative of their offspring as unanimously as did the parents of the young of Prague, bringing about in that fashion a second, this time 'Velvet', Prague Spring in November 1989. However, we cannot deny that this could come tomorrow. Tomorrow, when the convulsions of an immoral regime reaches its apogee, and the provocations and unwarranted repressions directed at the student youth are stopped, and those guilty of anti-student hatred and use of criminal elements are punished severely, and punished in accordance with current legislation. The chauvinism of the State authorities will not prevail. We have had enough of being governed by an immoral elite.

All crave freedom. The old slogan of solidarity: «For your freedom and ours!» was equally relevant in Prague and Warsaw, and the present regime in Ukraine is doing everything to make it relevant in Kyiv also. The consequences of victory will inevitably be a fundamental shrinking of the zone of hatred and of bondage in Europe, and, ultimately, in the world.

It is the unprecedented horror of the twentieth «century of death» that places an obligation on the democratic countries of the world, on the world

community, and, ultimately, on all people of good will to not remain indifferent to the attempts of those progeny of «an empire of evil», and supporters of still existing cruel, undemocratic, anti-popular state structures of power to again turn back the clocks, in defiance of the will of the people for freedom. The solidarity of evil must be countered by an ever more effective, because more moral, solidarity of good.

So, Grandsons and Granddaughters, for Your Freedom and Ours!

Zinoviy Antonyuk, Genrikh Altunyan, Myroslav Gorbachuk, Yevgeniy Zakharov, Sofiya Karasik, Mykhaylina Kotsyubinska, Irma Krein, Vladislav Nedobora, Vasil Ovsienko, Irina Rapp, Natalia Skoblinskaia, Nadiya Svitlychna

22 October 2004

IN DEFENCE OF THE YOUTH MOVEMENT

We judge parents by their children and by their attitude to their children. We can say the same about society.

What can our youth say about their own State and its regime?

Some say «It's not anything». Others – «It's removed from us». A third group answer: «It is against us».

The judgments of young people are hard-hitting and demanding. But also honest. Young people want to live in dignity, to earn an honest living. When all they see around them are lawlessness, corruption and criminal behavior, this is a world they cannot respect and cannot accept. Our young people have been cheated.

If the authorities have no shame, if they refuse to apologize to young people, for whom they have failed to create the conditions for a decent life, then these authorities are bankrupt and criminal.

The student's egg that was hurled at the Prime Minister, who is attempting to continue the grubby conquests of a malignant regime, was a fine metaphor. A well-nourished man fell to the ground. Why? Perhaps he imagined that thousands of eggs and thousands of curses for the fact that he wants to continue a criminal course of violence, intimidation and lies were about to follow? Better to fall immediately, than to wait until the whole nation begins to hurl abuse at him, as at Kuchma!

Ukraine is a country of contrasts. On the one hand a hard-working and economical nation, on the other – a lazy, boorish and venal mob recruited into a pseudo-socialist party in party.

It is this regime and this mob who hate our youth because the latter are trying to return our lives back to a path of dignity and lawfulness. They want a leader that Ukrainian people and the world will respect. They don't want disgusting bankrupts who seem to have even had enough of themselves.

The murder of Georgiy Gongadze was a hint regarding state terror. Ominously suggestive murders of active citizens, the sentences of bandits with no trial, expulsions of students for worthy civic behavior, the use of killers and boorish «professors» against the moral resistance of students, arrests, searches and beatings, involving young people who serve in the police, using means

of mass disinformation to bring trumped-up charges, the use of courts to deal with those who refused to obey – what decay, poison and destruction of the national organism by worms who will, tomorrow, perish without trace!

Stalin taught them to label academics, professors and poets terrorists. But he could, for further measure, shoot hundreds of thousands of them. And they can only «shove your head down the toilet[1]». Cowardly and low-life, they plan to use chemical means…

If the students proclaimed «Pora», then it really is time. They want to shorten the death throes of those whose own malice has turned gangrenous.

We, yesterday's prisoners of conscience, are proud of Ukraine's honest and courageous youth. Those who have never defended their honour and dignity, who have not fought for their right to a decent life and who have not become hardened through uneven battle, have never been young!

Such people are used and discarded.

We spent our youth in the struggle against an inhumane communist regime. Persecution, prison, exile were our school of life, from which we emerged crippled, yet honest and true to Ukraine. And we now pass to you young people the baton of duty and honour.

Do not lose hope! Believe us, your suffering will be shorter. However, be united and steadfast in upholding principles of justice, law and order. You are being attacked by monsters with yesterdays KGB and secret agents merged with criminal elements for whom any morality is alien. However the military and the police will not support them, because decent people there predominate and they too long for a change to a rotting regime that prevents them living and working with dignity.

The truth will prevail.

You are young, and it is for you to build our future.

Ukrainian Prisoners of Conscience

Yevgeniy Sverstyuk, Nadiya Svitlychna, Vasil Ovsienko, Mykola Gorbal, Genrikh Altunyan, Zinoviy Antonyuk, Yosyp Zisels, Levko Lukyanenko, Myroslav Marynovych, Levko Gorokhivskiy, Zorian Popadyuk, Petro Rozumny, Oles Shevchenko, Vitaliy Shevchenko, Igor and Iryna Kalyntses

22 October 2004

[1] A somewhat politer version of the original, which was what Vladimir Putin said Russia would do with all 'terrorists'. (*translator's note*)

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

ARTICLE 19 ASSESSMENT

of the Ukrainian Election Law and its implementation in the 2004 Presidential Election

27 October 2004

I. INTRODUCTION

The Law on the Election of the President (the Law) was amended through the Law «On the Introduction of Amendments to the Law of Ukraine 'On Elections of the President of Ukraine'» No. 1630-IV of April 2004. The amended version of the Law is being applied for the first time for the presidential elections of 31 October 2004.

The main presidential candidates are the current Prime Minister and incumbent's favourite, Viktor Yanukovich, and the opposition leader, Viktor Yuschenko. Other candidates include Socialist leader Oleskandr Moroz, and Communist leader Petro Symonenko, as well as 'marginal' candidates Roman Kozak and Oleksandr Yakovenko.[1] According to local polls, only Yanukovich and Yuschenko have real chances of winning the elections.[2] A second round of elections, already scheduled for 21 November, is likely to follow the 31 October elections.[3]

Thus far, the campaign has seen a number of violations of the Law. Although the provisions for direct access[4] to the media were, in general, respected, in practice access has been unequal. Yanukovich, as Prime Minister, has bene-

[1] Kozak and Yakovenko are self-declared opposition candidates widely believed actually to be in the Yanukovich camp and to be running mainly to discredit the opposition, so as to indirectly favour Yanukovich.

[2] According to a SOCIS sociological survey, Yuschenko enjoyed the highest electoral support at the beginning of September: 31% of respondents stated that they would vote in favour of Yuschenko during the first round of presidential elections. According to the survey, Yanukovych had the support of 24% of those polled, Petro Symonenko 7% and Oleksandr Moroz 6.5%. None of the other candidates (including Kozak and Yakovenko) are expected to gain even 1% of votes.

[3] According to Ukrainian law, if no candidate gains 50 percent of votes, a second round of elections has to be held.

[4] So-called 'direct access' programmes refer to small blocks of free airtime granted to all political parties and/or candidates to use as they see fit.

fited from immense and positive exposure. His main opponent, Yuschenko, has, instead, been in many cases vilified in the mainstream media, with limited chances to respond to criticism and to get his message across.

This statement analyses the provisions and application of the Law in relation to the 2004 presidential election campaign. It aims to inform both the Ukrainian public and the international community about shortcomings in the current electoral process in Ukraine regarding the role of the media. It also provides recommendations for the Ukrainian authorities to make future electoral processes more fair, open and transparent.

Should a second round of the elections be necessary after this weekend's poll, ARTICLE 19 calls on the Ukrainian authorities to guarantee, as a matter of utmost urgency, equitable access to the media by both candidates, in order to ensure that the public is able to make informed and free choices on election day.

II. INTERNATIONAL STANDARDS

Under international law, political parties and candidates have a right to express their views freely through the media, and the public has a corresponding right to hear those views. These principles are based on the rights to freedom of expression and non-discrimination, as well as the right to political participation. Guarantees of these rights are found both in international law and in Ukraine's Constitution.[1]

Of particular relevance in encapsulating international standards in this area is Recommendation No. R(99)15 of the Committee of Ministers of the Council of Europe on Measures Concerning Media Coverage of Election Campaigns (Recommendation R(99)15),[2] which states that «…the fundamental principle of editorial independence of the mass media gains special significance during elections».[3]

States have a positive obligation – at all times, but particularly during elections – to ensure media pluralism and to encourage a diversity of sources of information. As Recommendation R(99)15 states, «during election campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media.»[4] Furthermore, States should

[1] Article 34 of the Constitution states that «everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs»; Article 24 establishes that «citizens have equal constitutional rights and freedoms and are equal before the law»; Article 38 states that «citizens have the right to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of state power and bodies of local self-government.»

[2] Adopted in September 1999. Available at http://www.coe.fr/cm/ta/rec/1999/99r15.htm.

[3] *Ibid*, Principle III.

[4] *Ibid*, Appendix, Principle II.2.

«provide for the obligation to cover electoral campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters…».[1]

In addition to providing fair and balanced reporting, the media should be in a position to fulfil the socially significant function of 'public watchdog',[2] by exposing possible wrongdoing, corruption and maladministration on the part of elected representatives and, by extension, holding both the incumbent and other candidates accountable during the pre-election period. The media should also play a role in ensuring the transparency of the electoral system; provide different candidates with a platform to present their political agendas; disseminate information on the rules of voting; and expose any irregularities on election day and in the following periods, which may involve the formation of a new government and new political developments.

The balance between the State's obligation to ensure that the public receive sufficient information to cast an informed vote and, at the same time, to refrain from unnecessarily interfering with the media's right to freedom of expression is a delicate one. Measures taken should not go beyond what is necessary to achieve the aim of ensuring that the public is adequately informed and receives information from a variety of sources; the media should be free to provide comment and analysis on any issue related to the elections.[3] Although political broadcasts or reports may be subject to post-publication sanctions,[4] any such measures should be enforced through the regular judicial processes, in accordance with international human rights standards.

III. THE LAW AND ITS IMPLEMENTATION

III.1 Right to Freedom of Expression and Transparency

A general right to freedom of expression during the election period is provided for at Article 58(2) of the Law, establishing that:

Ukrainian citizens have the right to freely and comprehensively discuss the election programmes of candidates to the post of President of Ukraine, the political, professional and personal merits of the candidates …

In addition, Article 13(1), on 'Publicity and Openness of the Election Process', states that «the elections … shall be prepared and conducted in a public and open manner».

[1] *Ibid*.

[2] See for example *The Sunday Times v. United Kingdom (II)*, 26 November 1991, Application No. 13166/87 (European Court of Human Rights), para. 50.

[3] The ARTICLE 19 guidelines recommend that broadcasters should in fact be encouraged to provide election-related programming. *Guidelines for Election Broadcasting in Transitional Democracy* (London: ARTICLE 19, August 1994), Guideline 5.1.

[4] For example, if they are found to have been defamatory or likely to incite violence.

With regard to the media's access to information, Article 13(4) states that media representatives «shall be guaranteed unrestricted access to all public election-related events and to sessions of elections commissions and to the polling stations on the day of elections…». More details are set out in Article 28(9), stating that media representatives, among others,[1] «shall have the right to attend sessions of the election commission, including during the counting of votes …, as well as to be present at the polling station on the day of the elections …, in the premises where the voting is held». In turn, election commissions and other State bodies «shall be obliged … to provide [media representatives] with the necessary information regarding the preparation and conduct of the elections» (Article 13(4)).

Articles 13(4) and 28(9) are very positive in relation to the media's ability to report on election-related events. We note that meetings held by public bodies should generally be open, unless adequate reasons for closure exist, and any closure should take place in accordance with established procedures.[2] Notice of meetings is also necessary if the public is to have a real opportunity to participate. In addition, the authorities, and particularly in this case the Central Election Commission (CEC), should proactively provide the general public with as much information as possible regarding its activities and developments in the election processes, given the clear public interest in this sphere.

Recommendations:

- Article 13(4) should be amended to ensure that the general public, like the media, may request and obtain information concerning election processes from the CEC.
- Meetings of the CEC should generally be open to the public and should be closed only in accordance with established procedures and where adequate reasons for closure exist.

III.2 Independence of the CEC

According to the Law on the Central Election Commission No. 1932-IV of 30 June 2004, the CEC «shall have the competence to provide for the organisation of the preparation and conduct of elections and referenda in Ukraine and

[1] Others are «members of higher-level election commissions, candidates to the post of President of Ukraine, their proxies, official observers from the candidates for the post of the President of Ukraine and parties (blocs) – subjects of the election process (altogether not more than two persons from one candidate to the post of President and the party (bloc) that nominated him/her), as well as official observers from foreign countries and international organizations.»

[2] *The Public's Right To Know: Principles on Freedom of Information Legislation* (London: ARTICLE 19, June 1999), Principle 7. Reasons for closure might, in appropriate circumstances, include public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters and national security. Any decision to close a meeting should itself be open to the public.

to ensure the implementation and protection of the electoral rights of citizens of Ukraine and their rights to take part in referenda, as well as the sovereign right of the people of Ukraine to express its will.»

Article 3(1) establishes the independence of the CEC, stating that «the Commission is a collegial state body, which shall exercise its authority autonomously, independently from other bodies of state power, bodies of local self-government, their officers and officials.» Article 4(1) also crystallises the fact that the CEC shall «act in an open and public manner».

Pursuant to Articles 6(1) and (2) of the Law and Article 85(21) of the Constitution, CEC representatives are appointed by the parliament following nominations by the president. The Verhovna Rada (the Rada)[1] vote on the list of nominees in their entirety. This is very restrictive as it virtually nullifies the freedom to choose candidates by the Rada. The lists that have been proposed by President Kuchma, despite a self-declared objective to nominate CEC members who are representative of a wide political spectrum, have included primarily loyal followers of his policies. In addition, according to information provided to ARTICLE 19, the CEC has not operated in an independent manner and cases of partisanship (favouring Yanukovich and disfavouring Yuschenko) have been recorded.

This is a matter of some concern. The Central Election Commission (or, as generally defined, the election management body[2]) fulfils important functions, including regulating media coverage of the election, through the allocation of direct access programming and in dealing with complaints. It is, therefore, extremely important that the CEC operates free from political or other interference and that it is fully impartial vis-à-vis candidates, in order to ensure their non-discriminatory access to the media. Its institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.

In particular, in relation to the rules of appointment, the members should be appointed by an all-party body, such as the parliament, with nomination from a wide range of stakeholders (rather than by one individual, as is the case

[1] The Ukrainian Parliament.

[2] In addition to the Central Election Commission, this may be a committee within the broadcasting regulatory body, separate regulatory body, or a self-regulatory committee. See ACE Project, «Administrative Considerations» http://www.aceproject.org/main/english/me/me30.htm.

in Ukraine). The process for appointing members should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation.

Recommendations:
- Steps should be taken to ensure that the CEC is fully protected against political or other interference, both in law and in practice.
- Ideally, Articles 6(1) and (2) of the Law and Article 85(21) of the Constitution should be amended to allow a wide range of stakeholders to nominate CEC members.

III.3 Equitable Access to the Media

The general right to non-discrimination vis-à-vis candidates during election processes is provided for at Article 3(3), on 'Equal Suffrage', stating that «all candidates … shall enjoy equal rights and opportunities to take part in the election process». There should also be «impartiality from the side of State executive bodies … towards candidates …» (Article 11(2)(7)) and a prohibition against candidates employed by State bodies from using the resources of those bodies to their advantages (Article 64(15)).[1]

Specifically in relation to the media, Article 11(2)(6) states that that «the election process shall be realised on the ground of … equal opportunities for candidates … to access to the media». Article 60(1) reiterates that «the pre-election campaign in the media of all forms of ownership shall be conducted in compliance with the principles of equal conditions and according to the procedure envisaged by this law».[2] This is translated, in practice, into an obligation, in relation to State-subsidised direct access programmes, to provide «the same print space in the print media and air time on radio and television» to each candidate (Article 58(5)).

To allow candidates effectively to reach the public, there are also some obligations on the State bodies to provide premises for pre-election campaign events (Article 58(6)): in particular, if a building is made available for a campaign event to one candidate, its owner does not have the right to refuse it to another candidate (Article 58(9)). The CEC shall also ensure the production of

[1] The article states:
Candidates to the post of President of Ukraine who occupy posts … in State executive bodies … shall be prohibited from involving in the pre-election campaign or using their subordinates (during working hours), office transport communication, equipment [and other resources] … for any work connected the conduct of the pre-election campaign…

[2] The expression 'media of all forms of ownership' seems to include both the State-owned and private media. However, its exact meaning has never been defined in Ukrainian jurisprudence and in practice only the private *regional* media is subjected to some form of regulation with regard to election coverage.

posters which contain candidates' pre-election programmes; the poster «must be of the same format, size and layout» (Article 59(1)).

The statements of equitable opportunities for all candidates mentioned above are welcome and are in line with international standards of freedom of expression and non-discrimination. In addition, it is widely recognised that, in order for political candidates to get their messages across, it is essential that they should have access to the media. There is a strong obligation on States to remove any legal or administrative barriers to access. Paragraph 7.8 of the Copenhagen Document agreed by OSCE member States provides:

> To ensure that the will of the people serves as the basis of the authority of government, the participating States will … provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process.[1]

However, despite Article 64(15), prohibiting the abuse of State resources by State officials during the campaign, there have been allegations that Yanukovich has illegally benefited from this, including through the appropriation of funds, property and equipment.[2]

Recommendation:
- The authorities and the public media should not allow the party in power, or the incumbent, to unduly exploit their advantaged position vis-à-vis other candidates to get extra exposure or other practical advantages.

a) Direct Access to the Media

According to Article 60(4) of the Law, the CEC «establishes the procedure for providing airtime and print space» to candidates. The CEC also does so in case of 'repeat elections' (Article 60(9)).

Direct access is made available during the pre-election campaign between 19.00 and 22.00 (Article 61(2)). Each candidate receives 30 minutes on public television (UT-1) and 45 minutes on public radio, as well as 20 minutes on regional television channels and on regional radio channels (Article 61(4)).[3] The available time is divided into three equal time slots (Article 60(4)) and, for the

[1] *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Copenhagen, 29 July 1990.
[2] In addition, State employees and students were reportedly obliged to take part in his rallies: they were offered bribes or other advantages in exchange for their participation, or were threatened with dismissal if they refused to comply. There were also reports that some citizens were forced to give their signature in support of Yanukovich's candidacy.
[3] In all regions of Ukraine, including all oblasts, the Autonomous Republic of Crimea and the cities of Kyiv and Sevastopol.

State media, is distributed on the basis of lots drawn by the CEC (Article 61(6)). It is prohibited to comment on pre-election materials 20 minutes before and 20 minutes after they are broadcast (Article 61(5)).

Direct access to the public print media is regulated separately in Article 63, which states that a candidate has the right to publish, free of charge, his/her election programme in the official State bulletin, *Golos Ukrainiy*, and in *Uriadovy Courier*, «in a print lay-out that is identical for all candidates» (Article 63(1)). This is also the case for local State-owned newspapers, also «ensuring equal conditions to all candidates» (Article 63(2)).

International law recognises that it is legitimate to require public broadcasters to provide free direct access to airtime for political candidates. As provided for in Ukrainian legislation, access must be allocated in a fair and non-discriminatory manner and on the basis of clear and objective criteria.[1] Indeed, as a general principle, the ARTICLE 19 *Broadcasting Principles* state:

> Public broadcasters should be required to grant political parties and/or candidates direct access airtime, on a fair, equitable and non-discriminatory basis, for political broadcasts.[2]

Yet, although the provisions included in Ukrainian law for equitable access to the media are in line with international standards, and although these are usually observed, in practice they are not sufficient to ensure adequate coverage for all candidates. This is primarily due to the fact that the favoured candidate enjoys endless opportunities for extra exposure through news and other programmes (see below).

Direct access to the private media is not envisaged in the Ukrainian legislation, at least for the nation-wide media.[3] However, over the past few years, consensus has emerged that if one political party is granted broadcasting time, other parties should also receive that benefit; this rule should apply not only in relation to public media but also in relation to the privately-owned broadcast media. The most recent international statement on the matter can be found in the 2002 Venice Commission Guidelines, which provide unambiguously that «legal provision should be made to ensure that there is a minimum access to privately-owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.»[4] Similarly, the ARTICLE 19 *Broadcasting Principles* state:

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[1] *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, supra*, Paragraph I.7.8.

[2] *Access to the Airwaves. Principles on Freedom of Expression and Broadcast Regulation*. ARTICLE 19, London, April 2002, Principle 31(1).

[3] The legislation is vague in relation to the regional media, and might allow scope for direct access regulation at the regional level.

[4] European Commission for Democracy through Law (Venice Commission), *Code of Good Practice in Electoral Matters*, Strasbourg, 30 October 2002, CDL-AD (2002) 23, at 2.3.c.

> Public broadcasters have a primary obligation [to grant political parties and/or candidates direct access airtime, on a fair, equitable and non-discriminatory basis, for political broadcasts] but obligations may also be placed on commercial and/or community broadcasters… provided that these obligations are not excessively onerous.[1]

And:

> Commercial/community broadcasters may … be required to provide technical assistance to parties and candidates for purposes of production of direct access political broadcasts.[2]

The guiding principle in implementation, and in deciding whether or not to require private broadcasters to provide direct access slots, should be to ensure that the public is sufficiently informed in a balanced manner.

Given the relevance to the election campaign discourse of popular private country-wide channels 1+1, Inter and ICTV, it would be auspicious to introduce a framework for access to these channels by the candidates. Indeed, in Ukraine, not only is television the most popular medium but, in practice, the audience share of the non-State media is higher than that of UT-1. Inter, for example, has a 26.2% audience share against UT-1's 4.7%.[3]

Recommendation:
- The authorities should consider the introduction of guidelines for the provision of direct access programmes on private broadcasters.

b) Fair, Balanced and Impartial Reporting

The principle of non-discrimination in relation to candidates[4] should apply to ensure that candidates receive fair, balanced and impartial coverage in the broadcast media. While it is well-established that the private print media have considerable freedom in their reporting of elections, broadcast media, whether private or State-owned, should be required to cover electoral campaigns in a fair, balanced and impartial manner.[5] The Council of Europe Recommendation makes this clear:

> With due respect for the editorial independence of broadcasters, regulatory frameworks should … provide for the obligation to cover electoral campaigns

[1] *Access to the Airways*, *op. cit.*, Principle 29.2.
[2] *Ibid*, Principle 31.1.
[3] 1+1 gets 21.7%, Novyi Canal 7.2%, STB 5.1% and ICTV 2.9%. Data compiled by AGB company, Gabor, N, and Skoropadenko, Z, 'Ukrainian Media Landscape', the European Journalism Centre, October 2002, http://ejc.nl/jr/emland/Ukraine.html.
[4] As provided in the above-mentioned Article 60(1), stating that «the pre-election campaign in the media … shall be conducted in compliance with the principles of equal conditions.»
[5] Recommendation R(99)15, note 2, Appendix, Principle II.1.

> in a fair, balanced and impartial manner in the overall programme services of broadcasters. Such an obligation should apply to both public service broadcasters as well as private broadcasters in their relevant transmission areas.

It is important to note the proviso «with due respect for the editorial independence of broadcasters», meaning that there should be no inappropriate interference with programme content. It should also be noted that the requirements of fairness and balance do not imply that broadcasters should devote equal airtime to all parties and candidates; it means that all parties and significant viewpoints are paid due, or equitable, attention.

The obligation to report in a fair and balanced manner applies to news and current affairs programmes,[1] as well as to other programmes «which may also have an influence on the attitude of voters».[2] In addition, Recommendation R(99)15 states that, in relation to news and current affairs:

> No privileged treatment should be given by broadcasters to public authorities during such programmes.[3]

The obligation of fairness and balance extends to State-owned or controlled print media as well as to all broadcast media. Recommendation R(99)15 stipulates:

> Print media outlets which are owned by public authorities, when covering electoral campaigns, should do so in a fair, balanced and impartial manner, without discriminating against or supporting a specific political party or candidate.[4]

This clearly applies to the State-owned print media outlets in Ukraine.[5]

This principle is not developed in the Law and it is widely ignored in practice. For example, between 1 and 15 September, the coverage of Yanukovich's direct speeches[6] in news items on UT-1**,** exceeded by nearly 10 times the coverage of the other main candidates and was 818 times that of his main rival, Yuschenko.[7] In addition, in the month of August, during the period of signature collection by candidates, the nation-wide channels gave regular updates on the progress made by Yanukovich.[8] This extra coverage of favoured candidates

[1] *Ibid.*
[2] *Ibid*, Principle III.
[3] Recommendation R(99)15, note 2, Appendix, Principle II.2.
[4] *Ibid*, Principle I.2.
[5] *Golos Ukrainiykkk* and *Uriadovy Courier*.
[6] Live speeches and direct quotations.
[7] Data of the media monitoring carried out by the Institute for Mass Information (IMI) and the Kharkiv Group for Human Rights Protection (KHPG). The monitoring has been carried out with logistical support from ARTICLE 19 and financial support from the European Commission Delegation in Ukraine. It started at the beginning of August 2004 and was ongoing in October 2004.
[8] *Ibid.*

is specifically excluded from the regime of election media regulation pursuant to Article 58(3), which states that «official notices during the election process … about the activities of the candidates to the post of president of Ukraine while they carry out their official functions … *shall not be considered part of the pre-election campaign*» [italics added]. Although the advantages of the incumbent (or his favoured successor) are a fact in elections in all countries, in some they might give way to particularly blatant and pernicious forms of abuse.

Lots are used to compile the schedule of direct access programmes.[1] In stark contrast, news items, political advertising and other programmes showing certain candidates have been juxtaposed against images that may create a negative reaction in the viewers, such as violence, extremist behaviour and crime. Some media reports appear to manipulate their coverage of national and ethnic issues to the clear disadvantage of Yuschenko. For example, country-wide television channels and pro-presidential newspapers vigorously disseminated information on rallies of demonstrators carrying symbols of Nazi Germany, suggesting that these were organized by the opposition.[2] The main channels have also tended to present Yanukovich in a positive, and Yuschenko in a negative, light. These forms of unequal, unfair and unbalanced coverage have also been observed widely on the public broadcaster.

Partisanship on the part of the public broadcaster is particularly worrisome as public broadcasters have a primary obligation to ensure that the public receive adequate information during an election about the platforms of political parties and candidates, campaign issues and other matters of relevance to the election.

Recommendations:

- Specific guidelines should be established requiring the broadcast media to provide fair and balanced coverage of different parties and political candidates, with due respect for the editorial freedom of broadcasters.
- Special efforts should be made to ensure that the public broadcaster is impartial, at all times but particularly during election periods.
- Broadcasters should not grant public authorities undue coverage in news and current affairs programmes.

III.4 Political Advertising

In addition to direct access slots required by law, a candidate can purchase time for political advertising. This is provided for by Article 60(5), stating:

[1] Article 61(7) of the Law.

[2] It was not proven that there was a link between these demonstrations and the opposition, which has distanced itself from them. The information available indicates that the demonstrations might have been staged.

> The pre-election campaign in the media … at the expense of the campaign fund of the candidate … shall be conducted on the conditions of equal payment per unit of air time and … of print space and shall only be restricted by the expenditure limits of the campaign fund.

Political advertising can also be bought in the private print media (Article 63(5)).

Media outlets must, not later than 130 days prior to election day, calculate the cost of a unit of air time and print space. In turn, the National Broadcasting Council of Ukraine and the State Committee for Television and Broadcasting are to determine the average cost indicator of a unit (Article 60(6)). The prices must be published and disseminated through the media no later than 120 days prior to election day (Article 61(2)).

The Law also provides that no medium can favour a certain candidate by allowing discounts (Article 60(6)). Furthermore, «a medium that has provided a candidate … with airtime or print space shall not have the right to refuse to provide airtime or print space on the same conditions to another candidate», with the exception of media owned by political parties (Article 60(8)).[1]

ARTICLE 19 welcomes the provisions of Article 60(5), establishing that political advertising is to be provided on a non-discriminatory basis, which is in line with international standards in this area. For example, Recommendation R(99)15 states that if State-owned or controlled print media outlets accept political advertising, they should do so in a fair and equitable manner.[2] It also recommends that,

> Regulatory frameworks should ensure that … the possibility of buying advertising space should be available to all contending parties, and on equal conditions and rates of payment.[3]

The rule of non-discrimination in Article 60(8)[4] has resulted in an improvement over the 2002 parliamentary elections, when some candidates were denied the possibility of purchasing time for political advertising on certain channels. However, although there have been fewer such refusals, a number of techniques have been used to reduce the positive impact of the opposition candidate's ads, including negative campaigning directed towards him prior to or immediately following his ads. Although Yanukovich has mostly refrained from using this form of negative campaigning, it has been widely practiced by pseudo-candidates Roman Kozak and Oleksandr Yakovenko.[5] For example,

[1] This, in practice, applies only to the print media since, according to Ukrainian law, broadcast outlets cannot be owned by political parties or religious institutions.
[2] Recommendation R(99)15, note 2, Appendix, Principle I.2.
[3] *Ibid*, Principle II.5.
[4] Introduced through the 2004 amendments.
[5] This supports the conclusion that their main *raison d'etre* is to support Yanukovich by denigrating Yuschenko.

the latter have juxtaposed messages against Yuschenko's ads indicating that, should Yuschenko win, Ukraine would be split into two parts.[1]

Moreover, political ads by certain candidates have included excerpts from Yuschenko's speeches, which have consistently been placed out of context and presented so as to create a negative image of the opposition candidate. Advertising produced by certain candidates[2] has included (or consisted exclusively of) items that show Yuschenko in a negative light. For example, in the period from 1 to 15 September, one third of political advertising on ICTV (22 out of 60 ads) and almost half on UT-1 (46 out of 98) were directed against Yuschenko.[3] This phenomenon increased throughout the second half of September, as Yuschenko was reported negatively in 36% of all political ads on Inter, in 48% on 1+1 and in 54% on UT-1. Approximately one quarter of all candidates' direct access materials on UT-1 and Radio 1 were also directed against him.[4] At times, the originator of the 'negative' political ads was not identified.

The phenomenon of negative political advertising is particularly worrisome in those cases in which the originator is unclear. This suggests a campaign regime that is not fully open and transparent. While negative campaigning is practiced in many countries, and exchanges between candidates do not always comply with ethical norms, a problem arises when there is a sharp imbalance and attacks are routinely directed against a particular candidate.

Recommendation:
- The public should always be aware of the origin of a paid political advertisement.

III.5 Right of Reply

The right of reply is provided for at Article 64(5) of the Law in response to «spread[ing] deliberately false information about the candidate to the post of president of Ukraine» (Article 64(5)). The article states that a media outlet «that published information which the candidate to the post … considers obviously incorrect, must, within three days after the day such materials have been made public, but no later than two days prior to the day of the elections, give the candidate … upon … request, a possibility to refute such materials»[5]

[1] This is because Yuschenko mainly enjoys support in (mostly Ukrainian-speaking) Western Ukraine, and Yanukovich in (largely Russian-speaking) Eastern Ukraine. However, there is no clear evidence that such a sharp divide exists among the electorate.
[2] Once again, particularly Kozak and Yakovenko.
[3] Monitoring by IMI and KHPG, note 37.
[4] *Ibid*.
[5] This should be done by,
giving them the same air time on TV or radio accordingly, or by publishing in the print mass medium material provided by the candidate or party (bloc) that must be printed in the same font and be placed under the heading 'Refutation' at the same place in the column and of a volume not less

This provision is a positive one since, during the short and intense election period, false accusations can have a significant effect on the overall outcome. While in ordinary circumstances anyone who is libelled can sue for defamation in the courts, during elections the matter would in all likelihood not be resolved until after the vote has been held and thus be of little value in redressing any bias to the electoral process that may have occurred. It is, therefore, recommended that expedited procedures should be available. Recommendation R(99)15 provides:

> Given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply under national law or systems should be able to exercise this right during the campaign period.[1]

In practice, media monitoring has shown that, despite the rules on the right of reply, some candidates are vilified in the media and do not seem to be able adequately to respond to the dissemination of false and harming information about them.[2] This is particularly the case with political advertising directed against Yuschenko.

III.6 Opinion and Exit Polls

Article 60(7) states:

> In case the media publish the results of a public opinion survey related to the election of the President of Ukraine, it must indicate the organisation that conducted the survey, the date the survey was conducted, the number of people interviewed, the method by which the information was collected, the precise formulation of the question, and a statistic evaluation of the possible error.

In addition, Article 64(13) establishes that the results of opinion polls cannot be disseminated by the media during the last 15 days of the election campaign or the day of 'repeat voting'. It is also prohibited to disclose the results of exit polls on election day and throughout the voting process (Article 64(18)).

Article 60(7) is to be welcomed, since opinion polls should always be reported with due care, as they can be used as a partisan tool and can sometimes have an undue impact on voting intentions. If they are used properly, opinion polls can be an important way of measuring what voters think about particular issues, parties and candidates. The Recommendation R(99)15 therefore advises that certain rules should govern their publication:

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than the volume of the announcement being refuted. The refutation must contain a reference to the respective publication in the printed mass medium or broadcast on the TV or Radio and a reference to the facts being refuted. The refutation must be made public without amendments, commentaries or abbreviations, and should be done at the expense of the respective mass medium.

[1] Recommendation R(99)15, note 2, Appendix, Principle III.3.

[2] Monitoring by IMI and KHPG, note 37.

Regulatory or self-regulatory frameworks should ensure that the media, when disseminating the results of opinion polls, provide the public with sufficient information to make a judgement on the value of the polls. Such information could, in particular:

– name the political party or other organisation or person which commissioned and paid or the poll;

– identify the organisation conducting the poll and the methodology employed;

– indicate the sample and margin of error of the poll;

– indicate the date and/or period when the poll was conducted.[1]

The provisions at Article 64(13) and 64(18) are useful in limiting the potentially negative effects of opinion polls and exit polls in unduly influencing the public; poll findings can be open to manipulation by unscrupulous pollsters or politicians. At the same time, 15 days is an extremely long time to prohibit such polls. Comparative practice suggests that, at the very most, a week is sufficient. In addition, the main problem with opinion polls in Ukraine is that there have been very few truly independent polls.

Recommendation
• Article 64(13) should be amended to reduce the period of time prohibiting the dissemination of opinion polls results to *one week* prior to the elections.

III.7 Voter Education

Article 13(2) states that, in order for the election process to be open and public, the election commissions are to provide voter education. This involves:

(1) Informing the public about [the] composition [of election commissions], location and working hours, about the formation of territorial election districts and polling stations, about the voting hours and place, and about the voters' fundamental rights ….

(2) Ensur[ing] opportunities for citizens to get acquainted with the lists of votes, with information about candidates … and with pre-election programmes, and with the procedure for filling out signature sheets and marking election ballots.

The public is also to be informed on the results of the elections (Article 13(2)(3)). Decisions of the elections commission shall be disseminated through the media (Article 13(3)).

[1] Recommendation R(99)15, note 2, Appendix, Principle III.2. See also the ARTICLE 19 *Guidelines for Election Broadcasting in Transitional Democracy*, note 3, Guideline 12.

The provisions for voter education are welcome as, in addition to the requirements relating to neutrality and fairness, State-owned media (including private media that receive substantial financial backing from public sources) are also under an obligation to provide the public with general information about the political parties, candidates, campaign issues, voting processes and other matters relevant to the election.[1] This follows from the international law obligation on States to «hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.»[2] This implies that citizens should have the necessary information to register and vote, and to make informed choices regarding matters that are the subject of elections.

III.8 Other Matters

a) Restrictions on the Right of Freedom of Expression during the Campaign Period

'Pre-election campaign restrictions' are listed in Article 64. Article 64(3), in particular, states:

It shall be prohibited to disseminate in any form materials which contain calls for the liquidation of the independence of Ukraine, the change of the constitutional order by violent means, the violation of the sovereignty and territorial indivisibility of the State, the undermining of its security, the unlawful seizure of State power, the propaganda of war and of violence, the incitement of inter-ethnic, racial, or regional enmity, and the encroachments on human rights and freedoms and the health of the population.

In addition, the State and municipal media are forbidden from campaigning for or against a certain candidate. The activity of these media outlets can be suspended temporarily in case of violation of this provision (Article 64(4)).

There is no need to include Article 64(3) in the legislation, as these provisions should, to the extent that they are legitimate, be included in a law of general application rather than an election-specific law. Their inclusion here can be interpreted as a double-warning to candidates and/or the media in the exercise of their right to freedom of expression during the election campaign.

In addition, any restrictions to the right to freedom of expression during the pre-election period, as at all times, should satisfy a strict three-part test. This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure this interest.[3]

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[1] *Ibid*, Guideline 1.

[2] Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 3. See also Article 25, *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entry into force 23 March 1976, ratified by Ukraine on 12 November 1973.

[3] For an elaboration of this test, see *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991 (UN Human Rights Committee), para. 9.7.

To be 'provided by law' implies not only that the restriction is based in law but also that the relevant law meets certain standards of clarity and accessibility. The third part of the test, the requirement of necessity, means that even where measures seek to protect a legitimate interest, the government must demonstrate that there is a 'pressing social need' for the measures. Furthermore, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient.[1]

With regard to the question of liability, the ARTICLE 19 *Guidelines for Election Broadcasting in Transitional Democracy* recommend that media who merely republish messages made by others should enjoy protection:

It is strongly recommended that the media be exempted from legal liability for unlawful statements made by candidates or party representatives and broadcast during the course of election campaigns, other than those which constitute clear and direct incitement to violence. The parties and speakers should be held solely responsible for any unlawful statements they make.[2]

The media should not bear responsibility for unlawful statements made by political candidates in reports or broadcasts, unless the media outlet concerned has either taken specific steps to adopt the statements or where the statements are quite clearly illegal and the media outlet had an adequate opportunity to prevent their being disseminated. The media should also bear reduced responsibility for the content of direct access broadcasts. If the media were responsible for the contents of direct access broadcasts, this would put them in the position of being potential censors. This departure from the normal rules of liability is justified by the short duration of campaign periods and the fundamental importance to free and fair elections of unfettered political debate. This limitation of liability does not, however, relieve political parties and other speakers themselves from liability for their statements.

In addition, violation of Article 64(4) may involve the suspension of a media outlet. Although, as stressed above, it is of paramount importance that the public media maintain strict impartiality during election periods, sanctions should always be strictly proportionate to the harm caused and should be applied in a graduated fashion. Normally, the sanction for an initial breach will be a warning stating the nature of the breach and not to repeat it. Fines may be imposed in more serious cases, but only after other measures have failed to redress the problem, and suspension and/or revocation of a licence should not be imposed unless the broadcaster has repeatedly been found to have committed gross abuses and other sanctions have proved inadequate to redress the problem.

[1] *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 62 (European Court of Human Rights). These standards have been reiterated in a large number of cases.
[2] ARTICLE 19 *Guidelines for Election Broadcasting in Transitional Democracy*, note 3, Guideline 6.

Recommendations:

- Any restrictions on the right to freedom of expression during the pre-election period should, as at all times, be in full conformity with the three-part test for such restrictions, outlined above.
- The media should not bear responsibility for unlawful statements made by political candidates in reports or broadcasts, unless the media outlet concerned has either taken specific steps to adopt the statements, or where the statements are clearly illegal and the media outlet had an adequate opportunity to prevent their being disseminated.
- Sanctions should always be proportionate to the harm caused, and suspension of a media outlet should not be imposed unless the broadcaster has repeatedly been found to have committed gross abuses and other sanctions have proved inadequate to redress the problem.

b) Requirement of Objectivity

Article 13(4) states that «the media shall be obliged to cover the pace of the election process in an objective manner».

This provision does not take into consideration the fundamental distinction between print media, on the one hand, and broadcast media, on the other. While all broadcast media should report in a fair, balanced and impartial manner, it is generally recognised that print and Internet-based media should be free to express a political preference for one or other candidate. Hence, Article 13(4) runs counter to Principle I.1 of Recommendation R(99)15, which states:

Regulatory frameworks on media coverage of elections should not interfere with the editorial independence of newspapers or magazines nor with their right to express any political preference.[1]

Generally, it would be preferable to provide for fair, balanced and impartial reporting through self-regulatory measures. For example, Recommendation R(99)15 stresses, in its preambular statement, «the important role of self-regulatory measures by media professionals themselves – for example, in the form of codes of conduct – which set out guidelines of good practice for responsible, accurate and fair coverage of electoral campaigns». It adds that member States should adopt measures for fair, balanced and impartial reporting for the broadcasters «*where self-regulation does not provide for this*» [italics added]. However, regrettably, an effective regulatory system is not in place in Ukraine.

In it important to note that the requirement of fair, balanced and impartial reporting should not be understood as being applicable to every item taken individually; rather, it imposes and overall obligation to pay due attention to all parties and significant viewpoints throughout the electoral campaign.

[1] Recommendation R(99)15, note 2, Appendix, Principle I.1.

Recommendation:
- Article 13(4) should be limited in scope to the broadcast media.

IV. CONCLUSIONS

The law contains some positive features, such as a general guarantee for freedom of expression during the electoral campaign, provisions for non-discrimination in relation to candidates and their access to the media – including through direct access and the purchase of political advertising – and rules for a prompt right of reply. At the same time, ARTICLE 19 concludes that the legal framework for the election of the president of Ukraine, and particularly its implementation, could be significantly improved.

Overall, an effective system for fair and balanced reporting is absent in Ukraine. The effective implementation of the legislation is severely hindered by the control of the main media outlets by candidates or their supporters. In particular, the main critics of Yuschenko appear to be the channels that are close to the Head of the Presidential Administration, Viktor Medvedchuk, (UT1, Inter and 1+1), whilst those owned by Viktor Pinchuk[1] (ICTV and Noviy Kanal) have shown greater balance in their reporting of Yuschenko and less favouritism for Yanukovich. This state of affairs reflects divides in the journalistic community according to political affiliation, as well as a high level of media manipulation. Of concern is also the evidence of an increased use of temnyky (instructions to the media by the Presidential Administration) during the pre-election period: news items are virtually identical on all main television channels, which points to the conclusion that media outlets follow the same guidelines. Reportedly, a temnyk issued on the occasion of Yushchenko's first election rally, held on 4 July, instructed journalists: «When covering the event, do not give long shots of the rally and shots of the crowd; show only groups of drunk people with socially inappropriate deviant behaviour».[2]

To improve the implementation of the legislation, in March 2004, the Rada issued an appeal to various State structures calling for fairness during the electoral campaign.[3] The appeal urges State bodies «to use every means to promote citizens' conscious choice and uninhibited expression of their civic position during voting» and asks them to avoid «using official powers and resources in favour of any presidential candidate». Another recent appeal, also by the Rada**,** calls on the media and government agencies to provide unbiased coverage of the elections, so as to prevent the «distortion of facts and manipulation techniques». In addition, it urges full compliance with Ukrainian legislation by the

[1] The President's son-in-law, an MP for Labour Ukraine and, according to estimates, Ukraine's second wealthiest man.
[2] *Zerkalo Nedely*, 10-16 July 2004.
[3] This was voted by 390 out of 444 MPs.

Central Election Commission and the National Council for Television and Radio Broadcasting, adding that political interference in the work of the media is utterly unacceptable. It also notes that the Rada intends to monitor the election process to ensure equal access to the media for all candidates.

Although the above appeals are applauded, the Ukrainian authorities should, as a matter of utmost urgency, adopt more robust measures for the creation of an effective regime for election reporting and equitable access to the media by candidates. Such measures should, as a priority, aim to ensure that the public is adequately informed about election processes, candidates and the overall political context so as to be able to make informed and free choices on election day. These are clear prerequisites for free and fair elections in accordance with democratic standards.

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INTERNATIONAL HELSINKI FEDERATION FOR HUMAN RIGHTS

AN APPEAL TO RESPECT INTERNATIONAL STANDARDS FOR FREE AND FAIR ELECTIONS IN UKRAINE

Violations have increased ahead of 31 October 2004 Presidential Election
Massive violations of the electoral law and the OSCE and CoE standards for elections:

Free and fair elections represent one of the fundamental freedoms in each society. Only through free and fair elections the citizens have an opportunity to express their assessment of the way the country has been governed since the last elections, and make a choice for its future. Lacking free elections people become mere passive subjects of the State. The history of Europe amply proves that free and fair elections have contributed to prosperity.

The International Helsinki Federation for Human Rights (IHF) and the Ukrainian Helsinki Human Rights Union are deeply concerned that violations of international standards for free and fair elections have persisted and become even more acute in the course of the electoral campaign ahead of the 31 October presidential elections. We appeal to the relevant authorities to take what steps are possible in the remaining days, to protect the political freedoms and rights of the citizens. We fear that given the gravity and widespread character of violations of Ukrainian electoral law and international standards, the legitimacy of the coming elections could be seriously undermined.

A recent tendency reported by Ukrainian NGOs is the use in hundreds of cases of police action against individuals and organizations believed to support the opposition: unsanctioned searches of premises, arrests, and beatings. Sometimes NGOs are being accused of no less a crime than terrorism. Since these actions are carried out in violation of proper procedure, there is reason to suspect that various law enforcement and security agencies are being used to harass persons and organizations who support the opposition. Army units are being used to create among the population an atmosphere of fear. Ukraine is again on the verge of becoming a police state, which ignores the rights of its citizens and its international obligations.

Another grave feature in the present campaign is the use of political persecutions such as dismissal from work of e.g. journalists, and exclusions from universities.

Regarding media, State controlled TV, in particular UT-1, have consistently misinformed the public on the presidential candidates in news and other programming, promoting a positive impression of Prime Minister Viktor Yanukovych, and carrying only limited and then almost completely negative coverage of his main opponent Viktor Yushchenko.

There has been massive discrimination against the opposition: in the period from May to August, the Government's candidate received eight times more air time on national TV than the main opponent. The latter was obliquely accused of harbouring extremist views and of being allied with extremist organizations. Recently, the media have been used to present opposition figures as terrorists and criminals – before any court had had a chance to decide on the matter.

The only independent TV station of national importance, Channel 5, is now facing closure in what appears to be a politically motivated defamation case. The station's workers are now on hunger strike to express their protest.

Posters and t-shirts against Yushchenko – and for Yanukovich – have been mass produced. This could not have taken place without the knowledge of the central authorities. This also raises serious questions as to how this material has been financed.

As far as the freedom of association and freedom of movement, authorities have banned electoral meetings of the opposition. The Police has been used to block people from the provinces to join meetings in Kyiv held by the opposition candidate. On these days, Kyiv has become an almost closed city.

Even more thoroughly than in previous elections, the State have throughout the campaign used «administrative resources», the huge resources of the State to influence and pressure voters. Workers in various institutions and industries were routinely forced first to collect signatures for his registration and to participate at rallies in support of Viktor Yanukovich.

Yet another reason for serious concern is the dubious quality of preparatory work of the authorities with regard to e.g. voter lists, formation of electoral commissions, etc. The Central Electoral Commission has not done anything to address any of these problems, and thus failed to fulfil its role to ensure a transparent and fair process.

While limited transparency is possible through the presence on the local and central electoral commissions of representatives of all candidates, independent Ukrainian NGOs are not allowed to observe elections. This cannot but limit the credibility of the process, and further erode the legitimacy of the electoral results.

In spite of repeated appeals from Governments, international organizations and Ukrainian and international human rights NGOs, the Ukrainian authorities

have chosen not to address the violations of law and international obligations. The elections risk producing a result which will not have the necessary legitimacy and which will further delay the development of Ukraine towards a genuine democracy, and a society based on the rule of law.

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Vienna, Kyiv, 28 October 2004.

COMMENTARY OF THE KHARKIV HUMAN RIGHTS PROTECTION GROUP ON POLITICAL REFORM IN UKRAINE

(As of 4 November 2004)

Political reform as of 4 November 2004 is reflected, from the point of view of legislation, in the Draft Law № 4180 on introducing amendments to the Constitution of Ukraine in the final version of the Temporary Special Commission of the Verkhovna Rada of Ukraine responsible for the elaboration of draft laws on introducing amendments to the Constitution of Ukraine from 21.06.2004.

The Draft went through the necessary procedure for consideration in the Constitutional Court of Ukraine and received the appropriate consent from the Court to enable it to be submitted for vote to the Verkhovna Rada of Ukraine.

Draft № 4180 differs significantly from Draft № 4105 in the latter's form when voted on in the Verkhovna Rada of Ukraine, where it did not receive the necessary qualifying majority of votes (300). At the same time Draft № 4180 is in its present form very different from the Draft with the same number which was considered by the Venetian Commission in December 2003 as «the third Draft».

It is well-known that in its conclusion of 12-13 December 2003, the Venetian Commission commented that «the Draft on introducing amendments № 4180 is identical to the Draft on introducing amendments № 4105, with the exception of some transitional provisions concerning the dates of elections and the coming into force of the constitutional reform (Paragraph 88). There is now no question of describing the Drafts as identical.

In the present, updated form, Draft № 4180 is significantly different from its forerunners (№ 4105, the first version of № 4180), since it allows for the election of the President in nationwide elections. The previous Draft, considered by the Venetian Commission in December 2003, had allowed for the election of the President of Ukraine by the Verkhovna Rada.

In general the updated Draft № 4180 is a considerably less radical draft law for amendments to the existing text of the Ukrainian Constitution than the above-mentioned forerunners. However, even in its updated form, it does not, in our opinion, contribute to positive changes in the political and constitutional system of the Ukrainian State.

Like its unsuccessful forerunners, the Draft allows for the election of State Deputies of Ukraine on a purely proportional basis. In this respect it confirms – now on the highest constitutional level – the procedure of elections which had previously been allowed for by current legislation. In our opinion, the election of deputies to the Ukrainian parliament solely on the basis of proportional representation is, both at the theoretical and practical level, a manifestly hurried and insufficiently considered attempt to improve Ukrainian constitutional and, particularly, electoral legislation.

As the result of a well-known political compromise, a proportional system of elections to the Ukrainian Verkhovna Rada (parliament) at the moment exists on the level of an ordinary law. It would seem expedient to try out this system of elections, which is new for Ukraine, to the Verkhovna Rada first of all in practice, and only then, depending on the results of this experiment, decide whether it is necessary to introduce a proportional system of elections at the constitutional level also. For the moment it seems that State Deputies, fired by the political struggle and for this reason seized by reformist ideas, are trying to change the constitutional text in favor of a system which has thus far in no way recommended itself in practice. In the constitutional sense, this seems, at very least, not ideal. In the political sense, it demonstrates lack of judicial balance and unwarranted haste.

Draft №4180 introduces the possibility (in fact, the necessity) of uniting a deputy's mandate with the status of members of the Cabinet of Ministers of Ukraine. In our previous commentaries regarding other reformist beginnings of the same type, we have already mentioned that the given procedure both in effect and from a formal judicial point of view undermines provisions of the current Constitution of Ukraine: «State power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power.» (Article 6 of the Constitution of Ukraine)

It is obvious that, in giving its consent to the reform, the Constitutional Court yet again was governed less by judicial and legal considerations, than by situation-linked and political aims and factors. A special norm about the separation of powers in the Constitution is (should be!) no declaration of intent, but a strict judicial construct, protected from amendments by a special procedure for introducing changes and amendments to the first section of the Constitution of Ukraine.

Modern constitutionalism can demand more or less emphasis on the separation of powers. However if the separation of powers is declared as a specific principle (the cornerstone) of the current constitution, then this must not be disregarded. As an idea in Ukrainian constitutionalism, the separation of powers has existed since the time of the Constitution of Pylyp Orlik[1]. It was

[1] Pylyp Orlik, Ukrainian Hetman (1672-1742) introduced a kind of proto-constitution *(translator's note)*

present in the Constitution of the Ukrainian National Republic of 1918 and is a significant element in the Ukrainian constitutional tradition. In Draft № 4180 the specific norm principle about the separation of powers is clearly ignored. If the political reform in its present shape is implemented, this will mean that the Constitution of Ukraine has become even more demagogic and formal with respect to its most important key provisions. To the list of fictitious, in reality not protected by any judicial procedure, socio-economic rights of citizens will be added yet one more fundamental principle…

Draft № 4180 also extends the period of authority of the Verkovna Rada to five years. This norm is not fundamental, therefore it can clearly not serve as sufficient argument for interfering with constitutional integrity. The Draft also sets out radical demands with regard to the incompatibility of a deputy's mandate as parliamentarian with other forms of activity prohibited by the Constitution. In this way, non-compliance with demands concerning incompatible activities is made into grounds for swift, and in our opinion, excessively radical suspension of a deputy's powers.

Moreover, Draft № 4180 introduces a rule about removing parliamentary mandate from deputies in cases where «a State Deputy of Ukraine, elected from a political party (electoral bloc of political parties), does not belong to the deputies' faction of this political party (electoral bloc of political parties), or leaves (is expelled) from such a faction».

Since the Draft does not provide a comprehensive list of grounds on which a State deputy could be expelled from a faction, this means that the fate of a deputy becomes totally dependent on the policies and the will of the faction leadership (effectively, of the party hierarchy). It is clear that in real circumstances of time and place, this will almost totally stunt originality, and independence of political platform of State deputies, will introduce party control over their thinking, words and actions, and will – de facto – turn each of them into a voting robot. In our opinion, this demonstrates some kind of entirely unwarranted, primitive, in both the political and the judicial sense, and obscurantist «arithmetical» approach to parliamentary activity.

People (deputies, thus, being no exception) are complicated political creatures, for whom it is psychologically natural «to not agree». In their conclusions and their decisions, they can be guided not only by simple political calculation, «pluses» and «minuses» on scales of clear choice, but also by subtle intuition, certain brainwaves, political subconscious, etc. Yet, the Draft proposed by modernizers wants to know nothing about such aspects. One could even say that, when it comes to defining principles of party-deputy discipline and factional organization, the Draft uses as its principle some kind of vulgar determinism, school pupil obedience, subordination to the ideas of the worst form of collectivism.

We must, however, remind reformers that in modern parliaments of a European type it is precisely variety of thinking, polyphony of ideas that are valued, and not political monotheism from party pawns in their rows.

Really, what is the sense in such a case of having 450 State Deputies, alive and with thoughts and a mind? In fact, if they are all subject to absolute factional (party) discipline, then there is no real need to even have them in the hall for plenary sessions. Their function could be carried out perfectly well by party bosses (leaders of factions), who, according to the results of proportional elections would be issued the necessary number of plastic voting cards. One of the party leaders would have more cards, another less – in any case, live and «pluralistic» Deputies would be entirely superfluous here.

Another fundamental shortcoming of Draft № 4180 is, in our view, the placing of some ministers of the Cabinet of Ministers of Ukraine (in the sense of their appointment and actual subordination) under the President of Ukraine, and the rest – under the Verkhovna Rada and Prime Minister of Ukraine. As we have already mentioned elsewhere, this new system of appointments and subordination will result in a situation where the foreign and domestic policy of Ukraine are in completely separate hands.

Since the post of President of Ukraine according to Draft № 4180 remains not only representative, but genuinely influential regarding some specific executive functions (foreign policy, internal security and defence), in practice this could lead to a deformation in the executive vertical, and to non-constructive competition between the President and Prime Minister within the framework of one of the branches of state power.

If one considers that there is already competition between the roles of the speaker of parliament and that of the President, the logic of the constitutional reformers seems even less comprehensible. In simplest terms, competition between high-ranking posts which belong to different branches of the government is constitutionally justified and normal. However, it is impossible to understand the logic, either theoretically or in practice, for having competition between high-ranking state figures within one (in this case, executive) branch of the government, still less to support this.

The authors of the updated Draft № 4180 were clearly looking for a strategic compromise, but the way out they found has turned out to be a compromise of short-term tactics. As a result, a legal system, already criticized by the Venetian commission is again raised to the constitutional level. We believe strongly that such a solution and version of political reforms would make Ukraine less a parliamentary republic, than an unwieldy legal conglomerate, inconsistent in the constitutional sense with new European political formations.

The ominous fact that, according to the updated Draft № 4180, the President of Ukraine can dissolve parliament in three cases (each of which can be

the result of a broad range of reasons) is not consistent with the professed goal of transforming Ukraine from a presidential to a democratic republic. If the powers of the President of Ukraine as far as dissolving parliament is concerned are tripled in comparison with the present situation, then what kind of conscious «diminishment» of the President's status in favor of parliament can we speak of?

Although today the President is directly involved in forming the Cabinet of Ministers and appointing heads of local state administration, in practice ministers and heads of local state administration also depend to a great extent on the Prime Minister. Thus, having appointed some members of the Cabinet of Ministers and heads of local state administration, the President leaves the latter under the supervision of the head of the Cabinet of Ministers. Of course, if Ukrainian governors, rather than being appointed by the President, were elected by their constituents, it could prove sufficient reason for constitutional reform. However there is no talk of electing governors at present. The principle of direct dependence of governors on the President has remained unchanged according to the reforms.

As for the relationship between the President and the Verkhovna Rada of Ukraine, Draft № 4180 not only does not change this in favor of the Verkhovna Rada, but in fact leads to an even greater level of dependence of the parliament on the will of the President.

Therefore, if according to the reform the influence of the President within the framework of the executive branch of power is weakened, this should be considered a change in political tactics. If, in this, presidential control over the Ukrainian parliament is several times greater, then this should be understood as a change in political strategy. Moreover, such a change is not directed towards a parliamentary republic. Therefore, in actual fact, the reform does not make Ukraine less, but, on the contrary, more of a presidential republic.

The other changes are not, in our opinion, of fundamental importance. All of them clearly do not justify disrupting the integrity of the constitutional text and in that sense cannot be seen as positive.

As for the specific circumstances and political atmosphere around the introduction of constitution reforms, sandwiched between two rounds of presidential elections, they seem extremely inopportune, not to say absurd. Firstly, citizens of Ukraine on 31 October 2004 voted specifically for a President with the constitutional powers vested in him on that day. Secondly, the change in constitutional status of the President between two election rounds is a juggling of constitutional principles in the spirit of S. Gavrish[1] Speaking metaphorically, it is all as though somebody bought a cat at a market, and at home pulled a dog out of the sack.

[1] Gavrish was representative for Yanukovych at the Supreme Court. His statements are sometimes original, to say the least. (*translator's note*)

In the final analysis, the constitutional reform in its present version is supported not by leading political forces (even if we discard the «mass, yet insignificant» (according to S. Gavrish) abuses during the elections, the leader of the races is a tactical opponent of the reform), but by political outsiders – communists and socialists. This should make us wary. The moral right to change the Constitution of Ukraine can clearly not rest with those whose actions are not compatible with the logic of our progress.

Conclusions prepared by V. Rechitsky, specialist on Constitutional issues for the Kharkiv Human Rights Protection Group

TO UKRAINIAN SOCIETY

Friends!

From the very beginning of the «Orange Revolution» in Ukraine, in fact since immediately after the first round of presidential elections, many influential sources of the Russian mass media have not stopped claiming that there is a battle in your country between «pro-Russian» and «anti-Russian» factions, and have almost openly supported one of the sides of the civic conflict. A similar interpretation of the essence of events in Ukraine, albeit with an opposite assessment and different political sympathies, is presented to readers by a significant part of the western press.

We would like you to know that in Russia there are a lot of people who do not believe this. We are well aware that Ukrainian citizens – Ukrainians, Russians, Crimean Tatars, Byelorussians, Jews, Armenians, Greeks and others, regardless of their ethnic background, their native language, sense of cultural identity, place of residence, and even their political affiliations – have come out on the streets of Kyiv, Kharkiv and other cities not because they want to express «anti-Russian» sentiments. They have simply had enough of being treated not like citizens, but like cattle. They are outraged that self-seeking politicians have tried to manipulate them, and that the result of their expression of voters' will was flagrantly falsified. It is not a question of a battle for power between parties, blocs and individuals. The multicultural people of Ukraine have risen in defence of their civic and political rights, to defend their freedom and their right to choose their government. It is specifically this which constitutes the deeper meaning of the protest of Ukrainian people.

It is possible that those who determine Russia's official policy at the moment assume that Ukraine, torn apart by ethnic and cultural conflict, governed by a weak, corrupt, semi-authoritarian regime, forced to rely on external support, will be the most convenient neighbour for our country. We want you to know that there is another Russia.

That other Russia knows the truth.

That Russia which is interested in seeing Ukraine free, united and stable, striving, like itself, to return to Europe.

That Russia which understands that the defeat of democracy in Ukraine would be a harsh blow for Russian democracy.

That Russia which believes that the values of freedom and justice in our countries – some sooner, some later – will prevail.

We are with you.

The letter was initiated by the Russian Organization «Memorial» and signed by more than 100 human rights organizations, public figures and members of the arts in Russia.

17 November 2004

APPEAL TO THE SPEAKER OF THE VERKHOVNA RADA OF UKRAINE, VOLODYMYR MIKHAILOVICH LITVIN

Your Honour, Volodymyr Mikhailovich!

During the last session of the Civic Council under the direction of the Head of the Verkhovna Rada of Ukraine, the Executive Director of the Ukrainian Helsinki Human Rights Union Volodymyr Yavorsky presented a review of human rights violations during the 2004 election campaign. Events that have taken place since indicate a serious deterioration in the situation as regards the observance of human rights and fundamental freedoms.

We are seeing once again in Ukraine the persecution of free-thinking people and the use of law enforcement bodies as a weapon against political opposition. Of immense concern to human rights organisations in Ukraine are the mass detentions and arrests of activists from youth organizations, who peacefully distribute information materials, express in public their political convictions, and carry out their constitutional right to freedom of peaceful assembly. The enjoyment of these constitutional freedoms which are fundamental in a democratic state have been met with systematic repression from law enforcement agencies. Every day in Ukraine scores of people are detained, who have no involvement in any offences and suffer persecution purely for expressing views which are critical of executive power.

This assessment of the situation in Ukraine is shared by influential international human rights organizations. Confirmation of this can be seen in the statements of our partners in the International Helsinki Human Rights Federation. The most authoritative and famous human rights organization in the world, Amnesty International, in an official statement from 16 July laid emphasis on the fact that, for the first time since independence, Ukraine has prisoners of conscience. The organization has recognized as such six people convicted by the district court in Sumy to 10 days administrative arrest, for having demanded publication of the official protocol on the results of the voting at a polling

station, as stipulated in the law «On the Ukrainian Presidential elections». They were sentenced in a **closed** court hearing, without being allowed to see a lawyer, their parents or journalists.

Flagrant violations of the constitutional right to freedom and security of person are taking place in during these days in many regions of Ukraine.

One can only describe as the height of cynicism and disregard for the constitutional rights of citizens of Ukraine the mass detentions which took place on 16 November in various Ukrainian cities: Luhansk, Kherson, Mikolayiv and others. Students who had themselves come and given law enforcement officers orange roses, were held for between six and eight hours in district police stations.

Mass detentions of civic activists during visits to various regions of the presidential candidate and Prime Minister, Viktor Yanukovych, have become a routine part of the activity of law enforcement agencies. Before the first round of voting, on 18 and 19 October, during visits by Yanukovych to Chernihiv and Poltava, 17 people who were distributing printed matter with criticism of the Prime Minister of Ukraine were detained.

In the majority of cases, protocols of detention are not drawn up. The detained activists are advised to stay clear of politics. In some cases threats have been made that grounds will be found for bringing criminal charges. Thus, in Chernihiv, a detained activist of «Pora», Oleksandr Kovalenko was charged with dealing in counterfeit money. Others have been told that they will be charged with stealing mobile telephones, rape, possessing drugs for the purpose of selling them etc.

In most cases, thanks to active intervention by civic human rights organizations and the provision of legal aid when needed, all accusations presented by law enforcement agencies have been rejected by the court, and those held in detention released. However, the Ministry of Internal Affairs of Ukraine rather than stopping this, is actually making the practice of mass detentions of civic activists more widespread. The kinds of persecution are taking on ever more brutal and unlawful forms.

On 16 and 17 November, a wave of repressions against activists of «Pora» was seen in Kharkiv. On Engels Street, some unidentified individuals in civilian clothes, who produced no documents, detained with force activists of the «Pora» campaign, Ruslan German and Anton Vlasov, who had been handing out campaign material in support of presidential candidate, Viktor Yushchenko. The two were forced to get into separate cars. During the car journey, the young men had their passports taken away, and page 11 – the page with registration – ripped out. They were then taken to the Leninsky district police station where they were held about six hours, without any explanation being given or protocol being prepared. In addition, all information material was confiscated, the rea-

son given being that they were campaign materials. Following the intervention of lawyers from the Kharkiv headquarters of «Our Ukraine», the young men were released. They have lodged complaints about the unlawful actions of the Leninsky district police station to the office of the Prosecutor.

On the same day, at about 7 p.m., unidentified individuals in civilian clothes surrounded flat no. 3 on 175 Hirshman Street, which a «Pora» activist had in September rented and where «Pora» activists from Kyiv and Kyiv region were temporarily staying. Six solidly-built men began trying to force their way into the flat with threats, and demanding that those inside open the door. A little later, two police officers, a major and senior lieutenant came up. The «Pora» activists asked a representative of the Kharkiv Human Rights Group and journalists from the media group «Objective» to come. On the arrival of the representative of KHRG, the individuals in civilian clothes vanished. Major Markin, the deputy head of the criminal investigation unit of the Kyivsky district police station explained that he was on duty that evening in the district office, and that he had been asked to check who was living at that address and on what grounds, as the staff of the local housing office (ZhEK) were claiming that nobody had paid any communal charges for the flat for the last six months. We would suggest that this is a somewhat strange task for the criminal investigation unit. Viktor Kharchevskiy was persuaded to come out with his passport, the major, with journalists' video cameras on him, copied out the passport details of the activists, after which the police officers left.

However later, around 23.30, four men in civilian clothes again began threatening, trying to push the door in and demanding that they be let in. The young men barricaded the door. The thugs in civilian clothes stood guard outside the flat all night and morning. The «Pora» activists were only able to leave the flat at 12.00 on 17 November under the television cameras of journalists they had called. However, within one or two hours, Viktor Kharchevskiy and five other «Pora» activists from Kyiv were detained while distributing campaign material on the central square of the city. A protocol on an administrative offence was prepared and the young men spent the evening and night in the Dzherzhinsky district police station. Thanks to professional defence of their interests in the court by lawyers from KHRG, the court released the «Pora» activists, and the court hearing on the case has been postponed until 25 November.

All evening and half the night KHRG representatives tried to establish the whereabouts of two more young men from this group: Oleksandr Korol' and Oleksandr Nedashkovsky, who had gone out to distribute «Pora» leaflets and had not returned. In the Kyivsky district police station they claimed that the two had not been detained, the duty officer in the regional station also said that they had not been detained by either the Kyivsky district station or by any other district stations. However, at about 1.30 a.m. a person who did not identify himself telephoned and said that both Oleksandrs were in fact

being held at the Kyivsky district police station. In the evening of 18 November it was still not known what had happened to them, and only in the morning of 19 November, after repeated appeals from KHRG, did the law enforcement officers inform that Nedashkovski had been released, but that Korol' was being kept in detention, with nothing specific being said about the grounds for this detention.

On 16 November 2004, seven students of the Economics Faculty of Lviv National University, Yury Pshevolodsky, Ivanna Palivoda, Tetyana Artemonova, Ulyana Okolovych; Andriy Karas', Roman Vozny, Oleg Boriychuk, were detained in Vinnytsa, where they were staying in a private flat on Ivan Bohun Street.

All those detained are activists of the civic campaign «Pora». They had come to Vinnytsa in order to carry out campaigning work aimed at encouraging people to check that their names were on the voter lists before the second round of voting. Three of them (Roman Vozny, Oleg Boriychuk and Andriy Karas) were detained at night while painting graffiti on a wall on Kyivska Street in Vinnytsa, the other four were detained by an operations team of the Vinnytsa city police station at home. During the detention of the group of citizens at home, a search was made of the premises, during which after a third attempt, a police officer showed a small packet with a substance which looked like grass, and the people were detained on suspicion of «possessing drugs». They were taken to Leninsky and Zamostyansky district police stations. They were not charged with anything, nor were they taken to court, yet on the next day, 17 November, in the evening, all were put, on the basis of an order of the Prosecutor's office in Vinnytsa into the temporary isolation unit of the MIA of Ukraine in the Vinnytska region, where they were held unlawfully for several hours, despite the fact that each of them, when detained, had papers removed which established their identity, and detention in temporary isolation units of people with identification documents is categorically forbidden.

It was only thanks to the efforts of State Deputy V.V. Skomarovsky, lawyer V.V. Multyan, and the Vinnytsa Human Rights Group, that it was possible to have all those detained released late in the evening of 17 November.

We consider that the practice of mass and simultaneous short-term detentions of representatives of the opposition, lasting up to 72 hours (until the deadline for bringing charges) has nothing in common with the holding of free elections, that it is incompatible with democratic principles and must be stopped immediately.

The facts outlined above, in our opinion, provide convincing evidence that the actions of the law enforcement bodies of Ukraine bear all the hallmarks of political persecution of civic activists, are not based on the law, contravene provisions of the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

We would ask you to use the powers vested in you by the law, and also the authority of the highest legislative body of State power, to stop mass violations of the constitutional rights of people to freely express their views, to freedom and security of person and to freedom of movement.

Human rights organizations of Ukraine will continue to use all possible measures to counter repressive actions from bodies of executive power and to defend individuals who have become the victims of arbitrary detentions, arrest and other forms of political persecution carried out by law enforcement agencies.

Yevgeniy Zakharov
Head of the Board

STATEMENT OF THE KHARKIV HUMAN RIGHTS PROTECTION GROUP REGARDING POLITICAL EVENTS IN UKRAINE

(As of 23 November 2004)

In view of the unfolding political situation in Ukraine the Kharkiv Human Rights Protection Group (KHRG) considers it necessary to make the following statement.

We have reliable information about an unprecedented number of violations of electoral legislation in the Kharkiv region and other regions of the country during the second round of elections for President of Ukraine. We will be providing a detailed list and analysis of these violations in accordance with the Law later. However we are already in a position to state that in the vast majority of cases the violations were carried out by representatives of the regime's candidate.

The violations of electoral legislation were of an unashamedly open and cynical nature. They were accompanied by pressure on members of election commissions, independent observers, representatives of press and television. It is, regrettably, impossible to regards these violations as isolated or occasional. One has the impression that all of them had been planned out in advance as part of the regime's strategic plan to carry out mass falsification of the results of the presidential elections, and, effectively a constitutional coup.

We consider that during the second round of elections, technology was used which in substance and form were criminal acts which are directly covered by the Criminal Code of Ukraine. These violations can in no be way be reconciled with international legislation or European standards on human rights and democracy, set out in such documents as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the Document of the Copenhagen Council of the Conference on the Human Dimension of the CSCE, the Paris Charter for a New Europe (1990) and others.

We would draw attention to Article 3 of the Constitution of Ukraine which clearly states: «Human rights and freedoms and their guarantees deter-

mine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State».

It should also be remembered that, in accordance with the Constitution of Ukraine «The people are the bearers of sovereignty and the only source of power in Ukraine. The people exercise power directly and through bodies of state power and bodies of local self-government» (Article 5).

In this decisive moment for Ukraine's future we would also affirm that fundamental civil rights may also be protected by means of a democratic uprising which is an albeit extreme, but entirely legitimate element of world constitutional culture.

As is well-known, democratic uprisings are directly foreseen in Article 20 of the Constitution of German from 1949, which stipulates the right of German citizens to resist any attempts to encroach upon their democratic way of life, if no other means are available.

In Article 23 of the Constitution of the Czech Republic (1992), it is stipulated that citizens have the right to resist encroachments upon the democratic principles of human rights and fundamental freedoms, if the activity of constitutional bodies or the active use of legal norms have become possible in the country.

The legitimacy of democracy uprisings for the purpose of defending one's rights and freedoms is also stipulated in Article 120 of the Constitution of Greece (1975), Article 32 of the Constitution of Slovakia (1991), Article 54 of the Constitution of Estonia (1992) and in Article 3 of the Constitution of Lithuania (1992), etc.

The Kharkiv Human Rights Protection Group would once again stress that the highest value of constitutionalism and a society based on law is the political freedom of the people. It is precisely the freedom of the people's expression of their will which constitutes the main theme of the 1996 Constitution of Ukraine.

We declare our total support for those Ukrainian citizens gathered on Independence Square in Kyiv.

We have confidence that the leaders of the opposition will show wisdom and that the people will restore truth and freedom in the nearest future without bloodshed on either side.

We trust in the reasoned response of the Ukrainian parliament – the Verkhovna Rada – and would express the hope that in this vital moment for Ukraine it will find adequate legal measures to react ad hoc to the situation, and will be able to resolve the conflict through legislative means.

We hope also for an adequate and humane reaction to the events from the guarantor of the Ukrainian Constitution – the President of Ukraine.

We stress that the restriction on the right to freedom of movement of Ukrainian citizens, which is in these very movements being imposed around the capital of Ukraine – Kyiv – is illegal. Such a restriction can be applied only in a state of emergency which must be declared by Decree of the President of Ukraine, with notification sent to the UN, and which is only valid if confirmed by the Supreme Court of Ukraine.

We believe that the political freedom of the Ukrainian people will in the nearest future be restored by legal means and that truth will prevail.

Kharkiv Human Rights Protection Group
23 November 2004

STATEMENT OF THE KHARKIV HUMAN RIGHTS PROTECTION GROUP ON THE RESULTS OF THE SECOND ROUND OF VOTING IN THE PRESIDENTIAL ELECTIONS

GENERAL ASSESSMENT

Preliminary results of the voting on 21 November, announced thus far by the Central Election Commission (CEC), suggest widespread falsification of the election results in particular regions of Ukraine.

According to CEC information, on 31 October 27 897 559 votes were cast, in the second round on 21 November the figure was 30 511 289, that is, a further 2 613 730 votes were cast. We would assert that one of the sources for the increase in number of votes for presidential candidate Viktor Yanukovych was the use of these additional 2,6 million votes through flagrant and cynical abuse of electoral legislation. How did this happen?

Firstly, voter lists for the second round in some regions were compiled in violation of current law: the number of voters in the lists rose sharply which, in accordance with Part 1 of Article 80 of the Law «On the Ukrainian Presidential elections» can provide grounds for declaring the elections invalid. According to international observers from ENEMO (a European network of civic organizations which monitor elections) from Russia, Belarus' and Azerbaijan, voter lists in the Donetsk region increased inexplicably by 10% in comparison with the first round of voting. At the same time, the number of votes cast for Yanukovych in the Donetsk region increased by 1 million votes.

Secondly, in many regions a «plan» for ensuring participation in the second round of the elections was introduced in Territorial Election Committees (TEC). This was achieved in different ways. In the period between the first and second rounds, instances were recorded of people who had not voted in the first round being coerced into voting for Yanukovych. Unlawful actions were carried out such as mass rounds made of residences by unidentified individuals who did not belong to TEC, however had voter lists for the electoral district with names of those who had not voted on 31 October marked. These individuals tried any means to establish the reason why people had not voted (there is a video recording of this). Later administrative pressure was exerted upon those

who hadn't voted. For example, lecturers from Kharkiv Polytechnic University who had not come to vote to polling station №12 of the territorial electoral district №172 were accordingly summoned by the Dean for a 'brainwashing' session. On voting day members of the district election commission kept records of those who had not voted, and furthermore, telephoned electors, or passed their personal details to third parties, who in various ways forced them to come to the polling stations. This was particularly seen in polling stations set up in schools, where teachers visited the parents of their students, and hospitals where doctors appealed to their patients.

Such activities do not fall within the competence of Territorial Election Committees as defined in Article 27 of the Law, and are a direct violation of Article 5 of the Law.

Thirdly, cases where one and the same person voted several times using absentee ballots[1] was on a mass scale, as is confirmed by observers from all regions of the East, Centre and South of the country. This added hundreds of thousands of votes to the coffers of falsification and was an example of undisguised and cynical abuse of the law. The election results at these polling stations should therefore be annulled by the courts.

Coercion to vote for Yanukovych was also applied by putting pressure on students of different institutes and cadets from police colleges, who were forced to vote on the territory of the college under the supervision of the administration. Students from the Kharkiv Agricultural Academy have reported that they were told to take absentee ballot papers and vote on the territory of the Academy, while 300 cadets of the National University of the Ministry of Internal Affairs were simply taken to vote to Valki in the Kharkiv region.

A large number of violations were observed on voting day itself. There was an unprecedented number of votes cast outside polling stations, with numerous violations of the law (in some polling stations in Donetsk the number of votes cast not at polling stations stood at 20-30%, despite the fact that the number of applications to vote from home was much lower; it was precisely in these situations that voting papers for 'dead souls'[2] were added to the papers for people voting from home). At many polling stations official observers from Viktor Yushchenko's party were removed without any justification, particularly during the vote count. There were also the so called «carousels», when specially selected individuals voted for those on a list who could not vote, and finally for those who had not appeared.

[1] Absentee ballots are used if a person cannot vote at the polling station where they are officially registered. (*translator's note)*

[2] In Gogol's novel «Dead Souls», there was also profit to be made by people who were in fact dead, but not necessarily recorded as having died. In 2004, the records did in fact exist, but the analogy seems apt nonetheless. (*translator's note)*

There were cases of voting papers being added in bulk to the ballot boxes, and infringements of procedure for voting counting, etc. Then, when it became clear that even such vote rigging was insufficient, the protocols in Donbass were simply rewritten to ensure «victory».

The vote rigging at the polling stations where Viktor Yanukovych's victory was forecast was combined with open violence at the stations where Viktor Yushchenko's lead was «unplanned» in the first round. There were numerous attacks of sometimes armed unidentified individuals in civilian clothes on commissions and observers with the purpose of interfering with the vote itself or the subsequent vote count. In the Sumy region, a few people protecting voting papers were actually injured.

Against this background, the ban on taking video films and the mass refusals to allow representatives of the press to observe vote counts seem like trivial infringements.

The mass, systematic nature of the vote rigging proves that it had been planned in advance as part of the strategic plan of the State authorities to ensure the necessary percentage of votes for the presidential candidate, Viktor Yanukovych, to effectively achieve a constitutional coup d'etat.

In conclusion, we consider that during the second round of elections, technology was used which in substance and form were criminal acts which are directly covered by the Criminal Code of Ukraine. These violations can in no way be reconciled with international legislation or with European standards of law and democracy. Obviously, these actions of the regime evoked outrage in millions of people, who came out on to the streets of Kyiv, Lviv, Kharkiv, Sumy, Vinnytsa and many other cities in Ukraine.

The only legitimate solution to this crisis is a review of the election results at those polling stations and electoral districts, where significant or mass violations of the law were observed, and a judicial acknowledgement of the cases of vote rigging.

ON THE RESULTS OF THE SECOND ROUND OF VOTING IN THE KHARKIV REGION

According to figures from a parallel vote count based on the original protocols, at 11.00 on 22 November, 24.34% of voters in Kharkiv and Kharkiv region voted for Viktor Yushchenko (in Kharkiv – 28%), while Viktor Yanukovych received 69.89 % of the votes (in Kharkiv – 65%), with 4.1% supporting neither candidate. The number of actual voters had increased in the city by 10,5%, and in the region – by 6,5%. In our opinion, this is the result of flagrant violations of the Law on the elections, including coercion to vote, mass voting using absentee ballot papers, both in the city and in the region. In all, approximately 2,000 official reports have been compiled about violations of the Law.

For example, buses with license plates LAZ №6424 P7 and №7551 P1 were observed carrying cadets of the Air Force institute who voted in the Krasnokutsky district in the village Horodnye (polling station 101 Territorial Electoral District (TED) 183) and in other villages. Four buses in total with cadets from this institute travelled around the region. At polling station №26 and № 27 in the village Oleksiyivka fire fighter cadets arrived (by bus – an «Icarus» № 3431 XA) to vote using absentee ballots. The same students were also in the village Vodyane. In Zachepilivsky region, passengers of a dark-blue «Volkswagen» with licence plate 25393 XB voted with absentee ballots at several polling stations in the villages of Berdnyanka, Mazharov, and others. Military personnel voted with absentee ballots in the city of Lozov, at school №1, and in Kupyansk (polling stations 80 and 81). A white «Gazelle» №4367 with 19 passengers, and accompanied by a «Volga», №100-02-XF, drove around District по 184 where they voted at various polling stations. Employees of the regional State administration (regional departments of health, education, housing and municipal services, and others) left in five buses from the central city square to vote, possibly, in parts of the region. This movement was captured on video by a representative of the Human Rights Ombudsperson, Volodymyr Mukhin and State Deputy Kostyantin Sytnyk.

State Deputy Yaroslav Dzhordzik discovered that at polling station №168 TED №179 in the village Mospanovo of the Chuguyivsky region, in the morning 439 people had cast votes using absentee ballot papers (the voter list for this polling station has 1200 names in total). In the same village, a video was taken of a «carousel». In two cars with Russian number plates, ballot papers with Yanukovych's name marked were being handed out, and people were being paid 100 hryvnyas[1] for their blank ballot papers. The head of the polling station refused to let Mr Dzhordzik enter the polling station, claiming that his documentation was forged. Later, when Mr Dzhordzik returned to this village, a column of cars without number plates blocked his car; he was forced to get out of the car, his mobile was taken away and he was taken to polling station No. 168.

In Kharkiv, there were also buses and cars travelling from one polling station to another, with passengers using absentee ballots at each place. For example, students from the Road Transport Academy voted in the Institute of Medical Radiology (polling station №74 TED 172). In Territorial Electoral District No. 176 (Kominternivsky and Chervonozavodsky districts) a LAZ bus with Kharkiv number places went to polling stations No. 22, 24 and 26. The movement from polling station to polling station of a «Ford» №921 52 XK , as well as

[1] 100 hryvnyas = approximately 20 US dollars, this being a fairly large sum for a lot of people in Ukraine (*translator's note*)

well as a grey «Volga» with red numbers 1523 BK , were also recorded. The «Volga» drove from one polling station in the Dzerzhinky district to another taking four women who were seen to be holding 10-20 absentee ballot papers. They were observed, in particular, near polling stations № 72 and № 58. In the Frunzensky district a PAZ bus with number plate 215-09 XA was observed. Its 10 passengers voted at a minimum of three polling stations.

A large number of instances were recorded where pressure was exerted on observers from Yushchenko's party or even violence. For example, in Izyumsky district in TED №180 Andriy Propotylov, the deputy leader of the Izyumsky district headquarters of «Our Ukraine» was assaulted. Between the villages of Mikhailivka and Kapitolivka, a white car blocked his car, two unidentified individuals got out, smashed Andriy's car window and damaged his video recorder.

There were many violations connected with voting off site, not at the polling stations. In TED No. 183 (Valkovskiy district) voter lists for those voting from home were divided into several sheets, and cars were sent out all at the same time. No room was found in the cars for observers from Yushchenko's party: a police officer was accompanying the members of the commission, therefore, they said, an observer wasn't needed. Mass trips with ballot boxes and without observers from Yushchenko's party were observed in Velykobulsky and other parts of the region. Names had been added to the list of people voting from home, who had made no application for this facility, the applications being written already after the voting all in one person's handwriting (polling station №117 TED 182). At polling stations 73 and 85 of that electoral district, the commission members disappeared together with the ballot boxes and were not seen again. At polling station №3 TED 183 electors were not able to vote as some unknown individual had written, in their name, applications to vote from home.

At polling station No. 12 TED 181, 100 voters cast their votes in an open field. There are also a large number of recorded cases of people voting twice at different polling stations.

At some polling stations, representatives of law enforcement agencies and of local State administration interfered with the work of the Territorial Electoral Commissions. There were also some cases of campaigning on election day and the preparation of clean protocol sheets with the signatures of members of the district electoral commissions.

At the majority of polling stations in the city and region, press representatives (newspapers «Razom», «Skhid – Zakhid», «Privatna sprava», «Pravo znaty», the bulletin «Prava Ludyny»[1], etc) were not allowed to use video

[1] The newspaper titles mean, in the same order as above: «Together», «East – West», «Private matter», «The Right to know» and the bulletin «Human Rights» (*translator's note*)

cameras nor to be present while the votes were being counted. The Territorial Electoral Commission of TED no. 171 (Dzerzhinsky district) even passed a special order regarding this question on 21 November, in which it stipulated that only journalists whose accreditation documents have a photograph on them would be allowed access. This was an unjustified limitation to the provision of the Law which gives «representatives of means of mass information (not more than two from any one media outlet)» the right to be present at sessions of the election commissions and at polling stations.

25 November 2004

Information was taken from Media-Group «Objective», Television News Agency, the Kharkiv Section of the Committee of Voters of Ukraine, the Kharkiv regional headquarters of Viktor Yushchenko, and the Kharkiv Human Rights Group.

THE STATE AUTHORITIES DID EVERYTHING TO FALSIFY THE ELECTION RESULTS

STATEMENT FROM THE UKRAINIAN HELSINKI HUMAN RIGHTS UNION

The Ukrainian Helsinki Human Rights Union, in cooperation with affiliated organizations, carried out continuous monitoring of the observance of human rights during the election campaign of 2004. We recorded flagrant violations of human rights, as well as of electoral legislation, both as regards the scale of the violations, and their consequences. The elections took place in an atmosphere of pressure on voters from the State authorities. The practice again appeared in the country of political persecution of civic activists, and for the first time since independence, international organizations announced that there were prisoners of conscience in Ukraine.

Under such circumstances, the elections which have just taken place in Ukraine cannot be considered free, honest, or transparent.

On the day of the second round of voting for the President of Ukraine, 21 November 2004, there were major violations of citizens' electoral rights.

During the second round, misuse of power and obstruction of citizens' expression of their will, were seen on a mass scale in the use of absentee ballot papers. In Western regions of Ukraine, state executive bodies and heads of state enterprises forced their employees to take absentee ballots from district electoral commissions (these being given usually where a voter will be away from his place of permanent residence on the day of the elections) and give them to their bosses. Such cases have been officially established, including through court procedure. For example, employees of the Mikolayivsk inter-regional State Tax Administration of the Lviv region lodged a complaint with the local court about the actions of their boss. The actions of the Head of the Tax Administration were declared illegal.

There were hundreds of similar complaints addressed to electoral commissions, law enforcement agencies, election campaign headquarters of the candidates and the mass media. In the majority of cases they did not receive proper legal assessment, and those responsible were not held legally responsible as allowed for by legislation.

In many regions of Ukraine, in particular in Kherson and Sumy regions, as well as in the Autonomous Republic of the Crimea, cases were established of absentee ballots having been used by one and the same people at different polling stations.

For example, a resident of the Crimea, Anatoly Shaidur received several absent ballot papers from the District Electoral Commission №60 of TED №10. He used ballot paper №057417 to vote at polling station №66 and ballot paper № 057402 when voting at polling station №67. He was also on the voter list according to his place of residence and voted at polling station №63.

In Severodonetsk a group of students were discovered who, having voted with absentee ballots at polling station №33 TED 113, went on to do the same at polling station № 30 TED 113. The complaint made about this to the Territorial Electoral Commission was, without any grounds being given, not given consideration – the commission refused to include the complaint in its agenda.

This multiple voting was on a mass scale in southern and eastern regions of Ukraine, it being this which significantly increased the percentage for voter turnout.

Human Rights organizations carrying out monitoring regularly received information that the district electoral commissions had been «provided» by the State authorities with a «plan» for ensuring participation in the elections of not less than 90% of voters in Luhansk and Donetsk regions, and that the plan was being «implemented» by the commissions with glaring infringements of legislation. During the voting, cases were recorded where members of the commissions, and other individuals who had, in breach of the law, been given voter lists at polling stations in the Autonomous Republic of the Crimea, and in the Luhansk and Donetsk regions, telephoned people who had not yet voted, trying to persuade them to come to the polling station. Such widespread actions by district electoral commissions (DEC) exceed the authority vested in DEC by Article 27 of the Law «On the Ukrainian Presidential elections» and directly violate the requirements of Article 5 of the Law, which forbids any coercion of electors to vote. Moreover, at polling stations (or near them) there were representatives of state executive bodies, state enterprises and institutions, who noted down whether or not their employees appeared to vote.

In Luhansk, Mikolayivsk and Donetsk regions, in the Autonomous Republic of the Crimea and in the city of Sevastopol, names were included on voter lists based on place of residence not only of people who could not come to the polling station due to their state of health, but also of other individuals.

District electoral commissions behaved in such a fashion because of strong pressure imposed upon them by representatives of State power to increase voter turnout.

Cases where the work of observers and representatives of the mass media was hindered by electoral commissions were recorded in the Sumy, Luhansk and

Donetsk regions. There were particularly negative reactions to journalists and observers who took video footage of the electoral process on voting day. For example, an activist of a local human rights organization and journalist from the paper «Third Sector» in the Luhansk region, Oleksiy Svyetikov, was beaten up by unidentified individuals on the way out of polling station №27 TED 113. His video recorder was taken away together with a cassette of video material taken at the polling station.

We insist that all information concerning the use of violence against people who took part in the election process be immediately investigated by the law enforcement agencies and that those responsible face criminal charges. Similarly, all those who impeded citizens' free expression of their will should be held fully liable in accordance with the law.

We have to state that State executive bodies in Ukraine took an active part in the election process, using various illegal means to hinder representatives of the political opposition from carrying out their election campaign, and, in breach of the law, giving support to the State candidate. It was specifically the local State authorities which carried out the main work in favor of the candidate for President of Ukraine Viktor Yanukovych.

The entire election process and all its stages, in particular, the formation of electoral committees, the running of the pre-election campaign, the counting of votes, the preparation of the reports on the results of the voting, were, in violation of the law, entirely controlled by state executive bodies, both in the centre and in the regions.

The results of our monitoring in many regions of Ukraine, especially in the Luhansk region and in the Autonomous Republic of the Crimea suggest an excessively large number of violations of electoral legislation which had a significant influence on the results of the voting.

Law enforcement agencies of Ukraine were unable to ensure the safety of voters, this being confirmed by the number of violent incidents against voters, and observers in the Sumy, Cherkasy and Luhansk regions. Of particular concern are the reports of persecution of people who took part in the elections in support of the political opposition in the Luhansk and Donetsk regions.

We consider that in such circumstances the Central Election Commission must not only carry out a count of the number of votes cast for each candidate in accordance with the electoral commissions' protocols, but also take into account the circumstances under which the process of voting and the vote count took place at polling stations.

The Resolution of the Central Election Commission on the results of the elections for President of Ukraine, declared on 24 November 2004, suggests that, instead of having an objective and impartial attitude to all participants in the election process, and thoroughly studying all circumstances which could lead to a distorted result of the expression of voters' will, this body has not fulfilled its

main function as the organizer of the election process in Ukraine, but has rather served the function of legitimizing the will of those people who represent the State authorities in Ukraine.

The project of video monitoring over the observance of human rights during the presidential elections in Ukraine was carried out by the Chernihiv Civic Committee for Human Rights Protection with the financial support of the International «Renaissance» Foundation.

Participants in the Project

1. The Vinnytsa Human Rights Group

2. The Civic Committee for the Protection of Constitutional Rights and Civil Liberties (Luhansk)

3. The Luhansk Regional Branch of the Committee of Voters of Ukraine

4. The Institute of Socio-Economic Issues «Respublica» (Kyiv)

5. The Sevastopol Human Rights Group

6. The Institute for the Implementation of Innovations (Zhytomir)

7. The Institute for Social Research (Simferopol)

8. The Kharkiv Human Rights Protection Group

9. The Kherson City Association of Journalists «South»

10. The Kherson regional organization of the Committee of Voters of Ukraine

11. The Centre for Research into Regional Policy (Sumy)

12. The Chernihiv Civic Committee for the Protection of Human Rights

13. Sumy Committee for the Protection of Human Rights

14. The Christian National Union of the Transcarpathian Region (Uzhhorod)

A CONSTITUTIONAL AND LEGAL ANALYSIS OF THE POLITICAL SITUATION IN UKRAINE

(As of 25 November 2004)

We, the undersigned, being qualified specialists in the field of Ukrainian Constitutional Law and in other fields of law, hereby state that our constitutional and legal analysis of the political situation in Ukraine as it has developed as a result of the regular presidential elections in 2004 and the announcement of the official results of these, suggest the following:

1. The majority of stages of the election process were accompanied by grave violations and blatant disregard for fundamental constitutional principles of implementing election law, as set out in Article 71 of the Constitution of Ukraine, and principles of election law, set out in Articles 1,2,3,5,6,8,11 and 13 of the Law of Ukraine «On the Ukrainian Presidential elections».

First, at the stage of compiling voter lists a large number of mistakes were made in writing people's last names, first names, their patronymic or date of birth. A lot of names of people who live and are legally registered in a given Territorial Electoral District (TED) were left off the voter lists, while, on the other hand, there were people on the lists who had died or left the territory of the particular TED. As a result of this, tens of thousands of Ukrainian citizens who were entitled to vote, could not carry out their constitutional right to freely vote for President of Ukraine. The extraordinarily high instance of such mistakes in comparison with previous regular Presidential elections, and with the last regular elections of State Deputies of Ukraine, at which similar cases occurred extremely rarely, are convincing proof that we have here a flagrant violation of the fundamental principle of the election process – the universal right to vote.

Secondly, at the pre-election campaign stage there was open disregard for the following: the constitutional principles of equal electoral rights and free elections, set out in Article 71 of the Constitution of Ukraine, and in Articles 3 and 6 of the Law of Ukraine «On the Ukrainian Presidential elections»; the principles of legality and the prohibition on unlawful intrusion by anybody into the election process; public access and openness of the election process; the equality of all Presidential candidates; freedom of election campaigning; equal opportunities for access of Presidential candidates to the mass media; imparti-

ality as far as the candidates are concerned of State executive bodies, bodies of local self-government, enterprises, institutes and organizations, their managerial staff and other officials as set out in Article 11 of the Law of Ukraine «On the Ukrainian Presidential elections»

This is clearly demonstrated by mass violations on the part of all national audiovisual means of mass media of basic principles governing activity in the field of information: the guarantee of the right to information; openness, accessibility of information and freedom to share information; objectivity, reliability of information; fullness and accuracy of information, which are set out in Article 5 of the Law of Ukraine «On Information».

The Presidential candidate opposing the regime's candidate found himself in a virtual State information blockade, since not only was he not given the opportunity through national television channels of communicating to the electors the main points of his pre-election campaign, but he was also deprived of the right to openly refute false information which was being spread about him by this or that national audio or visual media outlet.

Furthermore, during the election process court decisions were not carried out which obliged the relevant television channels to provide the Presidential candidate with live broadcast time in which to refute false and openly offensive information being spread about him. At the same time the other Presidential candidate representing the regime enjoyed favorable conditions in all national and regional sources of the mass media. As a result of this, voters were not ensured conditions for the free formation of their future expression of will.

In addition, despite direct legislative prohibition, the vast majority of managerial staff and other officials of central and local bodies of executive power, as well as managers of enterprises and institutions partially owned by the State, took active part in the election campaign on the side of one of the Presidential candidates, this openly violating the principle of impartiality as regards Presidential candidates of State executive bodies, bodies of local self-government, enterprises, institutions and organizations, their managers and other officials.

Thirdly, during the actual voting, there were mass violations of the principles of voluntary participation of citizens in the elections, voting for oneself, and the confidentiality of the ballot box. This is most evident from the cases of mass voting by groups of individuals using absentee ballots, which effectively distorted the relevant norm of the law of Ukraine «On the Ukrainian Presidential elections». We consider that voting with the use of absentee ballots by organized groups of voters demonstrates an open abuse of the law. The prearranged movement of large numbers of voters was not dictated by an objective need for these people to leave their normal place of residence on voting day, but by the will of the organizers of this movement. We therefore consider that the given right was used not for the purpose of ensuring subjective voting right, but as a method of exerting influence on the free expression of will of the given

groups of voters, and as a consequence, for the purpose of distorting the real will of citizens at the elections.

Furthermore, evidence of mass violations of the principles of free elections, of the confidentiality of direct voting, of the public nature and openness of the election process can be seen in the cases of arbitrary and illegal cancellation of the right of press representatives, official observers from one of the Presidential candidates and official observers from international organizations to be present at polling stations while the voting was taking place or during the vote count. The relevant documentary proof is held by official observers from the Kharkiv region and by the Kharkiv Human Rights Protection Group.

2. In accordance with the Law of Ukraine «On the Ukrainian Presidential elections», it is directly forbidden to carry out campaigning activity by means of offering voters money or goods, services, work etc free of charge or at a specially reduced rate. Despite this, one of the Presidential candidates, presently holding the post of Prime Minister of Ukraine, used as one form of pre-election campaigning an increase at the expense of the State in social monetary payments – pensions, student grants, individual social security assistance, etc. It was precisely this step, as a strong point of the election program of the Presidential candidate, that formed the main focus of attention of the managers of the election campaign of the current Prime Minister of Ukraine.

We believe, that. while such activities are not directly prohibited by the Constitution of Ukraine or the Law of Ukraine «On the Ukrainian Presidential elections», they undoubtedly run counter to the spirit of the Law and to international standards of free and democratic elections, since they flagrantly violate the principles of free elections and of equal voting rights. Moreover, the payments made had not been allowed for in the law of Ukraine «On the State budget for 2004», and therefore the decision of the Cabinet of Ministers of Ukraine was based on political considerations. No Presidential candidate may use national revenue in order to carry out his own election campaign.

3. In accordance with universally recognized international standards of democracy, the essence of democracy lies specifically in the absolute adherence to the demands of legal procedure. Democracy is the total certainty of procedure with lack of predictability of results. Therefore the mass violations of democratic principles during the preparation for and running of the elections for President of Ukraine in 2004 render the results almost entirely devoid of any legal meaning. In the simplest terms, elections with significant violations of the requirements of legal procedure can quite simply not be considered elections at all.

In view of the above, we consider that the mass violations of the fundamental principles of the election process during the Ukrainian Presidential elections make it impossible to establish the real will of the citizens of Ukraine, which in turn violates Article 5 of the Constitution of Ukraine, according to which: «The people are the bearers of sovereignty and the only source of power in Ukraine.»,

as well as Article 3 of the Constitution of Ukraine, which states: «Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State.»

We therefore believe that the Supreme Court of Ukraine have all legal grounds for declaring the decision of the Central Election Commission of Ukraine to validate the results of the second round of voting to be illegal and to annul the decision, obliging the CEC when making a new decision in accordance with the law of Ukraine «On the Central Election Commission» as well as with the Law of Ukraine «On the Ukrainian Presidential elections» to declare null and void the results of voting at those polling stations around Ukraine where mass violations of fundamental principles of electoral law were recorded.

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LEGAL MECHANISMS AND STAGES FOR RESOLVING POLITICAL CRISIS

A systemic political crisis has arisen in Ukraine, caused by a whole range of factors. It has been conditioned by mass violations of civil rights and Ukrainian electoral legislation, and is a predictable consequence of attempts to artificially create a system of «manually controlled, regulated and manipulated puppet democracy», the result of «dirty» election technology, lies, falsification, manipulation of public opinion and consciousness, numerous myths which have become an everyday feature of our lives. The root cause of the crisis was the total inaction and helplessness of the head of the State, of the Cabinet of Ministers of Ukraine, of the entire system of State executive power, of law enforcement agencies and offices of the Prosecutor.

During the period prior to Ukraine's Presidential elections and on the day of the elections, a significant part of the State executive and its officials allowed themselves to be drawn into election campaigning despite this being in breach of the law. Article 64 of the Law of Ukraine «On the Ukrainian Presidential elections» expressly prohibits «State executive bodies and bodies of local self-government, their officials and functionaries» from taking part in election campaigning (Paragraph 2 of Part 1). However not only did officials at various levels quite often engage in various types of campaigning activities themselves, but they also involved their subordinates in the preparation, organization and running of these activities, using for this purpose transport, property and material which belonged to State enterprises, institutions or organizations (in this way forcing their subordinates to make improper use of State revenue, as well as of revenue which should have been used for the development of their respective enterprise, institution or organization. Moreover, officials carried out campaigning activity among their subordinates (also in violation of the law) which often took on the form of psychological pressure or was close to it. From a legal point of view, for the director of an institution or separate department of such to express an opinion to his or her employees (colleagues, etc) as to preference for one particular candidate as being the more attractive (worthy, balanced, promising, etc) choice can already be considered a certain degree of psychological pressure. In such a case, a situation arises

which does not contribute to the free exchange of views within the work collective as to the candidates, and where there can be grounds for assuming that holding a different point of view from the boss could annoy the latter and have negative consequences in future on one's level of salary, conditions of work, career possibilities, or even, in the final analysis, on whether one keeps one's job.

Open interference by many officials of various ranks and levels in the election process, blatant disregard by officials of the principles of election legislation, the improper carrying out by many State bodies of their functions (most particularly the offices of the Prosecutor and law enforcement bodies) make a shameful farce of the idea of free elections. It is a telling fact that only 75 State Deputies of Ukraine (of 433 present) voted on 27 November 2004 for a proposal to declare the elections lawful and democratic. This means that less than 17 percent of parliamentarians consider these elections to have been free and honest, and that a full and accurate expression of the will of the people was established. The percentage of «blind optimists» among voters is doubtless even lower.

The Central Election Commission, Territorial and District Electoral Commissions, did not ensure that election legislation was adhered to by all parties in the election process. The Central Election Commission in general failed to carry out its functional role and effectively removed itself from carrying out any supervision of adherence to election legislation. Quite often it did not notice (or chose not to notice) violations which the whole country was observing. The Central Election Commission took a suspiciously long time to count the votes after the round of voting on 31 October, and an even more suspiciously short time to produce the results of the second round, in its excessive haste again not noticing violations or events that were occurring, and demonstrating their lack of consistency, impartiality and objectivity. . By so doing, the Central Election Commission discredited not only the whole principle of free elections, but also itself.

The Cabinet of Ministers of Ukraine, the heads of many central executive bodies, the heads of regional and district offices of State administrations, the offices of the Prosecutor as well as law enforcement agencies did not attempt to stop the innumerable violations of election legislation and thereby discredited themselves in the eyes of the nation. As a result of such inactivity and bias from officials, an atmosphere of fear in society again appeared, and in our day, just as many years ago, on the eve of the elections a thoroughly undemocratic situation developed (which electors should not have to experience) where almost 45 percent of our fellow citizens were not only hesitant, but actually afraid to express their point of view as regards the Presidential candidate they were going to vote for. This fear remained after the elections

of 31 October, and after the second round of voting. There are a number of people who even now feel compelled to conceal their political preferences. This is explained, on the one hand, by the low political culture of ordinary citizens, and by the atmosphere which has developed in many work collectives (we have in mind a situation where other employees, colleagues, members of the same group not only do not respect another person's point of view, but actually criticize those who do not vote for 'their' candidate, or even insult or denigrate those who «go against the will of the collective», «step out of line»). On the other hand, voters are sometimes forced to conceal their attitude to a candidate in the awareness that this may annoy the head of the workshop, brigade, section, department, management of the enterprise, etc. Such an unfriendly, intolerant and, therefore, undemocratic political atmosphere is oppressive for voters, denigrates their dignity and has nothing in common with democracy and free elections as understood in the contemporary world. A lot of voters were forced to vote against their own convictions and preferences because they feared that it would become known who they had voted for (such fears were exacerbated by rumors about «hidden video cameras», the possibility of comparing ballot papers with verification slips and thus being able to identify voters, etc).

The vast majority of state executive bodies and officials, beginning with the head of the State and ending with the district police officers, who during a time of heightened political crisis «forgot» to carry out their functions and to use their authority, showed total helplessness, inertia, inaction and lack of integrity.

Ukraine is not facing political crisis for the first time. We can give several examples. In the Autumn of 1990 mass protests by students forced the government to resign. On 23 October 1990 the Supreme Soviet of the Ukrainian Soviet Socialist Republic decided to «meet the request of Comrade Vitaly Andriyevych Masol and relieve him of his duties as Head of the Council of Ministers of the Ukrainian SSR»

In 1992, the Verkhovna Rada of Ukraine, having acknowledged their own inability and helplessness, vested in the Cabinet of Ministers of Ukraine the right to issue decrees which would have legal force. For six months the Cabinet of Ministers of Ukraine hurriedly «produced» decrees, many of which remain current to the present day. In Summer 1993, immediately after the end of the «decree period», there was a wave of powerful, mass miners' strikes. To find a way out of the deep political crisis «considering the socio-political situation which had arisen in Donbass and other regions of Ukraine», the Verkhovna Rada on 17 June 1993 actually called a nationwide referendum for 26 September 1993 «as a vote of confidence (or no confidence) in the President of Ukraine and the Verkhovna Rada». However soon, after political consultations, the

President and the Verkhovna Rada agreed to hold early parliamentary and presidential elections, and the referendum became redundant. In this they managed, first of all, to still the heightened strike sentiments and emotions, and secondly, to extend the term of their authority (the Verkhovna Rada for 6 months, and the President of Ukraine for almost a year, so that the newly elected President of Ukraine assumed office on 19 July 1994.).

The present political crisis in Ukraine is the most serious and large-scale since independence. There can be no doubt that, thanks to the mass actions of civic disobedience, which began on 22 November of Independence Square and spread over a large area of Ukraine, our society has radically changed. The shift in public awareness brought about by these actions need the separate attention of sociologists, political scientists, philosophers and other researchers.

Together with this, it is worth pointing out some direct adverse effects of the political crisis, first of all for the budget. It is well-established that during the run up to the elections, and the elections of 2004 themselves, massive funds both from the State budget and non-budget sources were wasted, effectively «poured down the plughole». Under these circumstances, in any modern civilized country the government, as well as high-ranking officials, would have resigned, acknowledging their culpability for having brought the country to a state of being ungoverned and having squandered taxpayers' money. However, if they lack the conscience or awareness of their own responsibility for these events, then the Head of the State and Parliament must take this step. Their inability to govern the country is demonstrated further by the fact that Parliament reacted to the numerous violations of citizens' voting rights and the attempts to falsify the results of the elections only when forced to by the acts of civic disobedience, and then only on the sixth day after they had begun, with the Council of National Security and Defence of Ukraine reacting only on the seventh day.

However the time for political manipulations, political games and attempts to «outdo» one's political opponents has passed.

Therefore, in order to resolve Ukraine's deep political crisis, the President of Ukraine should dismiss the entire government, the Central Election Commission, the General Prosecutor, the Minister of Internal Affairs, the heads of particular regional and district administrations, and appoint acting officials to fulfill the above-mentioned roles, with a list of these people being agreed during the process of political negotiations. Incidentally, it is surely Leonid Kuchma, who should have the greatest objective interest in these steps, since it is only by such measures that he can hope to restore his authority as Head of the State, and hope that his previous miscalculations and mistakes may be forgiven. His fellow citizens will be able to forget particularly about these (mistakes and miscalculations) for a time, and be grateful to him for resolving the crisis. In the eyes

of the international community he will also be seen as a politician who stilled passions by peaceful means and was able to bring a great (in the first instance, in terms of size) central European country from the brink without bloodshed.

The second stage in resolving the crisis must be the formation of new territorial and district electoral commissions, and also the implementation of a range of measures which will make a repetition of mass, systematic and flagrant violations of election legislation and the distortion of the will of the voters impossible during a re-run of the elections. The third stage should be the re-run to be held on 19 December 2004.

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27 November 2004

A CONSTITUTIONAL AND LEGAL ANALYSIS OF PARAGRAPH 7 OF THE RESOLUTION OF THE VERKHOVNA RADA OF UKRAINE «ON THE STABILIZATION OF THE POLITICAL AND SOCIO-ECONOMIC SITUATION IN UKRAINE AND PREVENTION OF ANTI-CONSTITUTIONAL ACTIONS AND SEPARATIST MOVES, PLACING IN JEOPARDY THE SOVEREIGNTY AND TERRITORIAL INTEGRITY OF UKRAINE» OF 1 DECEMBER 2004

In connection with the decision taken by the Verkhovna Rada of Ukraine with regard to the adoption of a resolution of no confidence in the Cabinet of Ministers of Ukraine and with the statement by the Prime Minister of Ukraine that he does not recognize this decision, since he considers that it does not comply with the demands of the Constitution of Ukraine, we, being specialists in the field of Ukrainian constitutional law, have carried out an unbiased constitutional and legal analysis of the Resolution of the Verkhovna Rada of Ukraine and have reached the following conclusions:

1. In accordance with Part 2 of Article 113 of the Constitution of Ukraine «The Cabinet of Ministers of Ukraine is responsible to the President of Ukraine and is under the control of and accountable to the Verkhovna Rada of Ukraine within the limits envisaged in Articles 85 and 87 of the Constitution of Ukraine». This constitutional provision means that Parliament is empowered to exercise control over the activity of the government. This control can take the following forms: hearing the report on the course of the implementation by the Cabinet of Ministers of the State Budget of Ukraine (Paragraph 4 of Part 1 of Article 85 of the Constitution of Ukraine), discussion of the results of the consideration by the government of a State Deputy's inquiry to the Cabinet of Ministers of Ukraine (in accordance with Article 86 of the Constitution), the holding of parliamentary hearings in order to examine the state of implementation by the Cabinet of Ministers of Ukraine of the Constitution of Ukraine, laws of Ukraine, resolutions of the Verkhovna Rada of Ukraine (Paragraph 1 of the Regulations on holding parliamentary hearings in the Verkhovna Rada of Ukraine from 11 December 2003), the holding of hearings in the committees of the Verkhovna Rada of Ukraine (Regulations on holding hearings in the committees of the Verkhovna Rada of Ukraine from 11 December 2003) etc.

Depending on the results of parliamentary supervision over the activity of the Cabinet of Ministers of Ukraine, Parliament has the right to take various decisions, including, in accordance with Part 1 of Article 87 of the Constitution of Ukraine, the constitutional right to adopt a resolution of no confidence in the Cabinet of Ministers of Ukraine, which, in accordance with Part 4 of Article 115 of the Constitution of Ukraine, «results in the resignation of the Cabinet of Ministers of Ukraine».

That is, Parliament has the constitutional right to dismiss the government. This right constitutes one of the main elements of the system of «restraints and counterbalances», which is designed to ensure the effective functioning of the mechanism of implementing State power in a modern democratic country, to make it impossible for one branch of power to dominate another, to not allow usurpation of power and to ensure mutual control between the various branches of State power.

At the same time, in order to ensure stability of the activity of the government, the Constitution of Ukraine does not permit the Verkhovna Rada of Ukraine to consider the issue of responsibility of the government «within one year after the approval of the Program of Activity of the Cabinet of Ministers of Ukraine « (Part 2 of Article 87 of the Constitution of Ukraine). However a comparison of the provisions of Parts 1 and 2 of Article 87 of the Constitution of Ukraine and an analysis of their content make it possible to conclude that the Program of activity of the Cabinet of Ministers of Ukraine, which should give the strategic direction and priorities for the development of the State in the coming years can only be confirmed once during the entire period of its functioning, since, firstly, the State Budget of Ukraine serves as an annual program of the activities of the government, and, secondly, in any case, the annual adoption of a new Program of Activity would make it impossible for parliament to bring a resolution of no confidence in the Cabinet of Ministers of Ukraine, would effectively lead to a 'blocking' of the force of the Constitution of Ukraine in this area and would deprive the Verkhovna Rada of Ukraine of such an important form of parliamentary control.

2. Moreover, in accordance with the Temporary Regulations regarding the Cabinet of Ministers of Ukraine, confirmed by the Resolution of the Cabinet of Ministers of Ukraine from 5 June 2000 № 915 «The planning of the work of the Cabinet of Ministers of Ukraine is carried on the basis of suggestions from central and local bodies of executive power by means of a Program of activity of the Cabinet of Ministers of Ukraine for the period of its authority, of an annual State program for the economic and social development of Ukraine, of other State programs and legislative acts the Cabinet of Ministers of Ukraine. (Paragraph 1 of Section 2 of the Temporary Regulations regarding the Cabinet of Ministers of Ukraine).

Despite the fact that the period of authority of the Cabinet of Ministers of Ukraine is not actually defined in the Constitution of Ukraine, it directly follows from a whole series of constitutional norms. In particular, in accordance with Paragraphs 9 and 10 of Article 106 and Parts 2 and 3 of Article 114 of the Constitution of Ukraine, the President of Ukraine appoints the Prime Minister of Ukraine with the consent of the Verkhovna Rada of Ukraine, and then appoints, on the submission of the Prime Minister of Ukraine, members of the Cabinet of Ministers of Ukraine. In accordance with Part 1 of Article 115 of the Constitution of Ukraine « The Cabinet of Ministers of Ukraine tenders its resignation to the newly-elected President of Ukraine. «An analysis of these provisions of the Constitution of Ukraine demonstrate that, according to the Constitution of Ukraine, the period of authority of the Cabinet of Ministers of Ukraine is the term of office of the President of Ukraine, for the duration of which term the Cabinet of Ministers is formed.

The term of office of the President of Ukraine is directly stated in Part 1 of Article 103 of the Constitution of Ukraine as being five years. Thus, the term of authority of the Cabinet of Ministers of Ukraine, on condition that its authority is not suspended soon in accordance with the Constitution of Ukraine, is also for a period of five years.

In this way, on the basis of an analysis of the above-mentioned norms of the Constitution of Ukraine, as well as of the Resolution of the Cabinet of Ministers of Ukraine from 5 June 2000 № 915, one may conclude that the Program of Activity of the Cabinet of Ministers of Ukraine, is to be adopted once for the entire duration of the Cabinet's authority. This does not exclude the possibility of introducing certain clarification, amendments or addenda, however their introduction cannot be interpreted as the adoption of a new Program of Activity of the government.

3. A comparative legal analysis of the content of the Program of Activity of the Cabinet of Ministers of Ukraine «Openness, effectiveness, Achieving Results» approved by the Verkhovna Rada of Ukraine on 17 April 2003, and the Program of Activity of the Cabinet of Ministers of Ukraine «Consistency, Effectiveness, Responsibility», approved by the Verkhovna Rada of Ukraine on 16 March 2004 shows that in their structure, the names of the structural parts, as well as in their content, these are practically one and the same Program of Activity of the Government, with only some clarifying points and addenda, which in their entirety do not change the strategic direction of the work of the Cabinet of Ministers. There is an indication of this in the actual Program: «Consistency, Effectiveness, Responsibility»: «...In the Program the main goals and tasks involved with forming a socially effective, politically responsible power structure and the institutes of civic society…» etc are specified. Therefore, the approval by the Verkhovna Rada on 16 March 2004 of the effectively refined

Program of Activity of the Cabinet of Ministers of Ukraine does not deprive the Verkhovna Rada of the right to adopt a resolution of no confidence in the Cabinet of Ministers of Ukraine even without first annulling its Resolution on its approval.

In addition, an analysis of the goals and the content of the last Program of Activity of the Cabinet of Ministers of Ukraine given the latest events in the political, social and economic life of Ukraine show that the government has not only failed to ensure their fulfillment, but has been playing a waiting game, and as a result, has on numerous occasions demonstrated its total incapacity.

4. However the most cogent argument in favor of recognizing the Resolution of the Verkhovna Rada on the dismissal of the government as fully complying with the Constitution of Ukraine is that, in conditions of deep political crisis, when the government has failed to take appropriate measures to ensure the human rights and freedoms of citizens in the process of preparing and holding the 2004 Presidential elections and has permitted significant squandering of State revenue (and having spent huge amounts of taxpayers' money, it still could not succeed in establishing the will of the voters), it has shown total passiveness and inactivity in situations where it was obliged to act decisively and consistently, thus directly violating the provisions of Paragraphs 1,2,3, 7 and 9 of Article 116 of the Constitution of Ukraine. The government has forfeited the trust both of Parliament and of society, which gives all grounds for considering that Ukraine is facing a government crisis. Therefore to demand from this government that it respond to the situation which has developed appropriately is much like demanding from a paraplegic that he get up from his bed and move more quickly. In exceptional circumstances, when the vast majority of state bodies simply avoid carrying out the duties they have been empowered to fulfill, only Parliament retains the capability and potential for taking decisive action, in particular thanks to the sensible position taken by the Head of the Verkhovna Rada of Ukraine.

Therefore, Paragraph 7 of the Resolution of the Verkhovna Rada of Ukraine «On the stabilization of the political and socio-economic situation in Ukraine and prevention of anti-Constitutional actions and separatist moves, placing in jeopardy the sovereignty and territorial integrity of Ukraine» of 1 December 2004 is in total compliance with the Constitution of Ukraine and is mandatory for the Cabinet of Ministers.

Viktor Kolisnyk, Doctor of Law
Fedir Venislavsky, Candidate of Law
Viktor Kychun, Candidate of Law
Pavlo Lyubchenko, Candidate of Law

3 December 2004

THE SUPREME COURT OF UKRAINE

DECISION

IN THE NAME OF UKRAINE

3 December 2004 Kyiv

The Court chamber for Civil Cases of the Supreme Court of Ukraine consisting of

Chairman:
A.G. Yarema
Judges:
M. I. Baliuk
V.M. Barsukova
A. V. Gnatenko
L. I. Grygoryeva
V. I. Gumenyuk
A. O. Didkivsky
I. P. Dombrovsky
V.V. Krivenko
N.P. Lyashchenko
V.L. Marynchenko
P.V. Pantaliyenko
M.V. Patryuk
O.I. Potylchak
Y.V. Prokopchuk
M.P. Pshonka
I.L. Samsin
Y.L. Senin
O.O. Terletsky
V.M. Shabunin

Secretaries: I. Prokopenko and V. Skachko;

with the participation of M. Katerynchuk, representative with special authority of Presidential candidate V. Yushchenko in the single all-Ukrainian electoral constituency, and representatives of Presidential candidate V. Yushchenko: S. Kustova, R. Zvarych, O. Reznikov, M. Poludionny, S. Vlasenko, Yu. Karmazin and Yu. Kliuchkovsky;

representatives of the Central Election Commission: V. Bondyk, Yu. Donchenko, I. Kachur, M. Okhendovskiy;

representatives of the interested party – Presidential candidate V. Yanukovich: O. Lukash, S. Gavrish, B. Kharchenko, E. Yevgrafova and Y. Abramenko,

having considered at a court hearing the case based on a complaint from Mykola Katerynchuk, representative with special authority of Presidential candidate V. Yushchenko in the single all-Ukrainian electoral constituency, about the inaction of the Central Election Commission, the actions taken to establish

the final results of the second round of the Ukrainian Presidential elections of 21 November 2004 and the decision to declare Viktor Yanukovich President of Ukraine,

IT WAS ASCERTAINED THAT:

M. Katerynchuk, representative with special authority of Presidential candidate V. Yushchenko in the single all-Ukrainian electoral constituency appealed to the Supreme Court of Ukraine with the above-mentioned complaint in which he called for the following:

1. The actions of the Central Election Commission in establishing the final results of the second round of Ukrainian Presidential elections to be declared illegal, and the protocol of the Central Election Commission on the results of the second round of voting in the elections for President of Ukraine dated 24 November 2004 to be declared invalid; The Resolution of the Central Election Commission of 24 November 2004 № 1264 «On the Results of the Ukrainian Presidential elections of 21 November 2004 and the election of President of Ukraine» to be annulled as being illegal.

2. The Resolution of the Central Election Commission dated 24 November 2004 № 1265 «On publishing the results of the Ukrainian Presidential elections» to be annulled as being illegal.

3. To be established that the facts confirming systematic and grave violations of the basis and principles of the election process during the second round of Ukrainian Presidential elections on 21 November 2004 were such as to render impossible a reliable assessment of the will of the voters in the single all-Ukrainian electoral constituency for the Ukrainian Presidential elections.

4. The results of the second round of voting in the Ukrainian Presidential elections on 21 November 2004 in the single all-Ukrainian electoral constituency for the Ukrainian Presidential elections to be declared invalid.

5. The Candidate who, according to the vote count from the round of voting on 31 October 2004 gained the largest number of votes, to be declared elected President of Ukraine.

These demands, supported in the court hearing by the claimant and representative of the candidate to the post of President of Ukraine, V.A. Yushchenko, are substantiated by references to systematic and grave violations of the basis and principles of the election process during the second round of Ukrainian Presidential elections on 21 November 2004, and also to the contravention by the Central Election Commission of the requirements of the Law of Ukraine «On the Ukrainian Presidential elections» in determining the results of the Presidential elections.

The representatives of the Central Election Commission, as well as the representatives of the interested party, rejecting the claims made, have asserted

that the violations of election legislation, which were committed during the second round of Presidential elections, did not influence and could not influence the results of the elections, and that in determining the results of the Ukrainian Presidential elections, the Central Election Commission did not contravene current legislation.

Having listened to the explanations of the parties to the case, and having examined other evidence, the Court considers that the claim should be partially satisfied on the following grounds.

On 21 November 2004 the second round of the Ukrainian Presidential elections was held.

On 24 November 2004 the Central Election Commission compiled a protocol on the results of the second round of the Ukrainian Presidential elections and passed Resolutions № 1264 «On the Results of the Ukrainian Presidential elections of 21 November 2004 and the election of President of Ukraine» and № 1265 «On publishing the results of the Ukrainian Presidential elections».

When determining the results of the second round of voting on the day of the Presidential elections, the Central Election Commission did not in full session scrutinize the protocols of the Territorial Electoral Commission on the results of voting on the territory of the given Territorial Electoral Districts, did not check their reliability, accuracy or comprehensiveness, nor other documents listed in Part 6 of Article 83 of the Law «On the Ukrainian Presidential elections».

Before determining the results of the second round of voting on the day of the Presidential elections, the Central Election Commission did not consider appeals and complaints regarding violations by Territorial Electoral Commissions of the procedure for determining the results of the voting on the territory of the Territorial Electoral Districts, nor decisions taken by the Territorial Electoral Commissions as a result of their review.

At the time when the Central Election Commission announced the results of the second round of voting in the Ukrainian Presidential elections, the courts had not finished their review of complaints filed at the proper time about the inaction, the actions or decisions of Territorial Electoral Commissions, alleged to have occurred during the gathering of the results of the voting on the territory of the Territorial Electoral Districts, nor had the period allowed for review of these complaints expired.

Under such circumstances the actions and decisions of the Central Election Commission contravene the requirements of Articles 2,10, 11, 12, 16 and 17 of the Law of Ukraine «On the Central Election Commission», Articles 25, 28, 83, 84, 86, 93, 94, and 96 of the Law of Ukraine «On the Ukrainian Presidential elections» and are illegal. In connection with this, the resolutions passed by the Central Election Commission shall be annulled.

The Court has also determined that during the second round of voting the following violations of the Law of Ukraine «On the Ukrainian Presidential elections» were committed:

– the compilation and checking of voter lists was carried out with violations of the requirements of Article 34; the same person was included on the lists several times, and there were also people on the lists who did not have the right to vote;

– the preparation, registration, issue and use of absent ballots were carried out with violations of the requirements of Article 33, and without proper control from the Central Election Commission;

– election campaigning with the use of the mass media was carried out without adherence to the principle of equal opportunities and in contravention of procedure, set out in this Law; the prohibition on involvement in election campaigning of State executive bodies and bodies of local self-government, their officials and functions was not complied with; there were cases of unlawful interference in the election process;

– there were violations of the requirements of Articles 23, 24 and 85 regarding the composition of election commissions;

– there were violations of the requirements of Articles 68, 69 and 70 with regard to the participation in the election process of official observers;

– there were violations of the requirements of Articles 77 in holding voting outside polling areas;

– protocols of district election commissions on the results of the vote count were compiled without compliance with the requirements of Article 79;

– the transportation of documents to the Territorial Electoral Commissions was carried out with violations of Article 81.

The circumstances listed give grounds for concluding that the violations of the principles of election law, set out in Articles 38, 71 and 103 of the Constitution of Ukraine, and the principles of election law, defined in Part 2 of Article 11 of the Law of Ukraine «On the Ukrainian Presidential elections», make it impossible to reliably determine the results of the actual expression of the will of the voters in the single all-Ukrainian electoral constituency.

In determining the means for restoring the infringed rights and legitimate interests of the subjects of the election process, the Court is guided by Article 98 of the Law of Ukraine «On the Ukrainian Presidential elections», where the subject of the review of the complaint, having established that the decisions, actions or inaction of the subject of the complaint do not comply with legislation on the elections of President of Ukraine, satisfies the complaints, annuls the resolution fully or partially, declares the actions or inaction illegal, obliges the subject of the complaint to satisfy the demands of the claimant or by other means restores the violated rights and legitimate interests of the subjects of the election process.

The means of defending violated rights suggested by the claimant, being to declare the candidate who gained the largest number of votes in the round on 31 October 2004 President of Ukraine, cannot be applied, since, in accordance with Part 3 of Article 84 of the Law of Ukraine «On the Ukrainian Presidential elections», to be declared President of Ukraine, a candidate must have received more than half of the votes cast, and none of the candidates gained this number of votes.

Taking into account the impossibility of reliably determining the results of the actual expression of the will of the voters in the single all-Ukrainian electoral constituency by means of a recount of the second round of voting, and that the second round held on 21 November 2004 did not change the status of the candidates who, according to the vote count for the round of voting on 31 October 2004, received the greatest number of votes, the Court considers it necessary to restore the rights of the participants in the election process by means of an electoral re-run to be held in accordance with the regulations defined in Article 85 of the Law of Ukraine «On the Ukrainian Presidential elections».

Guided by Articles 8, 71, 103, 124 of the Constitution of Ukraine, Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 98 of the Law of Ukraine «On the Ukrainian Presidential elections», Articles 11, 24310 24320 of the Civil Procedure Code of Ukraine, The Court chamber for Civil Cases of the Supreme Court of Ukraine

HAS RESOLVED:

To partially satisfy the complaint from Mykola Katerynchuk, representative with special authority of Presidential candidate V. Yushchenko in the single all-Ukrainian electoral constituency, about the decisions, actions and inaction of the Central Election Commission.

To declare the actions of the Central Election Commission in establishing the final results of the second round of Ukrainian Presidential elections, and the protocol on the results of the second round of Ukrainian Presidential elections dated 24 November 2004 illegal.

To annul the Resolution of the Central Election Commission of 24 November 2004 № 1264 «On the Results of the Ukrainian Presidential elections of 21 November 2004 and the election of President of Ukraine».

To annul the Resolution of the Central Election Commission dated 24 November 2004 1265 «On publishing the results of the Ukrainian Presidential elections».

To oblige the Central Election Commission to call a re-run of the voting in the elections for President of Ukraine within the timescale set out in Part 1 of Article 85 of the Law of Ukraine «On the Ukrainian Presidential elections», taken as beginning on 5 December 2004. To hold the re-run in accordance with

the procedure set out in Article 85 of the Law of Ukraine «On the Ukrainian Presidential elections».

To reject the other demands.

This decision is final and not subject to appeal.

Chairman:	N.P. Lyashchenko
A.G. Yarema	V.L. Marynchenko
Judges:	P.V. Pantaliyenko
M. I. Baliuk	M.V. Patryuk
V.M. Barsukova	O.I. Potylchak
A. V. Gnatenko	Y.V. Prokopchuk
L. I. Grygoryeva	M.P. Pshonka
V. I. Gumenyuk	I.L. Samsin
A. O. Didkivsky	Y.L. Senin
I. P. Dombrovsky	O.O. Terletsky
V.V. Krivenko	V.M. Shabunin

THE SUPREME COURT OF UKRAINE

SPECIAL RESOLUTION

3 December 2004 Kyiv

The Court chamber for Civil Cases of the Supreme Court of Ukraine consisting of

Chairman:	N.P. Lyashchenko
A.G. Yarema	V.L. Marynchenko
Judges:	P.V. Pantaliyenko
M. I. Baliuk	M.V. Patryuk
V.M. Barsukova	O.I. Potylchak
A. V. Gnatenko	Y.V. Prokopchuk
L. I. Grygoryeva	M.P. Pshonka
V. I. Gumenyuk	I.L. Samsin
A. O. Didkivsky	Y.L. Senin
I. P. Dombrovsky	O.O. Terletsky
V.V. Krivenko	V.M. Shabunin

secretaries: I. Prokopenko and V. Skachko;

having considered at an open court hearing the case based on a complaint from Mykola Dmitrovych Katerynchuk, representative with special authority of Presidential candidate Viktor Andriyevych Yushchenko in the single all-Ukrainian electoral constituency, about the decisions, actions and inaction of the Central Election Commission (hereafter CEC) in determining the results of the second round of voting in the elections for President of Ukraine on 21 November 2004,

HAS RESOLVED:

By decision of the Supreme Court of Ukraine on 3 December 2004 to partially satisfy the complaint of Mykola Dmitrovych Katerynchuk, representative with special authority of Presidential candidate Viktor Andriyevych Yushchenko in the single all-Ukrainian electoral constituency, about the decisions, actions and inaction of the CEC in establishing the final results of the second round of voting in the elections for President of Ukraine on 21 November 2004.

The Court has decided to declare the actions of the Central Election Commission in establishing the final results of the second round of voting in the elections for President of Ukraine on 21 November 2004, and in compiling a protocol on the results of the second round of voting in the elections for President of Ukraine dated 24 November 2004 illegal.

The Resolution of the Central Election Commission of 24 November 2004 № 1264 «On the Results of the Ukrainian Presidential elections of 21 November 2004 and the election of President of Ukraine» has been annulled.

The Resolution of the Central Election Commission dated 24 November 2004 № 1265 «On publishing the results of the Ukrainian Presidential elections» has been annulled.

The Central Election Commission is obliged to call a re-run of the voting in the elections for President of Ukraine within the timescale set out in Part 1 of Article 85 of the Law of Ukraine «On the Ukrainian Presidential elections», taken as beginning on 5 December 2004. To hold the re-run in accordance with the procedure set out in Article 85 of the Law of Ukraine «On the Ukrainian Presidential elections».

The other demands have been rejected.

The Court has determined that during the second round of the Ukrainian Presidential elections there were numerous violations of the fundamental basis and principles of the election process, defined in Articles 38, 69 and 71 of the Constitution of Ukraine, Articles 2, 3, 6, 9, 11 of the Law of Ukraine «On the Ukrainian Presidential elections», as a result of which it was impossible to reliably determine the results of the actual expression of the will of the voters in the single all-Ukrainian electoral constituency. A major part of the violations were committed by the CEC itself, by other participants in the election process

or by bodies of State power as a result of the passive behavior of the CEC and its members.

In particular, questions which should have been considered by the CEC collectively were effectively considered by individual members and were not tabled at the sessions. It was precisely in this way that the question about establishing the final results of the second round of voting in the elections for the President of Ukraine on 21 November 2004 was decided, when, in violation of the requirements of Part 1 of Articile 84 of the Law of Ukraine «On the Ukrainian Presidential elections», the CEC only voted on approving the protocol which had been compiled without proper checking of information by all members of the Commission, and without the latter having seen the protocols of the Territorial Electoral Commissions.

It has been established that during the second round there were mass violations of the electoral rights of all participants in the election process through the uncontrolled use of absentee ballots, with coercion exerted on employees of enterprises, institutions and organizations, including State employees, to vote using absentee ballots; there were organized movements of large groups of voters in order to vote from one district to another; State executive bodies were involved in these movements and in the use of absentee ballots. The occurrence and widespread nature of these violations was reported during the elections by the Mass Media, official observers and voters. The topicality of this issue was confirmed by the adoption before the second round by the Verkhovna Rada of Ukraine of amendments to the current Law of Ukraine «On the Ukrainian Presidential elections».

However, in contravention of the requirements of Articles 16 and 17 of the Law of Ukraine «On the Central Election Commission», the CEC basically failed to fulfill its intended role in controlling the course of the election process and ensuring citizens' voting rights, etc

There was a grave violation of the principle of legality seen in the failure by the CEC to implement the decision of the Supreme Court of Ukraine of 16 November obliging the CEC to establish the final results of the voting in Territorial Electoral District № 100.

The above-mentioned demonstrates that the Central Election Commission violated the principle of the rule of law, of legality, objectivity, competence, professionalism, collegiality in review and resolution of questions, well-foundedness in the taking of decisions, openness and publicity, as set out in Part 2 of Article 2 of the Law of Ukraine «On the Central Election Commission»

Furthermore, during the process of court review, the Court received a written statement from the head of an institution which developed program software for the CEC and was responsible for its implementation during the election and the vote count. The letter states that, on the instruction of the head of the CEC access codes to the system were removed and given to outside in-

dividuals who could manipulate the results and falsify them, later inputting this data into the original protocols.

The Court Chamber deems it necessary to inform the Verkhovna Rada of Ukraine, the President of Ukraine and the General Prosecutor of Ukraine about the violations of legislation discovered, in order to react with the measures envisaged by law.

Guided by Article 235 of the Civil Procedure Code of Ukraine, the Court Chamber

HAS RESOLVED:

To send a copy of this Resolution to the Verkhovna Rada of Ukraine, the President of Ukraine and the General Prosecutor of Ukraine for their information and appropriate response.

This Resolution is not subject to appeal.

Chairman:	N.P. Lyashchenko
A.G. Yarema	V.L. Marynchenko
Judges:	P.V. Pantaliyenko
M. I. Baliuk	M.V. Patryuk
V.M. Barsukova	O.I. Potylchak
A. V. Gnatenko	Y.V. Prokopchuk
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V. I. Gumenyuk	I.L. Samsin
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I. P. Dombrovsky	O.O. Terletsky
V.V. Krivenko	V.M. Shabunin

FRUSTRATING THAT THE DECEPTION AND INSINCERITY CONTINUE…

Viktor Kolisnyk, Doctor of Law, Kharkiv

It is frustrating. Frustrating to once again have to prove elementary things, judicial axioms, which do not need to be proven. The Resolution of the Supreme Court is final and not subject to appeal. Everybody knows that, including first-year students. This means that any public assessment of this decision, commentaries, discussions about it, and particularly publicly expressed doubts as to legality (or constitutionality) of this decision are unacceptable and indicate only lack of respect for the court. For the Supreme Court. This is like creating a din in the hearings chamber of a local court while a sentence is being passed, interrupting the chairman with cries of «Freedom for Yury Detochkin!»

It is frustrating. Frustrating because Parliament at such a difficult time is haggling over this somewhat strange, and too 'raw' political reform, the sincerity of whose initiators arouses serious doubts, given that for so long the head of the State bewailed his insufficient powers and called consistently for them to be increased, and now, when he no longer needs them (because his term of power is coming to an end), he has decided to «nobly» shed them, handing them over partly to Parliament and to the Government.

It is frustrating. Frustrating because again some sensible, rational, even wise politicians are letting themselves get offended with other politicians for unfulfilled agreements and are refusing to work with them or look for compromise. And that at a time when parliamentarians should have jointly demanded the implementation of their own resolution of 1 December 2004 on dismissing the government, which was the chief culprit in causing the political crisis and whose miscalculations would almost certainly suffice to warrant 10 dismissals.

It is frustrating. Frustrating, that such haggling is taking place when the massive vote-rigging during the second round of voting is well-known, and when it is obvious to all normal citizens and unbiased experts that only an infintessimally small part of a huge iceberg of violations committed during the elections was made public in the chambers of the Supreme Court. Parliament should, therefore, be primarily concerned with strengthening legislative guarantees aimed at minimizing violations during the re-run of voting, and not make

use of the opportunity to «push through» its political reform. And in general, what should one think of a political reform which is carried out in haste, without comprehensive analysis and open academic discussion? One can hardly consider the analysis of amendments to the Constitution which was held, in general, at artificially organized regional public forms in conditions of previously determined unanimous support for the reforms in the spirit of «yes, sir, we approve», as having been in any way comprehensive, thorough or in-depth.

And is the reform expedient in any case? Is it worth amending a Constitution in accordance with which we have still never actually lived? What has the Verkhovna Rada done to ensure that the Constitution works in full force? Parliament has still not even been able to pass dozens of laws which, following from directives in the Constitution, are mandatory. To this day there are no laws on the Cabinet of Ministers, on the central bodies of executive power, on the procedure for publishing laws and other legislative norms, and a lot of others. This is already the third parliament which cannot pass a law on regulations for the Verkhovna Rada. It is not clear why it is necessary to make the role of Head of State largely declarative (and what sense there is in having this person directly elected by the population), and to make the position of Prime Minister more powerful. Perhaps it would be better to move differently, declaring the Head of State to be at the same time Head of the Government, that is, for the Head of State to personally head the executive branch of power. That way, all would be in place in the system of State power and the balance between different branches of power would be ensured. For some reason this system works well in the USA, but is supposedly not appropriate for Ukraine

It is frustrating. Frustrating that during the elections a large percentage of members of electoral commissions received envelopes with certain amounts of money, that is to say, effectively they were bribed, since they knew very well that these 'little gifts' were from a certain candidate, and they were being encouraged to understand that they should not pay attention to the odd «violations». This means that they were effectively bought. Others were intimidated into signing blank, unfilled-in protocol forms just in case, for example, in case the result of the voting proved to be different from that expected in particular offices of important officials. That way it would be easy to adjust the figures. This is indeed what happened in many cases. We can cite another example. Before the elections, members of Territorial Electoral Commissions went around visiting voters, asking if they were going to vote for the State candidate. Where they received a negative response, more often than not, it was precisely in these names that mistakes occurred on the voter lists. Surprisingly enough, voters were extremely active and in large numbers approached the Territorial Electoral Commissions or local courts to have their right to be on the voter list confirmed, and having received the appropriate reply, returned to the polling

station and did indeed vote. As for their «double» with the mangled surname, somebody else voted for him or her, sometimes with blocks of ballot papers (a form of «bulk» voting). There were also numerous other schemes devised for manipulating votes. It turns out, though, that due to haggling and mutual insults in Parliament there may not be enough time to form new electoral commissions, and then these same «experienced» members of commissions, who have already «made their name» with their civic position and who averted their eyes from the violations, deliberately not noticing or actually encouraging them, will again organize and run the repeat round. Will we not then see the same in the December re-run that we saw on 21 November?

It is frustrating. Frustrating that some State Deputies, politicians, high-ranking officials in public appearances and interviews repeat over and over again that more than half of the electorate voted for one of the candidates, and far less for the other (even giving exact figures). This is nothing less than cynicism and hypocrisy since in the chambers of the Supreme Court it was proven that the scale of the violations was so great that it was impossible to determine the results of the election. Thus, references to such figures are not only incorrect, but actually against the law. Yet such «inflated» figures are heard again, just as in the old times when reports and statistical data were unthinkable without such adjustments. As though the Resolution of the Supreme Court of 3 December 2004 had never happened.

It is frustrating. Frustrating because falsifications and manipulation of public awareness are continuing after the second round of voting, and citizens are again, as during the pre-election campaign, being forced (sometimes even on threat of dismissal) to take part in mass measures in support of the pro-regime candidate. Employees of State sector organizations are taken (with transportation costs at the expense of taxpayers) from different parts of the region, without even being asked how they feel about such measures. As if they weren't free people (teachers, doctors, students, etc), but slaves from Ancient Rome.

It is frustrating. Frustrating, because the same officials who involved their subordinates in election campaigning, forced them to vote in a certain way, organized the rigging of election results, took a direct part in this process or simply consciously chose not to notice violations of election legislation (although it was they who were supposed to and could have prevented such violations), now have an interest in new falsifications and adjustments, since even a remote resemblance to the results of 21 November will work in their favor, towards justifying their actions or inaction. For then they will be able to claim that there were no administrative resources specifically in their district (city, region) during the elections. Such officials, or more accurately, a certain number of them, not only cherish the hope of a repeat of such a result or one similar, but will also do everything in their power to achieve it.

It is frustrating. Frustrating that despite the fact that hundreds of thousands, and maybe even several million citizens who have had enough of hypocrisy, deception and double standards (which have again become part of big politics, and our everyday lives) have come out (keeping in mind rotating shifts) on to squares, these voters are assiduously ignored (first of all by the Head of State) and an attempt is made to convince themselves and those around, that this is not «all the people», but rather, as ORT[1] put it, a group of «extreme young hotheads».

And some of our fellow Ukrainians, cocooned in their fairytales and outdated myths and convenient stereotypes, look indifferently at those who stand up openly against the falsification not only of the elections, but of all our life in society, laugh or sneer at them, spread various rumours, gossip or absurdities about them, labeling them as «Bandera-supporters», «nationalists», or just «people with a screw loose» etc. Those who had the courage to come out on to the squares were very different, but they were united by one thing: the desire to free society from deception, dirt, lies and convention, when they say one thing, think another, and do something entirely different. Such a society has no future. It would be interesting to know whether the critics of the «Orange Revolution» have thought at all about what our society and State would have been like if people had not come out on to the squares, but had gone on quietly accepting injustice, open contempt of election legislation and remaining silent (saying «I'm alright, mate» and «my vote doesn't mean anything, they'll count as they want, whatever»)? The course of events could have been different. Then, probably, there wouldn't have been emergency sessions of Parliament, there wouldn't have been the hard-hitting Resolutions of the Verkhovna Rada of Ukraine of 27 November 2004 and 1 December 2004, Parliament would not have declared the results of the second round of voting on 21 November 2004 invalid, there would have been no vote of no confidence in the Central Election Commission from the Verkhovna Rada of Ukraine. Nor would there have been the Verkhovna Rada's vote of no confidence in the Cabinet of Ministers of Ukraine. There would probably have been no session of the Supreme Court with its live broadcast, either, nor the public announcement of the Supreme Court's Resolution of 3 December 2004. That is, if citizens had not supported the nationwide action of civic disobedience, it is entirely possible that the legislative would not have been able to even attempt to fulfill the function of parliamentary control it is empowered with, and the court branch of power would not have guaranteed on a nationwide scale the restoration and defence of citizens' voting rights. The mechanisms for implementing State power, therefore, demonstrated their entire incapacity, inertia and ineffectiveness. It was only civic activity which aroused this mechanism and forced it to work, or, more accurately, certain parts of it.

[1] ORT is one of the Russian State television channels. It was particularly active in presenting the Orange Revolution in a very negative light. (*translator's note*)

It is frustrating. Frustrating that society is again having the idea of «federalism» deftly foisted upon it by certain officials, who, judging by their public utterances, have only a foggy concept of federalism, the granting of autonomous status and of the fundamental principles of the territorial structure of the State. Both the road to federation, and that towards the creation of autonomous areas (federalism and granting autonomy are not the same thing) are very, very complicated. Without going into detail concerning the financial and economic justification for the possibility of self-sufficiency, self-reliance, and self-financing of potential subjects of a possible federation, we would note that, according to data of analysts, Donbass has in the last years received massive subsidies from the centre (cf. «Dzerkalo tyzhnya» № 49 from 4 грудня 2004, p. 4 and p. 9), while the financial recalculations to the centre have not been as substantial as certain officials would claim. However, let us address constitutional and legal issues. Firstly, in order to turn Ukraine into a federal republic, it would be necessary to make amendments as a minimum to Part 2 of Article 2, and to Article 133 of the Constitution of Ukraine,and if the need arises to change the name of the State, then Article 1 of the Constitution of Ukraine as well, and therefore to a lot of other constitutional provisions, and also to other regulations, as it will definitely be necessary to redefine the authorities between centre and the subjects of a future federation. This is an extremely complicated, drawn-out and laborious task. It would require lengthy scientific discussion in order to work out a well-considered, high-quality and organic Draft law for introducing amendments to the Constitution. Then, in order to pass it, it would be necessary to gain a majority in parliament of 300 votes, and to definitely hold a nationwide referendum. These are precisely the mechanisms for introducing amendments to Sections 1, III and XIII of the Constitution of Ukraine. It is not necessary to be Pavlo Hloba[1] in order to state already: it is most unlikely that the majority of citizens of Ukraine would today be prepared to accept and support the idea of turning our State into a federal republic. It would take several years (possibly several decades, even) in order to persistently popularize this idea and gradually convince the majority of citizens of its advantages for Ukraine. Secondly, as demonstrated by the experience of other countries, the subjects of a federation usually have, in addition to all other aspects, their own constitution, parliament and legislation. Already now, in conditions of unitarism, we are by no means always able to agree different legislative acts one with another, and with constitutional norms, and the Constitutional Court is not able to review the vast bulk of legislative norms, determine whether they are constitutional, and to give an interpretation for all contradictory and imprecise provisions of legislation. It is especially difficult to agree the content of subordinate legislative acts with current laws. With the appearance of a new level for constitutional regulation the problem would immediately arise of bringing

[1] Pavlo Hloba – a popular astrologist

addenda to the general constitution into agreement with the constitutions of members of the federation. However, even more complicated would be the problem of bringing legislation of the whole State into agreement with legislation of the members of the federation. This is a problem which is a permanent headache for any federation, while in the Ukrainian variant it could totally paralyze the entire legal system and State mechanism. Ukrainian society would be in danger of plunging into an endless chasm of agreements, discussions, forums, conferences, etc (as we have already seen with the content of the new Constitution in 1991-1996, when unlike our neighbours we wasted much too much time and for precisely this reason fell hopelessly behind in drawing up and passing the most important unified laws). Therefore federalism, rather than being the road to prosperity of the regions, is first of all the road to a new mass of problems which have already accumulated in too great a number in society and in the State mechanism. Therefore, a circumspect politician, and even more so, a legal specialist will always respond with great caution to the calls of newly-ledged federalists. Moreover we already looked over the idea of federalism during the period of drawing up and discussing numerous drafts of the Ukrainian constitution in the first half of the 90s and then the vast majority of specialists agreed with the thesis that most acceptable for Ukraine was precisely a unitary system. This does not preclude the possibility of perfecting the territorial structure of the State by means of decentralization and significant widening of the powers of local bodies of State power and bodies of local self-government, most particularly in order to ensure the comprehensive and balanced socio-economic development of the region. The State should be interested in this since, having freed itself from petty tasks in looking after the regions it will be able to carry out national functions (foreign policy, national security, defence potential, nationwide programs etc) more effectively. However this can be achieved without a fundamental change in the form of state-territorial structure.

7 December 2004

OPEN LETTER FROM THE KHARKIV HUMAN RIGHTS PROTECTION GROUP TO PARTICIPANTS IN THE NEGOTIATION PROCESS

(on the political situation in Ukraine as of 7 December 2004)

In the light of the political events of recent days in Ukraine, the Kharkiv Human Rights Protection Group believes it necessary to turn to the participants in the negotiation process with the following letter. This document can be regarded as our statement or appeal in response to the situation which has arisen. We are convinced that the following must be said now:

1. We consider the attempts to unite into one «voting package» votes on amendments to the Law «On the Presidential Elections», the issue of the dismissal of the Central Election Commission (CEC), the Government (Cabinet of Ministers) of Ukraine and issues of constitutional reform to be morally, politically and legally inadmissible.

First of all, this merging seems to us profoundly immoral. When the opposition demands the dismissal of the Government and the CEC, and also the introduction of amendments to current electoral legislation, this is not in order to gain this or that political or legal benefit for the opposition, but in order to restore the fundamental and intrinsic right of the people and every citizen of Ukraine to vote fairly and with equal rights, and therefore, effectively, to exercise their sovereign will which, we would remind you, is not *subordinate to*, but *above* the participants in the negotiation process.

In this respect, we would once again stress that the electoral rights of citizens, the right to vote fairly and to be elected, are prior to all forms of power, their branches and divisions, and also all State bodies and political institutions – from parliament to the President, the Cabinet of Ministers and CEC inclusive. After all, the latter, in the final analysis, are no more than political managers, functionaries and there to serve the people.

It is precisely for this reason that electoral rights, their scope and the procedure for exercising them must not become a subject for opportunistic deals, haggling or other political speculation. Electoral procedure must not be artificially improved or worsened as suits the regime. In a democratic, law-based State

they always have (should have) only one vector – increase in their own effectiveness, guarantees, and, as a result, – political effect.

Therefore, no participant in the Ukrainian political system should (is entitled to) promise any improvement (or in general, modification) of electoral legislation on security of voting or not voting for constitutional reform, or for any other kind of parliamentary voting at all.

The will of the Ukrainian people both in the material, and in a procedural sense, must not be subject to (be subordinate to, depend on) the will of any of the participants in the negotiation process. This will is a priori sovereign, higher, intrinsically above any participants in the negotiations and above the political elite in general of the country. We would once again remind you that a decision whether to make the second round of presidential elections «more» or «less» fair and transparent – cannot and should not depend on any corporate deals. After all, the values which are directly affected are infinitely higher than the interests of party leaders, parliamentary factions, presidential candidates, the Prime Minister or the CEC. Still more so are they higher than the personal interests of L. Kuchma, V. Yanukovich, P. Simonenko, O. Moroz, or V. Yushchenko.

2. Furthermore, the issue of constitutional reform, frankly speaking, is much too important and fundamental to be «pushed through» in the midst of the political crisis which has developed. We would remind you that the Constitution is the highest strategy regulator of the domestic life and foreign policy of Ukraine. In this capacity it cannot be held hostage to or be used for political tactical maneuvers. The Constitution is far higher than any political tactics, higher than any parliamentary or presidential maneuvering, and therefore must not be modified or altered in emergency conditions, so to speak, «along the way».

We would again insist that the proposed package of modifications to the Constitution in Draft Law №4180 is far from ideal. It runs counter to elementary political and judicial logic, often simply defying pure common sense.

It is well known that the Ukrainian Constitution of 1996 was written using models existing at the time in Europe and the world. As a document with conceptual borrowings, it surpassed in its political and legal qualities the internal creative possibility of Ukrainian constitution thinking of the time.

The situation is fundamentally different now. In contrast to the integrated, familiar text of the present Constitution, the draft political reform is the result of exclusively 'homemade' plans and designs, the product of the political culture of the day. However, although the Draft this time is really national, its political and legal qualities remain more than suspect. It is by no means an accident that this Draft was criticized by the Venetian Commission, which politely, but in entirely transparent form, made it clear that the construction of our constitu-

tional bicycle had not been improved. Unfortunately, the sincere and open criticism of our kindly-disposed colleagues and friends was unable to positively influence our self-confident persistence. Indeed, it would appear that our naïve self-sufficiency in issues of constitutional law has only increased.

We have pointed out many time that almost all of the mixed bag of draft projections for constitutional amendments, which the present regime has tried at different times and with different degrees of intensity to push through, have been detrimental to the democratic process, have disrupted the imperfect, yet viable executive ladder of management, have introduced a disciplinary statute for State Deputies, have played up to the political primitivism of party bosses and leaders of factions, and have in general leveled out expressions of individualism at top levels and on the rungs of the ladder of State management.

In this sense, the last version of the Draft on constitutional amendments №4180 is yet one more attempt at incompetent constitutional adjustment. Not wishing to raise the level of their own political culture to the demands of the current Constitution, the regime in power is stubbornly attempting to lower the level of constitutional regulation to their muddled and short-sighted pseudo-democratic notions.

In this none of the leaders feel any concern that the Draft effectively shatters the integrity of the domestic and foreign policy of Ukraine, threatens the principle of collegial responsibility of the Cabinet of Ministers and ignores the principle of the division of power. The Draft introduces a basis for uncritical parliamentary collectivism and clearly increases the risk of confrontation between parliament and President....

However, the main problem in our opinion is that Draft №4180 in real terms narrows the social base of democracy in Ukraine. According to the draft for constitutional reform, political strategy and tactics of the country become the prerogative of Parliament which, in contrast to all the people, one can nonetheless corrupt. It is well-known that democracy of the people as a whole is important precisely because it is physically impossible to corrupt the entire nation. This classical, long-understood political thought has frequently found confirmation in very different spheres. Therefore the dependence of the truly influential post of President on the direct expression of the will of the people in Ukraine's circumstances is absolutely justified, urgent and not subject to doubt.

This dependence is also a strategic counterbalance to possible foreign pressure on Ukraine. Moreover, Ukraine is still at the stage of political development where its financial and economic might are too merged with politics. This is why in Ukraine's political system, a democratically elected President still continues to play a particular role.

As we have already mentioned, a President with strong powers is important for an adequate reaction by the country to Russian or other similar foreign challenges. Russia, and other countries of the CIS, are all presidential republics on whose foreign policy we directly depend, and not only in the area of energy supplies. Proof is scarcely required that Ukraine must have presidential mechanisms for swift reaction to challenges of this kind. In this kind, there is clearly more involved than merely the optimization of relations at the level of the executive branch of power.

We therefore consider that one could even consider constitutional reform in the direction of strengthening the presidential executive powers, making the Cabinet of Ministers of Ukraine subordinate to the President, while at the same time imposing direct political and legal responsibility for the actions and politics of the Government.

In any case, the reduction of the status of the President to purely representative international functions, as proposed by the reformers, is, in our opinion, poorly motivated and unjustified, and jeopardizes the ensuring of the interests of State independence and national sovereignty. If the reform goes ahead, the already high corporate element in Ukraine's political system will rise sharply. The influence on parliament of powerful financial and economic groups with their self-seeking interests will become stronger and take on a systematic character.

Ukrainian moderate federalism is quite another matter which could, in terms of reform, be sensibly discussed («two Ukraines»). After all the idea of decentralization has been recognized in Ukraine since Dragomanov's day. As is well-known, M. Hrushevsky, S. Shelukhin and R, Lashchenko were all convinced federalists. In general, constitutional reform of such a kind could really be appropriate for the time. However, this would have to be something quite different, a truly anti-crisis reform.

3 We would also state firmly that the lobbyists for a strategy of constitutional (political) reform should not be parties whose leaders gained 5-6 percent or even less of the votes in the first round of presidential elections. It is certainly incomprehensible to us why the ideas of reform should have to be introduced by those who had expressed the most reservations about them and who precisely for that reason gained the support of a significant part of the electorate.

It seems entirely illogical that the ideas of political outsiders (we would ask them not to take this personally) like P. Simonenko or O. Moroz should have to be introduced, on the strength of his political authority, by V. Yushchenko. One could say and write a lot on this subject, however in the wish and attempt to implement the reform at the expense of «Our Ukraine», we see a situation where «the beaten are leading the unbeaten».

Yet again we would draw the attention of political leaders to the fact that introducing constitutional reform with a radical alteration in the powers of the President between the first and second rounds of a presidential election is absurd and unconstitutional. The situation should clearly not arise that citizens of Ukraine in the first round of elections voted for a President with one status, while in the second – for a President with a manifestly different status.

It is clear to us that the hundreds of thousands of people on Independence Square in Kyiv are standing in December snow not to elect a person who «reigns, but does not rule». People are standing on the square to defend their choice of President, a President, dear to them, representing truth and good, Consciously and subconsciously they are counting specifically on him, on the power and authority of his constitutional post. The people on the square are fighting for the right to a just hetman[1], and not a cunning member of the court entourage. It would be ill-advised to forget this.

The power of spirit, the lively reason, openness and moral purity of the people on the square are incomparably higher than the obscurantist spirit of an intrigue-motivated constitutional reform. Students, workers and businesspeople are certainly standing for reform, but not for the reform of formal institutions, but for change to a pathologically corrupt, dishonest regime. They are all protesting not against the incomplete legal coatings, but against the human mass, which these coatings, in the given circumstances, are covering. Thus, they are protesting against lazy and degenerate people, and not against constitutional appendices and norms. Therefore, the current attempt at political reform is, in our view, an attempt by the old regime to divert this outburst of human energy into the wrong channels. The dead grasping for the living, envious of their unfettered freedom, are trying with their last strength to drag us into an old, moldy and dark political grave.

We are convinced that the people on Kyiv's Independence Square are protesting against their denigration, the culprits of which are not institutions, but entirely real individuals. Yet devious, bad or simply not very intelligent politicians want at any cost to prove to us that the enemies of these people are not the thievish little embezzlers of State funds with the pretensions of provincial snobs, but something abstract, formal and judicial.

In this sense, the «reformers» deepen the present crisis, rather than smoothing the situation. After all the demands of «Maidan»[2] are really quite modest: they seek only fair, not rigged elections. On the other hand, the reformers' de-

[1] A Hetman was a national leader in Ukraine in the past (*translator's note*)

[2] «Maidan' means 'square', but since the days of the Orange Revolution has come to symbolize the movement (*translator's note*)

mands are ambitious and entirely immoral. They are trying to steer the people's force into «reform», which rather than strengthen, actually oppresses and crushes our best hopes.

4. Vaclav Havel, commenting on the events of the Ukrainian Orange Movement, was right: the issue is not the election of Viktor Yushchenko, the person, but rather the funeral of Ukrainian postcommunism altogether. Therefore the passing-bell which has been ringing for half a month already on the capital's square is ringing for that demise. On that square people freed themselves of their fear, and with it, their sense of dependence and slavery. Their leader is the antithesis of immorality and, at the same time, of an authoritarian political style. He is thus the antithesis not of the form, but of the old political content. V. Yushchenko is truly a Ukrainian political «outsider», a bohemian in the best sense of the word. His style of communicating with the people is natural and relaxed. His thoughts are at once refined, and clear. He is definitely a people's candidate, the personification of a Ukrainian ideal of talent.

In fact, this is clear to all participants in the negotiation process. However rational understanding with the regime's people combine with many not at all elegant, «secondary» feelings. Once Thomas Mann described the French King, Henry IV: «He was simple of soul, but not of mind». V. Yushchenko clearly has a natural charisma, both of soul and of mind.

The real scale of this figure, his depth and significance are growing literally before our eyes, unfolding day by day. However just as quickly, we see people's envy towards him increase. We have at present an excellent phenomenon of a person's naturally gaining in stature with all that such a rise is usually associated with.

A free nation is usually not mistaken and loves those who truly deserve it. Ukrainians have truly taken to V. Yushchenko. On the background of his incredible and genuine popularity, those figures who very recently, literally yesterday were in the foreground, seem much less significant. Yet as has turned out that it is precisely these people who are participants in the negotiation process. It is therefore to these people that our open letter is, in the first instance addressed.

Ukrainians would obviously not stand for half a month in the snow for any of them. Yet do they have the moral right to be offended by this? And is it really appropriate in the given situation to think about how, as quickly and skillfully as possible, to clip the wings of a leader who has succeeded in showing people the advantage of dignity and freedom?

Do they really want constitutional reform so strongly? Do they really want fairness, guarantees of human rights, democracy?

We cannot exclude the possibility that our people in power really do want to gaze at these wonders. However, we will probably never know this. Therefore, having well-justified doubts, and sadness in our hearts for all that they committed, we turn to them with an appeal not to take *such* fervent care of our interests.

At the same time, we would like to say to these people: put aside your political jealousy, clear your minds of your mean-spirited and thought-impoverished constitutional –separatist intrigues, move aside, let the Ukrainian people finally set out on a free road.

7 December 2004

ORANGE REVOLUTION, BLUE REFORM…

Vsevolod Rechytsky,
Specialist in Constitutional Law for the Kharkiv Human Rights Protection Group

The last traces of the tent settlement in Kyiv have not yet vanished, people from the capital's Independence Square still examine their «Participant of the Orange Revolution cards», possible ways that events will develop are still being debated on television channels, while the regime has already gone, as Kravchuk expressed it figuratively, «to drink cognac». Indeed, it has deserved it.

After all, what for so long President Kuchma was unable to achieve by administrative efforts and persuasion, suddenly succeeded at the peak of civic opposition. Two weeks of Yushchenko's Orange Revolution notched up more than all the years of evolutionary reformism of Leonid Kuchma. However contradictory are our purely personal sympathies or emotions of a wider, public level, this is the end «landscape after a battle».

Whether the Ukrainian community has won anything in a strictly constitutional sense is impossible as yet to say. Both revolutions and constitutions stop slowly, just as they gather pace. It is well-known that the later are naturally heavy and inert mechanisms. And although the final version of our constitutional (political) reform was the most reasonable of all those which had been proposed – from those of Pavel Lazarenko to Oleksandr Moroz inclusive – its full effect may be felt clearly not in the nearest future.

In general, the new constitutional system is relatively simple. From now on the President will partially be in charge of the foreign policy of the country, defence, internal security, and also the heads of local state administrations. The rest of the matters of political management will be dealt with by the Cabinet of Ministers. The two-tier power structure in the executive ladder of power is clear, but then it was precisely this, it seems, that the reformers wanted.

As a result of the reform, State Deputies of Ukraine take on the status of «staunch tin soldiers» of parties and parliamentary factions, while their leaders and ideological guides turn into true Chinese Mandarins. At least it is specifi-

cally they who will decide on the composition of the Cabinet of Ministers of Ukraine, and the State budget.

The court system has remained virtually untouched, the reanimated authoritarian gains of the Prosecutor are not worth overestimating or dramatizing excessively. It is probable that the supervision of the Prosecutor will immerse still deeper our disinterested wardens of legality into small-scale local and middle-level regional business, but the latter don't need to get used to that. On the other hand, according to specialists, this partial return of the prosecutor's supervision over adherence to human rights and civil liberties is explained not so much by Ukraine's low level of legal development (which is Strasbourg's official position), as by the low level of income of the Ukrainian population. Indeed, the defence of one's rights, freedoms and interests in a court of law remains an expensive and casuistic procedure for many ordinary Ukrainian citizens.

In general, it would be possible to reconcile oneself to the reform if Ukraine's level of civic, political and cultural development were significantly higher, closer, let's say, to the Czech Republic. However Ukraine is a very young democracy, and it is unlikely that the application of parliamentarian mechanisms and procedures for solving most of its main and most burning problems will truly have an impact on its relatively weakly-developed political system.

Hannah Arendt, in her analysis of the features of any organic revolution, once stated that genuine revolutions always widen the framework of people's representation. That is, the social basis of state management with every new revolution becomes wider, more democratic. Something clearly contrary to this can be observed in the legal result of the Orange confrontation. According to the reform, the direct influence of the people on Ukrainian politics is actually decreased. Although citizens of Ukraine will continue to elect Presidents, and the mass media will function without «temnyki», this will not significantly influence the political course of the country. It is for this reason that the legal consequences of the Orange movement can be regarded from the angle of real legislative revolution.

Honestly speaking, a President with post-reform authority could in fact be elected by Parliament, and it is only the subordination of local State administrations to him that makes it possible for now to regard his post as a counterbalance to the legislative branch of power in the State If, in future, the heads of the local state administrations start being elected, the national election of a President will finally lose any sense.

The situation is, however, more complicated from the point of view of foreign policy. As everyone knows, to the East and North, Ukraine borders on

presidential republics of an entirely authoritarian type. Russia alone can suffice as example.

One should also take into account that after the election of Viktor Yushchenko President, Ukraine has gained the opportunity not only to become a democracy, but also a country, which (like the Baltic States) maintains a positive separation from post-Soviet republics. However it is precisely Russia's presence on the long Ukrainian borders that serves as sufficient evidence of the need for Ukrainian presidential republicanism. The key point here is the possibility for a swift presidential reaction to Russian challenges to foreign policy which Ukraine will not lack in the future.

As far as the European and Atlantic political world is concerned, it is not very important whether Ukraine becomes a parliamentarian or a presidential republic. However, the situation is quite opposite from the point of view of optimizing Ukraine's political relations with its Eastern neighbours. Speaking simply, it will be much more convenient for Ukraine to respond to decisions taken about us by their 'presidential machines' with the help of symmetrical political and legal mechanisms.

It is precisely in this context that it is worth paying more attention to the organizational disarray and variety hall «pluralism» of Ukrainian political forces, to the factional self-centredness of their interests, and to the ever present demagogy found in national parliamentary debates.

Moreover, to change the form of government of the Orange Revolutionary march is almost the same as to move the furniture in a national apartment during a flood or fire. Does Ukraine have the necessary historical time, real creative capacity and the human resources for this? Will Ukrainian parliamentarism manage to become an adequate response to the structurally fierce, purely presidential pressure of the Russian energy industry and military pyramid?

Virtually no one can doubt today that the constitutional reform was and remains for people of Kuchma's or Medvedchuk's ilk a synonym for a lifebelt against the probable consequences of Yushchenko's presidency. Yet, saving themselves in such a non-standard fashion, they are hardly thinking about deeper, truly national interests. Any doubt expressed on this score would seem to me purely rhetorical.

The paradox of the constitutional reform is seen in the way that, while continuing to dilute responsibility in a mixed parliamentary environment for strategic decisions in the country, the reforms demonstrate a sharply increased level of political demands with regard to tactical parliamentarian maneuvers and operations.

On the one hand, the Cabinet of Ministers of Ukraine and the Verkhovna Rada of Ukraine will in parallel be responsible for the current domestic and strategic foreign (principle-defining) policy of Ukraine. On the other hand, in order to carry out this role in a proper fashion, an unprecedented degree of factional disciple will be introduced into parliament.

Thus, if in accordance with Article 81 of the acting Constitution of Ukraine, a decision about pre-term cessation of the authorities of a state deputy of Ukraine following his or her resignation, or due to withdrawal of citizenship or the person's departure abroad for permanent residence, is taken by the Verkhovna Rada of Ukraine, in accordance with the reform… «if a state deputy of Ukraine, elected from a political party (electoral bloc of political parties), does not belong to the faction of deputies of this political party (electoral bloc of political parties) or if the deputy of Ukraine leaves this faction, his or her authorities shall be cancelled pre-term on the basis of law at the decision of the higher leadership body of the relevant political party (electoral bloc of political parties) from the date of the decision».

In general, this new procedure for removing a deputy's authorities demonstrates not only the introduction of tough factional discipline into the Verkhovna Rada, but also the diminished importance of the individual in the Ukrainian political process. From the outside, it is reminiscent of the consolidation of political allies around their ideological leaders, familiar in Ukraine from communist days.

In this way, the constitutional reform is reinstating an imperative (party-corporative) mandate which was already half forgotten in Ukraine. A deputy is again regarded here as a party pawn, a rank-and-file cardholder for electronic voting., whose function is to work «as a cog and wheel» (V. Lenin), although no longer for a national cause.

It looks as though the elections to the Verkhovna Rada of Ukraine risk becoming a link in the mechanism for introducing not so much electoral, as party priorities. It is unlikely that the personal psychological qualities of a parliamentarian, his or her individual experience, intellect, and also geographical link with a certain region will be used here. One can even say that in this case we are looking at the restoration of «democratic centralism» – the universal principle of most Soviet constitutions.

It looks as though the constitutional reform will transform parliament from a place of open public discussion into an arena for battles of factional gladiators. This is to be regretted, since in the context of constitutional changes, one cannot so far speak of the renewal of the stimuli of political action which Vaclav Havel believes to be: moral instinct, sense of taste, ancient political wisdom, and analytic delicacy of feelings.

On the contrary, one can observe that as far as the renewal of the status of national deputies is concerned, the constitutional reform has applied philosophical reduction, legal-logic simplification, and the denigration of constitutional material to the requirements of crude legislative tactics.

It should be noted that combining the vote for constitutional reform with the introduction of amendments to current electoral legislation was also, from whatever vantage point, unethical. When «Our Ukraine» demanded the resignation of the government and the Central Election Commission, and also the immediate amendment to the Law on Presidential elections, this was not a question of gaining political or legal benefits for the opposition, but about the restoration of the innate right of the Ukrainian people to vote for the fulfillment of their sovereign will. This will was not ***subordinate to***, *but* ***above*** the participants in any negotiation process.

It is well-known that the political right to the right to vote and to be elected are prior to all forms of power, their branches and divisions, and also all State bodies and political institutions – from parliament to the President, the Cabinet of Ministers and CEC inclusive. It is precisely for this reason that electoral rights, their scope and the procedure for exercising them must not become a subject for opportunistic deals, haggling or other political speculation. Electoral procedure must not be artificially improved or worsened as suits the regime. In a democratic, law-based State they always have (should have) only one vector – increase in their own effectiveness, guarantees, and, as a result, – political effect.

This means that no participant in the Ukrainian political system has the right to promise any improvement in electoral legislation on security of voting or not voting for constitutional reform, or for any other kind of parliamentary voting at all. The will of the people in the material and procedural understanding must not be the object of compromise, that is be dependent on the whim of participants in the negotiation process. Such will is *a priori* sovereign, naturally above all actual and potential participants in the negotiations, and above the political elite of the country altogether.

We would once again remind you that a decision whether to make the seond round of presidential elections «more» or «less» fair and transparent – cannot and should not depend on any corporate deals. After all, the values which are directly affected are infinitely higher than the interests of party leaders, parliamentary factions, presidential candidates, the Prime Minister or the CEC.

On the other hand, in itself the issue of constitutional reform is much too important and fundamental to be «pushed through» in the midst of the political crisis which has developed. After all, the Constitution is the highest strategy regulator of the domestic life and foreign policy of Ukraine. In this capacity it

cannot be held hostage to or be used for political tactical maneuvers. The Constitution is far higher than any political tactics, higher than any parliamentary or presidential maneuvering, and therefore must not be modified or altered in emergency conditions, so to speak, «along the way».

According to the constitutional reform voted for, the real politics of the country have virtually become the prerogative of Parliament – a political institution which, in contrast to the people, one can nonetheless corrupt. It is well-known that democracy of the masses is important partly because it is physically impossible to corrupt the entire nation. This well-known position of Thomas Jefferson has already found confirmation in very different spheres. Therefore the dependence of the authority and efficacy of the post of President on the direct expression of the will of the people in Ukraine's circumstances is not subject to doubt.

The strength of the post of the President is also an important counterbalance to possible foreign economic pressure on Ukraine. This argument is strengthened by the fact that Ukraine is at the level of development where its financial-economic strength and public policy are virtually inseparable. Under these conditions, a special role in the political system of Ukraine can be played by a nationally elected leader who is well equipped with legal instruments. It is obvious that here we are talking about much more than the mere optimization of relations between the executive and legislative branches of State power.

Therefore, in view of the requirements mentioned, the subject of constitutional reform could be not so much the weakening, but rather the strengthening of presidential executive powers, making the Cabinet of Ministers of Ukraine subordinate to the President, while at the same time imposing direct political and legal responsibility for the actions and politics of the Government.

The reduction of the status of the President to purely representative international functions, as introduced by this reform, is, in our opinion, poorly motivated and unjustified, and jeopardizes the ensuring of the interests of State independence and national sovereignty. As one can already see today, corporatism in Ukraine's political system will rise sharply. The influence on parliament of powerful financial and economic groups will take on a systematic character.

Ukrainian moderate federalism is quite another matter which could, in terms of reform, be sensibly discussed. After all, the idea of decentralization has been recognized in Ukraine since Dragomanov's day. As is well-known, the Ukrainian narodniki, in particular, M. Hrushevsky, S. Shelukhin and R. Lashchenko were supporters of broad decentralization. In general, constitutional reform of such a kind for all that it is mentioned by ideological opponents of the Orange Revolution could really become the theme of anti-crisis reform.

One needs to stress that the main lobbyist for constitutional reform were political supporters of Leonid Kuchma, leaders of the Social Democratic Party of Ukraine (o), representatives of parliamentary factions which at the elections gained no more than 5-6 percent of the votes of the electorate. It is against political logic that these reforms should have to be introduced by those who had expressed the most reservations about them.

It seems unjustified that the constitutional ideas of the political outsider O. Moroz should have to be introduced by V. Yushchenko who, in terms of electoral support, was eight times more successful. One could say and write a lot on this subject, however in the wish and attempt to implement the reform at the expense of «Our Ukraine», we see a situation where «the beaten is leading the unbeaten».

Yet again we would draw the attention of political leaders to the fact that introducing constitutional reform with a radical alteration in the powers of the President between the first and second rounds of a presidential election is absurd and unconstitutional. Neither from the point of view of the canons of law, nor from that of honest politics should the situation arise where citizens of Ukraine in the first round of voting voted for a President with one status, while in the second – for a President with a manifestly different status.

It is difficult not to agree that hundreds of thousands of people on Independence Square in Kyiv stood in December's freezing conditions not in order to elect a figure who «reigns, but does not rule». People were clearly standing up for a strong leader. Consciously and subconsciously they were counting on the constitutional force of the presidential post. It would be unwise for clear-minded politicians to forget this.

In general it would seem that the strength of spirit and of mind of people of the Square were infinitely higher than the ideological tonality and moral potential of the constitutional reform. A permanent political rally over several weeks stood not for a change in formal institutions, but for a change in a pathologically corrupt, clearly 'live' and not abstract regime. People protested not against legal coating, but against the specific people they covered, against individuals, and not against badly written constitutional principles and norms

Vaclav Havel, commenting on the events of the Ukrainian Orange Movement, within a broad European context was clearly right: what happened on the Square in Kyiv was evidence of the funeral of the relics of Ukrainian postcommunism. The passing-bell which rang for half a month on the capital's square was ringing over that demise. On that square people freed themselves of their fear, and with it, their sense of dependence and slavery.

Therefore, in drawing conclusions, we must acknowledge an obvious paradox. The Orange Revolution was politically and ideologically directed against the majority of those who, as a compromise, introduced the current Ukrainian constitutional reform. Many Deputy-reformist, as is well-known, linked their electoral hopes with the white and blue V. Yanukovych.

Thus the situation does not seem entirely traditional. As Bulgakov's character Woland says (in *The Master and Margarita)*: «We speak both for technology and for its exposure.» This metaphor for the reform is clearly postmodern, because it is precisely contemporaries who often act in extremely contradictory ways.

In Kyiv it is Winter and the blue color in nature seems at this moment in place. However constitutional logic will hardly be as easy to reconcile as seasonal changes in color.

15 December 2004

HUMAN RIGHTS WATCH: FRAGILE FREEDOM OF SPEECH

«Despite the relations which have changed recently, persecution of journalist continues», comments Rachel Denber, Acting Executive Director of the Human Rights Watch Section for Europe and Central Asia, «the Ukrainian regime has indeed loosened its iron grasp – but not much.»

On 3 December, the Supreme Court, with a situation in the country of mass acts of protest and separatist sentiments, referring to numerous violations, declared the results of the second round of presidential elections between the incumbent Prime Minister Viktor Yanukovych and opposition candidate Viktor Yushchenko invalid.

The re-run of the second round is set for 26 December. One of the results of the present political crisis has been, despite all else, some let-up in the strict control of the present regime on the mass media.

This is particularly evident in the nature of television news which has changed and in the decrease in political pressure on newspapers, orientated towards a West Ukrainian or capital city audience.

«There is already more balanced information appearing about the opposition candidate, – Rachel Denber affirms. – However this is connected not so much with the commitment to freedom of press and of expression of ideas, which the government asserted, as with an overestimation by many forms of mass media of the political situation».

Human Rights Watch, which on 25 December is concluding its 10-day mission to assess the situation as regards freedom of press in the regions, notes the retention in a number of regions of the country of control and continuation of persecution from the regime. The years of repression directed at independent journalists and of unofficial censorship have led to a situation today where one can virtually not talk of a culture of independent mass media and about professionalism of journalists.

Human Rights Watch drew attention to the fact that changes in the presentation of the news do to some extent reflect a sharp change in the political situation over the recent period. For example, on 28 October 42 television journalists from several leading pro-regime Kyiv channels publicly announced that they were refusing to follow «directives» and promised to report with maximum objectivity on both candidates. In Kyiv, Lviv, Donetsk and Luhansk,

editors and journalists unanimously agreed that there was a feeling of truly greater balance in the presentation of material mass media broadcast nationwide.

In Lviv region stronghold of Viktor Yushchenko in Western Ukraine, Human Rights Watch noted a clear rejection of previous practice. Some changes, however, appeared motivated by opportunism, dictated by the rapid change in political circumstances. Thus, after the mass protests and the official decision to hold a re-vote, the daily newspaper «Za vilnu Ukrainu»(«For a free Ukraine»), which had previously followed the government line, changed the color of its logo to orange, which has become the symbol of the opposition.

Human Rights Watch also comment that regional television channels and mass media in the east of the country have become more independent. In the second half of December, local journalists told our mission that after the second round on 21 November, they observed for the first time a significant increase in the numbers of media outlets which reported on the activity of Viktor Yushchenko.

However our interviews with journalists in Donetsk and Luhansk where the support for Viktor Yanukovych is traditionally strongest, suggest that control over the mass media and persecution of journalists are continuing. The opposition mass media are scarcely noticeable or entirely suppressed by the regime, and the majority of those remaining have turned into speakers for the local administration. The remaining journalists still attempting to express alternative political views meet with an antagonistic attitude from the local authorities.

On 21 November, the deputy editor of the «Ostrova» («Islands»; the only large opposition newspapers in the Donetsk region), Sergiy Formanyuk was assaulted while trying to enter a polling station with a video camera. According to him, at the entrance he was stopped by three unidentified men and by a man who introduced himself as the chairperson of the Territorial Electoral Commission. The latter demanded that Formanyuk present not only his press accreditation, but also additional documents. When the journalist took out his Dictaphone in order to tape the conversation, the person describing himself as the chairperson, grabbed it out of Formanyuk's hands and told the three unidentified individuals to «deal with» him. The latter dragged Formanyuk out of the building, threw him to the ground and began kicking him. They also attempted to take his video camera away. The police officers nearby must have seen what was happening, but they made no attempt to interfere. Despite every attempt by the journalist to have his assailants brought to justice, the police have refused to open criminal proceedings.

On 24 November the Luhansk regional council at an emergency session prohibited cable communications companies from broadcasting either «Era» or «Channel 5», which were coming out largely on the side of the opposition. This decision was soon annulled, however the regional council turned to the

Committee on television and radio with a request to remove the licences from both television channels.

Luhansk journalists also informed Human Rights Watch about an unprecedented positive event: on 21 December, Luhansk regional television (LRT) – the mouthpiece for local administration – for the first time invited a representative of the opposition to a live broadcast.

In all of this, the regained freedom seems, at best, fragile and incomplete. One can still not talk of real commitment of the government to freedom of the mass media.

«The new President has a unique opportunity: to reject in one move the old habits of repression of the mass media» stated Rachel Denber. «A free press is one of the pillars of any democratic state and the prerequisite for development of political pluralism.»

Rupor

... PLUS «DEKUCHMIZATION» OF THE WHOLE COUNTRY

Yevgeniy Zakharov

The events of November and December have forced Ukrainian society to confront tasks which can no longer be brushed off as needing attention some time in the vague and distant future. Any velvet revolution is followed by a velvet restoration which swiftly turns vicious if it meets with no resistance. We presently have just such a moment where civic society can and must extend the frontiers of freedom and firmly defend the territory wrested from the State.

In practical terms, this means the review and change of the most important laws on human rights and fundamental freedoms, and, accordingly, a transformation in legal relations. However, new laws alone will not work if the repugnant semi-feudal social system, where only proximity to those wielding power guarantees privileges and benefits remains intact. If fiscal pressure continues to make it impossible to work without stealing, then everyone will remain vulnerable before the full power of the State edifice and will be forced to continue paying dues («you have to share!»)

In the final analysis, people and their relations are more important than the laws which consolidate these relations. If it was precisely moral decay that became one of the main reasons for the social crisis which triggered off the Orange Revolution, then it is first and foremost vital to achieve a change in the moral climate in society. Let us just remember that we have several months only, a year at most, to get these processes started and to make them irreversible.

Ukrainian society needs first of all a process of purification, a rooting out of the immoral system of social relations which were reasserted under Kuchma, but which became entrenched back in the communist regime. What is meant here is a process similar to the «denazification» of Germany after the Second World War or the «decommunization» of the Baltic States and of the Wyszegrad Four (Poland, the Czech Republic, Slovakia and Hungary) at the beginning of the 1990s.

In Ukraine, this process of tracking down and eliminating the remains of the communist era should probably be called «dekuchmization»[1], since Leonid

[1] These words have been retained, since the Ukrainian equivalents are loaded with associations, beginning with the reminder of a Bolshevik slogan about the «electrification of the whole country».

Kuchma, whose name was not for nothing used to describe an entire era, symbolizes the present regime and is personally answerable for the moral decay of society. At the same time, we must recognize the fact that we all bear responsibility for Ukraine's present state, all without exception.

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So what should «dekuchmization» entail? The following steps are crucial.

1. Firstly, society must be given the opportunity to find out the truth about the crimes, the pillaging and the self-aggrandizement of the regime which is ending. We must declassify and make public the countless decrees of the President, the Resolutions of the Government and other normative acts which, under the illegal stamp «For official use only» (OU), «not to be printed», «not to be published» conceal information about the corruption of high-ranking officials and those executive bodies which serve them, these being the State Administration of Affairs, the Constitutional Court, the High Council of Justice etc. The Kharkiv Human Rights Protection Group (hereafter KHRG) has been monitoring such acts through the computerized system «League:Law» and can confirm that sometimes in the space of a month as many as 10% of Presidential decrees have been classified as secret.

Each time when their contents have become publicly known, it has transpired that what was involved was cases where the President was bestowing gifts upon himself or his loyal retinue (the Resolutions regarding the notorious State Administration of Affairs (SAA) whose budget exceeds that of many ministries, for example financing for the Ministry of Transport, or the directives on supplementary payments to members of the High Council of Justice etc) or on concealing elicit deals (for example, the agreement between the companies «Gasprom» and «Naftohaz Ukrainy» on creating a gas consortium). The «National program for the development of energy policy up to 2010», adopted back in 1996 with no public discussion whatsoever, remains hidden under the stamp «OU» to this day.

Review is urgently needed of «The list of items of information that constitute State secrets», which is unjustifiably broad, sometimes to the point of absurdity (with the number of employees of the Customs Service and the results of prosecutor's office checks into complaints of human rights violations being classified State secrets), as well as of the actual procedure for making classifying information.

2. Court cases connected with political persecution of the opposition, as well as of the business interests supporting it, must be reconsidered. Examples here would be the case of Bank Slovyansky[1], that of the Ingulets terrorist act

[1] The Vice-President of Bank Slovyansky, Boris Feldman, was arrested on charges of tax evasion and financial mismanagement. The Supreme Court annulled the tax evasion charges in 2004, and reduced his sentence to five years, that being the amount of time he had spent imprisoned.

of 1999[1] (Kuchma recently pardoned Serhiy Ivanchenko on the petition of his wife, however the other figures in this case remain in prison, and the compensation to victims, if paid at all, has been pitiful), the case over 9 March 2001[2], as well as that involving the Donetsk lawyer Serhiy Salov[3] (whose application, incidentally, to the European Court of Human Rights is soon to be ruled upon), and others.

One should remember that all these cases are talked about in Melnichenko's tapes[4], a parliamentary investigation into which should have been held a long time ago, as they hang like a heavy burden impeding movement forward. If such an investigation proves that officials are implicated in crimes, they must be prosecuted. It is vital to finally carry out a proper investigation into the murder of Georgy Gongadze.

3. A public expert examination should be undertaken of the most important events in various fields – politics, economics, the environment, in the social sphere, etc, in order to establish where the regime deceived us, and then to subject these events to public assessment, in particular, legal evaluation. To this end we must review independent Ukraine's short history, make a list of such events over the last 15 years and create efficient expert groups (a good example of such public expertise would be the analysis of the causes of the Chernobyl disaster, carried out by environmentalists at the beginning of the 1990s). I believe that the people needed and means for such expert examinations can be found.

Where the rights of individuals have been violated, they must be restored, or at least compensation for the damage, whether in moral suffering or material losses, should be provided. I would note in this respect that it would be expedient to carry out (in cooperation with the Accounting Chamber) a thorough examination of the implementation of the State budget for 2004 and of local budgets. One can safely predict a sizeable number of financial irregularities connected with the elections.

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[1] In 1999, an explosion during a meeting between Natalya Vitrenko and voters caused serious injury to several bystanders. Serhiy Ivanchenko, the authorized representative of Oleksandr Moroz, Leader of the Socialist Party, together with his brother and Vladimir Samoilov were charged with the crime. Major Melnichenko's tapes suggest that the men were framed, probably as an attempt to discredit Moroz.

[2] This was the last day of confrontation between the mostly young activists of the organization «Ukraine without Kuchma». Around a thousand activists were detained and/or beaten up by law enforcement officers, many targeted at stations, bus stops when heard speaking Ukrainian. The protest movement suffered a serious setback.

[3] Salov was also a representative of Oleksandr Moroz, who was arrested in 1999 for having shown a fake leaflet thrown in his postbox which said that Kuchma had died. He was charged with «impeding the free expression of the will of the people», and having been held in a pre-trial detention centre, received a five-year suspended sentence.

[4] Major Melnichenko, now living in exile in the USA, secretly made tapes where Kuchma was speaking to his people. The most notorious conversation is that referring to Georgy Gongadze, and clearly implicating Kuchma in effectively ordering his murder.

One should, in addition, investigate foreign policy, primarily relations with Russia, to check out the widely held suspicion that national wealth and the country's sovereignty were being used as payment for support given to Kuchma's regime.

4. The mechanisms for vote rigging used in the Presidential elections must be made public, like an ulcer which will spread infection if not burst. It is extremely important in my opinion to give those people involved in the election fraud the opportunity to acknowledge their complicity and to release the burden of guilt from their soul, whether they acted under duress or for personal gain. Here I would do what they do during a firearms amnesty: a deadline is fixed until which firearms can be handed in with no questions asked. Only after this deadline has passed are penalties imposed if firearms have not been given in. In our case, a special law will need to be adopted envisaging an amnesty for all who during the stipulated time frame declare their role in the vote rigging and explain what it entailed. Only then will investigations be initiated and the necessary court proceedings held. I hope that this will be an honourable conclusion to the election process. Obviously this cannot apply to the most substantial and flagrant violations, such as the interception of information about the results of the voting and the manipulation of information, the collusion between members of the Central Election Commission and Presidential Administration. These crimes must definitely be brought before the courts.

5. The next task which remains as acutely needed as 15 years ago is «deKGBization». Clearly the Security Service of Ukraine (SSU) is not the same as the KGB. Nonetheless, it has proved unable to avoid being used by the regime for political persecution. This was particularly evident between 1998 and 2001 when the SSU was headed by Leonid Derkach. There is ample evidence that the SSU inherited a lot from the KGB, resorting to illegal activities, intimidation and blackmail, while at the same time fostering an image of itself as the state body least tainted by any corruption. The reorganization of the SSU at the beginning of the 90s was carried out in a non-transparent manner; if the commission whose members included Genrykh Altunyan, Mikhailo Goryn and Yury Kostenko[1] prepared a report, then this was not made public. It is precisely for this reason that it is now vital to openly and with public participation, investigate information suggesting SSU interference in the activities of political parties and civic organizations, as well as in business, and having established the truth, to carry out a staff shake-up of the service. Wide-scale public discussion as to the priorities of national security would also be appropriate since, in my opinion, the SSU all too often interprets these to the detriment of Ukraine's interests. An example would be in its declaring that one of its priori-

[1] Genrykh Altunyan, Mikhailo Goryn and Yury Kostenko were State Deputies and members of the Security Council in 1992 who worked on creating a new Security Service of Ukraine to replace the KGB.

ties is information security, although any limitations to exchange of information leads to the stagnation of a country. On the basis of how the SSU is behaving in the area of information, it seems safe to assume that they are either pursuing their own interests or that they simply have no understanding of how the world has changed since the Internet came on the scene.

Here also there is a need for a special law which would enable a public commission to gain access to secret information and investigate evidence of illegal activities carried out by the SSU. Such a commission would also oversee the readjustments in staff according to the Polish or Czech model: all employees would be dismissed then re-assessed for suitability, with some being reinstated. Secret employees would be subject to the lustration process: information about their involvement in the KGB would be made public if these people wanted to continue to hold high-ranking official posts. Here again it would be possible to benefit from the successful Polish experience: in accordance with the law on lustration, anybody wishing to be elected or appointed to certain posts (ministers, judges, etc) has to state whether they were ever secret agents of the security service. The case is considered by a special lustration court, and if it is found that the application lied, he or she is deprived of political rights for 10 years.

6. No less important is it to carry out a shake-up of other law enforcement bodies: the offices of the Prosecutor, the police, tax police, etc. Information about the illegal actions of these bodies needs to be disclosed and investigated, with the appropriate conclusions drawn, especially conclusions as regards retention of jobs. It is absolutely essential to make interference in business impossible and to put an end to the shameful practice of offering «protection». The tax police should simply be disbanded.

The problem of mass surveillance needs to be addressed, in particular, that of forms of communication which are a flagrant violation of people's right to privacy. It is known that in 2002, Appeal courts issued 40 thousand warrants for the interception of communications by investigative operation units of law enforcement bodies (for comparison, in the USA, despite their battle with terrorism, 1,367 warrants were issued for the year). It must be publicly ascertained how these warrants were spread out between the crime police, the SSU, the tax police and other law enforcement agencies, whether they were applied efficiently, how many criminal investigations were initiated and how many reached the court, what the verdicts were, etc. Staff changes would be made on the same basis as in the SSU.

7. Fundamental changes are needed in education, both at school level and higher. As the initiative «Academic Honesty» showed, the situation as far as academic freedom is concerned, is dire. It is shameful when only three rectors in the entire country were prepared to speak out against blatant vote rigging. Law institutes are in a terrible state and continue to prepare «obedient» specialists just as under the absolute rule of the Soviet legal paradigm. One can

assume that here too a staff «clean-up» is unavoidable, at least as regards the most morally repugnant rectors of the ilk of Sumy's Oleksandr Tsarenko[1].

8. Business must be kept separate from political activity. This thesis has become axiomatic and therefore need only be noted here.

9. Institutional mechanisms need to be created for public, parliamentary and extra-parliamentary control. At present such mechanisms are either in embryonic form or entirely non-existent.

10. One must find a way of raising the authority of the legal system, and of making the judicial branch of power independent and, as it were, «denationalized». If the court is a body of State power, it cannot make rulings on claims brought against the State, because it has no right to act as a party during the consideration of a case. Therefore the court must act in the name of the law, and not on behalf of Ukraine. This, in fact, is one of its most important functions. At the present time, the independence of the courts is to a large extent fictitious. Court reform has not been completed and, as far as I can see, there remain a considerable number of current norms which need changing.

The salaries of judges, in the first instance, those in local courts, need to be raised substantially. Last year the following figures were talked about: the Budget allocation for a judge of the Constitutional Court was 600,000 UH a year, for a judge of the Supreme Court – 120,000 UH, while a judge in a local court received 12,000 UH per year. It is time to rectify this disproportionate imbalance of a purely corrupt nature. One of the judges of the Supreme Court recently stated that their salaries are 10 times lower than those of judges of the Constitutional Court, while the latter have also been awarded generals' (!) rank. One need therefore feel no surprise when they try to prove that one plus one is equal to one. Such a Constitutional Court needs to be disbanded, and a new one created on the basis of a special law. A review is also needed of the composition of the High Court of Justice. However, the most important – and hardest – task remains that of ensuring public control over the judiciary.

11. It is time also to review the structure, proportions, functions and numbers in the State apparatus. Clearly the functions of the Presidential Administration need to change, while the State Administration of Affairs should quite simply be liquidated. The rationale behind such bodies as the State Committee on Television and Radio Broadcasting seems highly doubtful, with at very least serious reservations as to its functions. However this area requires separate and more detailed discussion.

12. It would be desirable to review decrees conferring the title of «Hero of Ukraine» and other State awards. It is an outrage that, for example, Med-

[1] The protests in Sumy began over the planned merger of three institutes. Tsarenko, the rector of one of them, expected to become the head of the single institute and was particularly active in persecuting students. The determination of the students, their parents and many lecturers forced Kuchma to back down and withdraw his planned merger (in August 2004).

vedchuk[1] can flaunt his «Hero» status, but such people as Yevgeniy Hrytsyak or Danylo Shumuk[2], true heroes of Ukraine, were never honoured in this way. This review should be undertaken by a public commission comprised of people with unquestioned moral authority.

The implementation of all these measures will inevitably bring to light many cases of corruption, misuse of power and other crimes. In view of this, it is worth returning to the issue, already mentioned, of lustration. Here, however, I would mention what I perceive as the negative experience of the Czech Republic and Hungary. Lustration as limitation of the rights of all officials, beginning, for example, with the heads of regional State administrations and higher is inadmissible. Guilt is not collective, only individual. We will accuse, investigate, sentence, punish and forgive. Or will not forgive depending on the crime. This directly applies to Leonid Kuchma as well. Certainly a respectful attitude to its former presidents is one of the hallmarks of a civilized country. However, if convincing proof is provided of crimes which Kuchma committed, than he must be prosecuted.

A review of misuse in the economic sphere should be undertaken with the greatest care: firstly, these abuses were inevitable, and secondly, precipitous actions could have serious consequences for the development of the economy. It would be better to seek out flexible solutions which would make it possible to bring the economy into the open, separate business from politics and, finally, introduce clear rules and guidelines.

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A wide-reaching program of «deKuchmization» places on the agenda considerable changes in legislation. While in no way aspiring to provide a comprehensive list, I would suggest just a few directions which should be followed.

It should first be noted that the constitutional reform adopted as part of the «package» on 8 December is bad beyond redemption. On the one hand it is very short on substance and does not address many important issues, while on the other it creates the threat of unavoidable conflict between the President and Prime Minister (which could have been averted by making the President head of the executive and placing the Government (the Cabinet of Ministers) under him or her. It reinstates the intrinsically Soviet practice of overall surveillance by the Prosecutor's office, introduces an imperative style of mandate, turning State Deputies into «hand-raising» pawns obeying the will of faction leaders,

[1] Victor Medvedchuk was Presidential Administration Chief of Staff under Kuchma. One could provide more information, little of it being salubrious.

[2] Yevgeniy Hrytsyak, the leader of the Norilsk Uprising of 1953, spent many years in the camps. Danylo Shumuk, a Western Ukrainian, spent 36 years imprisoned for his beliefs, beginning under Polish rule in the 1930s, then under Stalin, Khruschev and Brezhnev.

etc. It is true that since Draft № 4180 was amended during the voting procedure, it must be reconsidered by the Constitutional Court and then gain a constitutional majority once again. I am certain that this can give the public the opportunity to wage a campaign against a constitutional reform which is being foisted upon it in such an unacceptable form.

Ukrainian society needs reform that is real, not just for show. The constitution of 1996 was a compromise with the forces of the left, which is why it introduced such a diffident form of capitalism and contained a barrage of social guarantees of the purely Soviet type, empty promises that no regime would be able to honour. This Constitution is already far removed from today's reality and needs to be rewritten.

In addition, the constitutional system does not work, as there is no institution established for constitutional complaints: individuals do not have the right to appeal against violations of their constitutional rights to the Constitutional Court, which is essentially why the latter is simply not a court at all. There is also a need for a corresponding code of procedure. For these reasons, the Constitutional Court should either be disbanded with its authority being passed over to the Supreme Court (this process would requires amendments to the Constitution, which is fairly difficult), or a new law on the Constitutional Court should be passed changing the principles of its formation, broadening the range of people who have the right to lodge complaints, and introducing procedure for reviewing cases. This would entail something like a Constitutional Procedure Code.

I have highlighted already the fact that a strong and independent judiciary is a prerequisite for the recovery of the country. In view of this, we must review the laws which regulate the activity of the courts, while at the same time introducing norms which guarantee the influence of non-governmental organizations on the election (appointment) of judges.

This also applies to the law on the prosecutor's office and other law enforcement agencies: in order to create safeguards against the arbitrary actions of these bodies, mechanisms for public control need to be stipulated. The current law on public control over the law enforcement bodies and armed forces cannot withstand any criticism and needs to be thoroughly changed.

It would be advisable to refine the Draft law once begun on public control over the activities of the executive branch of power (including the prosecutor's office and the security service), which would develop the idea of parliamentary and extra-parliamentary control. It would also be sensible to significantly rework the long out-of-date law on investigative operations (which provides very weak safeguards for human rights), paying specific attention to the procedure for control over communications exercised by law enforcement bodies.

It is important to win the battle over the Criminal Procedure Code which in 2004 was sent back for reworking before a second reading five times in a

row. The Penal Code which has been in force for a year also requires radical change.

Control over the activities of the State authorities can only be exercised by an informed society. We must, therefore, ensure clear and understandable procedures for access to information, in particular to the archives of the security services. If one considers the extraordinarily inflated quantities of legislation on information, this can be seen in general to hamper progress in this sphere and to limit the freedom of expression and of the press, rather than promoting its development. For this reason, the temptation arises to simply abolish the numerous laws regulating the information network (the particularly harmful ones, specifically the law on procedure for covering the activity of State executive bodies and bodies of local self-government and the law on social guarantees for journalists), and to start afresh.

It is time to review electoral legislation in order to strengthen safeguards of rights and civil liberties, in particular the rights of civic organizations. This must be done in advance, long before elections, after all elections can be made honest and transparent only through the non-interference of the executive and through public control. There must also be a clear and enforceable procedure for recalling State Deputies.

A new law should be adopted on civic associations. The law from 1992 is already hopelessly out of date, and the longer it remains in force, the more it contradicts the actual state of affairs. It would be worth also drawing up a law on the procedure for holding political rallies, demonstrations and other public actions, since both local authorities and the courts continue to be guided by the old Decree of the Presidium of the Supreme Soviet of the USSR from 28 July 1988 which has an overt permission-based nature and contravenes the current Constitution.

A review of social guarantees for all those groups in society whose own efforts are not capable of ensuring a decent standard of living is long overdue, and the divide between rich and poor in Ukraine has reached frightening proportions. Then fighting poverty must become one of the priorities of the new regime.

Finally, it is time to make amendments to the Law on the rehabilitation of victims of political repressions and to pay those people the long-standing debts, so rectifying this discriminatory situation in which many find themselves.

In order to begin these processes, I believe that a number of working groups responsible for different aspects need to be created. Members could include, on the one hand, so to speak «the people of Maidan»[1], and on the other – representatives of the new administration, State Deputies and, of course, experts. These groups would clearly need to agree their activity to some extent with

[1] «Maidan» being «square» in Ukrainian, but referring to all that has become known as the Orange Revolution.

the new State authorities, however, where needed could be guided by the direct public actions of Maidan which would in this way encourage the State powers to take decisions it found difficult. Politically these groups should probably always be one step (but no more than one!) more radical than the State authorities, as well as obviously being financially independent of them, that is, of the State Budget. However, the process of agreeing specific aspects of their activity and status possibly requires separate, more detailed discussion elsewhere.

In conclusion we would stress again that what is involved is not merely the reform of the Kuchma regime, but a much belated, and therefore determinedly offensive policy of decommunization. This cannot be avoided and must not be put off any longer. It is time, therefore, to begin. Not tomorrow, but here and now.

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