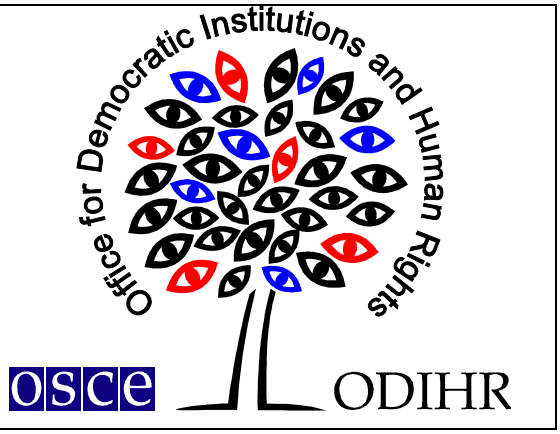
Warsaw, 10 February 2014 Opinion-Nr.: GEN -UKR/244/2014 [RJU] www.legislationline.org	

OPINION

ON

AMENDMENTS TO CERTAIN LAWS

OF UKRAINE PASSED ON 16 JANUARY 2014

Based on unofficial English translations of the Laws

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I. INTRODUCTION

1. *On 16 January 2014, the Parliament (Verkhovna Rada) of Ukraine passed a Law amending the Law of Ukraine on the Judiciary System and the Status of Judges, as well as the Procedural Laws concerning Additional Measures to Protect the Safety of Citizens, and a number of other laws amending key pieces of legislation, in an accelerated procedure. This package of laws included amendments to,* inter alia*, the Code of Administrative Offences, the Criminal Code, the Criminal Procedure Code, the Law on Public Associations, the Tax Code, laws on the police and security service, as well as those pertaining to the judiciary, criminal, economic and civil procedural legislation, and legislation on telecommunication and the protection of information. On the next day, the President signed the amendments, which thereby entered into force.*

2. *On 21 January 2014, the Chairman of the Committee on Human Rights, National Minorities, and Interethnic Relations of the Verkhovna Rada sent an official letter to the Director of OSCE/ODIHR asking for a legal opinion on the amendments passed on 16 January 2014 (for a list of the laws passed, see Annex 1).*

3. *On 23 January 2014, the ODIHR Director responded to the Chairman of the Committee on Human Rights, National Minorities, and Interethnic Relations, confirming ODIHR's readiness to prepare a legal review of the amendments' compliance with OSCE commitments and international human rights standards.*

4. *On 28 January 2014, following a series of protests against the legal amendments, both within Ukraine and abroad, the Verkhovna Rada decided to repeal the amendments passed on 16 January 2014, with the exception of Law No. 731-VII "On amendments to the Law of Ukraine on elimination of negative consequences and preventing the prosecution and punishment of persons regarding the events that took place during peaceful gatherings". On 31 January 2014, the President of Ukraine signed a law that recognized these amendments as null and void.*

5. *In a subsequent exchange of letters with ODIHR, the Chairman of the Committee on Human Rights, National Minorities, and Interethnic Relations of the Verkhovna Rada confirmed that despite these new developments, the Committee would still welcome ODIHR's Opinion on the amendments. In a letter of 5 February 2014, the Chairman noted, in particular, that a number of draft bills containing provisions similar to those included in the repealed legislation had been registered with the Verkhovna Rada, and could be considered and supported by this body.*

6. *This Opinion was prepared in response to the Chairman of the Human Rights Committee of the Verkhovna Rada's letters of 21 January and 5 February 2014. It is based on contributions from members of OSCE/ODIHR's Expert Panel on Freedom of Assembly, the Office of the OSCE Representative on the Freedom of the Media, and has benefited from consultations with the European Commission for Democracy through Law of the Council of Europe (hereinafter "Venice Commission").*

II. SCOPE OF REVIEW

7. The scope of this Opinion covers only the amendments passed on 16 January 2014, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of all legal amendments passed in Ukraine in recent months, nor of the entire legal framework of Ukraine touching on key human rights and

fundamental freedoms, such as freedom of peaceful assembly, freedom of association, freedom of expression and fair trial.

8. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international human rights standards, as found in the international agreements and OSCE commitments ratified and entered into by Ukraine.

9. This Opinion is based on an unofficial English translation of the amendments, which can be found in Annexes 2-8 to this document. Errors from translation may result.

10. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments with regard to legislation and policies in Ukraine that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

11. At the outset, OSCE/ODIHR welcomes the decision of the Verkhovna Rada to repeal the majority of amendments passed on 16 January 2014. In this context, it notes that a large number of the amendments did not meet key international human rights standards, in particular those concerning the freedom of peaceful assembly, the freedom of expression, the freedom of association, and the right to a fair trial.

12. In particular, the amendments adopted on 16 January, especially when viewed in their entirety, would have, among others, significantly limited the possibility of individuals to organize public assemblies in the manner and location chosen by the assembly organizers; violations of blanket bans would have led to disproportionately high sanctions. Other amendments would have greatly limited the work of organizations receiving foreign funding, and the work of the media, as well as of individuals wishing to exercise their freedom of expression, online and offline. In order to ensure that future legal amendments or other laws touching on these or similar topics are in full compliance with international standards and OSCE commitments, the OSCE/ODIHR recommends as follows:

A. To ensure that future amendments to numerous pieces of legislation affecting key human rights and fundamental freedoms are adopted only after serious scrutiny and proper consultation of all relevant stakeholders within a timeframe that allows for a proper and in-depth consideration of all relevant issues; [par 18]

B. To implement the ECtHR judgment of *Vyerentsov v. Ukraine*, and clarify the procedures regulating assemblies in Ukraine, while avoiding amendments to laws that would introduce disproportionate sanctions for non-compliance with such procedures; [par 32-33]

C. To specify in the Law "On Elimination of Negative Consequences and Prevention of the Prosecution and the Punishment of Individuals with Regard to Events That Have Occurred during Peaceful Rallies" that exemption from criminal liability should not apply in cases involving certain criminal acts committed by public officials, especially acts of torture or of inhuman or degrading treatment; [par 39]

D. To avoid legislative changes which involve general blanket bans concerning the holding of assemblies, among others on locations, the wearing of masks or

uniforms, temporary structures and sound equipment, blocking public or private property, or motorcades that would require prior state authorization, and which foresee harsh and disproportionate sanctions for non-compliance; [pars 47, 55, 61 and 65-66]

E. To make sure that legal amendments restricting access to the Internet for certain violations of law are avoided, and that responses to such violations are more differentiated, and involve proportionate penalties; [par 110]

F. To avoid criminal provisions using vague terms such as "apparently slanderous" acts, "impudent disrespect" or the exercise of "influence of any form" towards law enforcement officers and judges; [pars 113-114]

G. To abstain from introducing new legislation that allows the competent authority to dismiss members of the National Council for Television and Radio Broadcasting without citing clear grounds and circumstances in which this shall be permissible; [par 117]

H. To rule out, in principle, any provisions labeling certain associations as "foreign agents", coupled with onerous registration and reporting requirements, and harsh sanctions for non-compliance; [par 127]

I. To reconsider provisions on contempt of court, and ensure that if such provisions are introduced to the Criminal Procedure Code, a balance is struck between ensuring the proper administration of justice, and safeguarding human rights and fundamental freedoms; [par 132]

J. To see to it that amendments introducing provisions allowing for criminal procedure *in absentia* are coupled with provisions requiring extra efforts to notify accused persons or defendants, and the necessary appointment of defence counsel, as well as the right of a thus convicted person to demand a retrial; [pars 136-137] and

K. To avoid amendments to parliamentary rules of procedure that would conceivably facilitate, and expedite procedures to lift the immunity of parliamentarians [par 144].

IV. ANALYSIS AND RECOMMENDATIONS

1. International Human Rights Standards

13. This Opinion analyses the amendments passed on 16 January 2014 from the viewpoint of their compatibility with relevant international human rights standards and OSCE commitments. Key general international human rights instruments applicable in Ukraine are the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the ECHR")[1], and the International Covenant on Civil and Political Rights (hereinafter "the ICCPR").[2] Both instruments protect key human rights such as

[1] The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 3 September 1953. The Convention was ratified by Ukraine on 11 September 1997.
[2] The International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966). This Covenant was ratified by Ukraine on 12 November 1973.

the freedom of peaceful assembly, the freedom of association, the freedom of expression, and the right to a fair trial, among others.

14. In addition, Ukraine, as a participating State of the OSCE, has also undertaken to adhere to a wide array of OSCE human dimension commitments pertaining to the protection of human rights and freedoms, and to democratic principles as such. OSCE commitments also touch on the basic human rights mentioned above, but also include more specific guarantees for a free and independent media, and the basic elements of a democratic state.[3]

15. The ensuing recommendations will also make reference, as appropriate, to other documents of a non-binding nature, such as the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly[4], key recommendations made by the OSCE Representative on the Freedom of the Media, Recommendations by the Council of Europe Committee of Ministers, and General Comments of the United Nations (UN) Human Rights Committee.

16. It is noted here that, in an attempt to complete this Opinion in a timely manner, and due to the highly technical nature of a number of provisions, ODIHR was not able to analyse in detail every legal change effected by the amendments, and has therefore chosen to focus its comments on a number of key issues that were considered to be of particular concern. The fact that a particular amendment or other provision is not commented on in this Opinion shall not be understood as an ODIHR endorsement of this piece of law.

17. While this Opinion focuses mostly on the contents of the amendments, the speed with which these quite numerous and complex amendments were passed by the Verkhovna Rada does not appear to comply with key OSCE commitments on democratic lawmaking. The amendments were passed on 16 January 2014, only a few days after the last of the draft amendments had been registered with the Verkhovna Rada. It may be worth reiterating at this point that OSCE commitments require legislation to be adopted "as the result of an open process reflecting the will of the people, either directly or through their elected representatives" (Moscow Document of 1991, par 18.1). Given the short timeframe between registration of the last of the amendments, and their adoption by the Verkhovna Rada, it is doubtful whether these principles were adhered to in this case.

18. Particularly legislation affecting a wide array of human rights and fundamental freedoms should undergo extensive consultation processes, both within parliamentary committees, and among the general public. For this reason, it is strongly recommended that in future, such important legislation, in particular where it amends multiple pieces of other legislation, be passed only after serious scrutiny and proper consultation of all

[3] For an overview of OSCE Human Dimension Commitments, see ODIHR, Human Dimension Commitments, 2nd Edition, available at http://www.osce.org/odihr/elections/76894. See, in particular, the 1990 Document of the Copenhagen Meeting on the Conference on the Human Dimension of the CSCE, par 5.16 (on fair trial rights), pars 9.1, 10.1 and 10.2 (on freedom of expression and information), par 9.2 (on freedom of peaceful assembly and demonstration), and par 9.3 (on the right of association). Commitments to democracy can be found in the 1990 Charter of Paris for a New Europe/Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe. Specific commitments on the freedom of the media are outlined in the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe, and in the 1989 Concluding Document of Vienna — The Third Follow-up Meeting (pars 34-36), among others.

[4] OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly, (2nd Edition), ("Guidelines on Freedom of Peaceful Assembly") available at http://www.osce.org/odihr/73405.

relevant stakeholders within a timeframe that allows for a proper and in-depth consideration of all relevant issues.

2. Amendments Affecting the Freedom of Peaceful Assembly

2.1 Freedom of Peaceful Assembly and Sanctions for Violations of the 'Established Procedure'

19. Article 11 ECHR, Article 21 ICCPR and par 9.2 of the Copenhagen Document protect the freedom of peaceful assembly. According to Article 11, par 2 ECHR, any restrictions to this right should be prescribed by law and be necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

20. Under international human rights law, restrictions to the freedom of assembly, association and expression should be both adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual to regulate his or her conduct.[5] The level of precision required of domestic legislation – which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.[6]

21. The freedom of peaceful assembly is, in addition, protected under Article 39 of the Constitution of Ukraine, which allows for rallies, meetings, processions, and demonstrations to be held, and specifies that executive or local self-government bodies shall be notified in advance. Restrictions on the exercise of this right may only be imposed by a court, and only in accordance with the law, and in the interests of national security and public order, for the purpose of prevention of disturbances or crimes, protection of the health of the population, or protection of the rights and freedoms of others.

22. While Ukraine so far does not have a specific law regulating assemblies, other legislation, such as the Code of Administrative Offences, contains provisions pertaining to procedures for planning and holding assemblies.

23. In the Law amending the Law of Ukraine on the Judiciary System and the Status of Judges, as well as the Procedural Laws concerning Additional Measures to Protect the Safety of Citizens, Section 1 deals with amendments to the Code of Administrative Offences, including amendments to Article 185-1 on violations of the procedure for organizing and holding assemblies, meetings, rallies and demonstrations.

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[5] See *Sunday Times v. the United Kingdom*, ECtHR judgment of 26 April 1979, appl. no. 6538/74, par 49; *Larissis and Others v. Greece*, ECtHR judgment of 24 February 1998, appl. nos. 23372/94, 26377/94 and 26378/94 par 40; *Hashman and Harrup v. the United Kingdom*, EctHR judgment of 25 November 1999, appl. no. 25594/94, par 31, Rotaru v. Romania, ECtHR judgment of 4 May 2000, appl. no. 28341/95, par 52; *Maestri v. Italy*, ECtHR judgment of 17 February 2004, appl. no. 39748/98, par 30.

[5] See *Groppera Radio and Others v. Switzerland*, ECtHR judgment of 28 March 1990, appl. no. 10890/84 par 68; *Kruslin v. France*, ECtHR judgment of 24 April 1990, appl. no. 11801/85, par 24-25; *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, ECtHR judgment of 5 May 2011, appl. no. 33014/05, par 63-64.

[6] Ibid.

24. Article 185-1 not only speaks of general violations of "the established procedure" for the organization or holding of meetings, rallies, street processions and demonstrations by the participants in such events, but also mentions specifically that this shall include all of the above gatherings held in proximity to certain types of locations. These locations include government agencies, local self-government authorities, institutions, enterprises, organizations, residence or other property of citizens. The above offences are punishable by 100-200 minimum non-taxable incomes of citizens or administrative arrest for up to ten days.

25. This provision considerably limits the manner in which, and the locations where assemblies and similar gatherings may be held. Given the extent of the locations banned by Article 185-1, this would effectively mean that assemblies that do not follow the "established procedure" may not be held anywhere near any type of building or premises, as the above provision covers essentially all public and private properties. The term "proximity" is also not defined, and is thus open to many different (potentially arbitrary) interpretations.

26. Based on Article 39 of the Constitution, which largely reflects the wording of Article 11 of the ECHR, and Article 21 of the ICCPR, such limitations need to be prescribed by law. In Ukraine, however, as stated by the European Court of Human Rights (hereinafter "ECtHR" or "the Court") in the case of *Vyerentsov v. Ukraine*, there appears to be an excessive amount of ambiguity over what the established procedure prescribed by law for interference with the freedom of peaceful assembly actually is. This ambiguity is due to the fact that the Constitution merely speaks of a notification procedure prior to holding an assembly, while at the same time, among others, a 1988 Decree by the then Presidium of the Supreme Soviet provides for a procedure in which individuals wishing to hold an assembly must seek prior permission from the local administration, which is entitled to ban such demonstrations.[7] This Decree has been applied in certain cases; however, as it was passed prior to the passing of the Constitution, and clearly deviates from the procedure set out in the Constitution, it is highly doubtful whether the procedure described therein is applicable today, based on general legal principles on the hierarchy of laws, including the fact that in case of conflict, subsequent laws repeal those enacted previously (*leges posteriores priores contrarias abrogant*).

27. For this reason, the Court found that, "it cannot be concluded that the 'procedure' referred to in Article 185-1 of the Code on Administrative Offences is formulated with sufficient precision to enable individuals to foresee, to a degree that was reasonable in the circumstances, the consequences of their actions."[8] The Court also found that procedures introduced by local authorities to regulate the organization and holding of demonstrations in their particular regions appeared to be similarly unforeseeable, as there was no general Act of Parliament on which such local documents could be based and domestic courts had also doubted the validity of local decisions.[9]

28. Thus, in the absence of a proper law on assemblies in Ukraine, and a clearly "established procedure", and in line with the ECtHR's case law, the interference posed by the new Article 185-1, while based on law, is not sufficiently foreseeable to

[7] For a discussion of these provisions in greater detail, see *Vyerentsov v. Ukraine*, ECtHR judgment of 11 April 2013, appl. no. 20372/11, par 54 and *Shmushkovych v. Ukraine*, ECtHR judgment of 14 November 2013, appl. no. 3276/10.
[8] Ibid.
[9] Ibid.

justifiably limit the exercise of the freedom of peaceful assembly. In such a situation, individuals would be sanctioned for violating a procedure that is itself not clearly outlined in applicable law. As the ECtHR has found in the same judgment of *Vyerentsov v. Ukraine*, such punishment would not be in line with Article 7 of the ECHR, which provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."[10]

29. Moreover, it was noted by the Court that the violations of Articles 11 and 7 of the ECHR stem from "a legislative lacuna concerning freedom of assembly which remains in the Ukrainian legal system for more than two decades". It therefore stressed the need for urgent and specific reforms in Ukraine's legislation and administrative practice, in order to bring such legislation and practice into line with the Court's conclusions, and to ensure compliance with the requirements of Articles 7 and 11 of the Convention.[11]

30. In this context, it is recalled that neither the Constitution of Ukraine, nor Article 185-1 specifically contemplate spontaneous assemblies. Such assemblies, held in response to current incidents or occurrences, are a healthy feature of democracy, and should be protected as long as they remain peaceful.[12] In addition to the clarification requested above, a specific exemption for spontaneous assemblies should be included in Article 185-1.

31. As for the sanctions imposed by the amended Article 185-1, the European Court of Human Rights has held that punishment for violations of procedures in the area of the freedom of peaceful assembly are an interference with that freedom, and should therefore be proportionate in nature.[13] To punish individuals with a fine of 100-200 minimum incomes[14] or ten days of administrative arrest merely for failing to adhere to the applicable procedure runs the risk of disproportionately punishing such individuals for what is, in essence, a minor infraction; in addition, the existence of a minimum punishment exacerbates this risk.[15]

32. Based on the above, and bearing in mind the recommendations formulated in previous ODIHR and Venice Commission opinions on the still pending draft Law on Assemblies, it is recommended to implement the judgment of the European Court of Human Rights in the case of *Vyerentsov v. Ukraine*, and clarify the procedures regulating assemblies. The process of outlining such recommendations should be done in full consultation with all relevant stakeholders, and in line with international standards, in particular those outlined in previous ODIHR and Venice Commission opinions.[16]

33. Until such time, it is further recommended to avoid similar types of amendments to Article 185-1 of the Code of Administrative Offences, or at least, in future reform

[10] Ibid., pars 60-67.
[11] Ibid.,par 95.
[12] Guidelines on Freedom of Peaceful Assembly, pars 128 and 131.
[13] See *Berladir and Others v. Russia*, ECtHR judgment of 10 July 2012, appl. no. 34202/06 par 50 and 54.
[14] As of 2014, this minimum is 609 hryvna, or about 52,71 EUR, which means that fines could reach over 10.000 euros.
[15] See *Rai and Evans v. United Kingdom*, EctHR Decision of 17 November 1999, appl. nos. 26258/07 and 26255/07 and in the context of freedom of expression, *Patrick Coleman v. Australia*, Human Rights Committee 10 August 2006, CCPR/C/87/D/1157/2003.
[16] For an overview of past OSCE/ODIHR-Venice Commission Opinions on the freedom of peaceful assembly in Ukraine, see http://www.legislationline.org/topics/country/52/topic/15

efforts, to bear in mind the principle of proportionality for sanctions, and to take care to specify exactly which type of behavior will lead to which (proportionate) sanction. Moreover, any legislation regulating assemblies should take into account the legitimacy of spontaneous assemblies and bear in mind the parameters set by Article 39 of the Constitution.

2.2 Impunity for Violations of the Law Committed During Peaceful Assemblies

34. Another amendment passed on 16 January 2014 introduced some changes to the wording of the Law of Ukraine "On Elimination of Negative Consequences and Prevention of the Prosecution and the Punishment of Individuals with Regard to Events That Have Occurred during Peaceful Rallies" (which had been signed by the President of Ukraine on December 19th 2013). This law specified that "[i]ndividuals, who have been the participants of protest actions and mass events, shall be exempted from liability in connection with their actions and decisions made during the period from November 21, 2013, to the effective date hereof (Article 1)." The remainder of the law essentially exempted from punishment those convicted for those offences, and dealt with the termination of on-going administrative proceedings in the cases covered by the law.

35. The amendments to this Law adopted on 16 January stipulate that individuals who are suspects or accused (defendants) in connection with certain criminal offences[17] set out specifically in the amendments, shall be exempted from criminal liability, if the said offences were related to mass protest actions that started on November 21, 2013. On-going criminal proceedings in cases covered by the law are terminated.

36. The difference between the December law and the January amendments is that the December law exempted individuals from criminal and administrative liability in connection with their actions related to mass protests in a certain timeframe (Article 4), while the January amendments (Article 1) limit this to an exemption from criminal liability for persons who have already been accused or suspected of criminal acts. Moreover (this applies to both laws), the exemption presumably applies not only to protesters, but also to state officials present at the events, including law enforcement personnel. In this context, it is noted that Article 122 (intentional bodily injury of medium gravity) is included in the list of certain criminal offences set out in the amendments to the law. Moreover, this list also includes offences that foresee aggravated sanctions if the crimes were committed by officials, namely Article 161 (violation of citizens' equality based on their race, nationality or religion) and Article 171 (preclusion of legal professional activities of journalists) of the Criminal Code, while Article 365 (excess of authority or official powers) appears to deal only with offences committed by officials.

37. Under the jurisprudence of the European Court of Human Rights on Article 3 ECHR (prohibition of torture, inhuman or degrading treatment and punishment), where an individual raises an arguable claim that he or she has been ill-treated by police or other state officials in breach of the prohibition of torture, inhuman or degrading treatment or punishment, the State is obliged to conduct an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, as the Court has stressed repeatedly, the general legal

[17] The offences referred to Articles 109, 122, 161, 171, 185, 194, 259, 279, 289, 293, 294, 295, 296, 341, 342, 343, 345, 348, 349, 365, 376, 382, 386 of the Criminal Code of Ukraine.

prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice, and in some cases agents of the State could thus abuse the rights of those within their control with virtual impunity.[18] Although the law does not appear to preclude civil suits against police officers, the ECtHR has also held that a remedy cannot be regarded as sufficient if it is aimed at awarding damages rather than identifying and punishing those responsible.[19]

38. In light of this obligation, and given the special obligation of the state, and its representatives, to uphold the law, and to protect human rights, it would be of great concern if the December law, and the January amendments to it, would *de facto* shelter public officials from being held accountable for serious wrongdoing, in particular in criminal cases (e.g. allegations of violence or other forms of abuse of power). Without prejudice to the intended aim of both pieces of legislation, it is stressed, in this context, that no legislation should ever render representatives of the state immune from criminal prosecution where their conduct gives rise to an arguable claim that an individual has been the victim of a serious human rights violation, given the special responsibilities that they have vis-à-vis the public, and the need for accountability. Especially in cases of ill-treatment by police officers, or of excess of authority or official power (Article 365 of the Criminal Code), exemption from punishment would be an unacceptable form of impunity, and could have severe negative consequences, in the sense that police and other security service personnel may not feel dissuaded from committing such acts in the future.

39. For these reasons, it is recommended to specify in the text of the "Law On Elimination of Negative Consequences and Prevention of the Prosecution and the Punishment of Individuals with Regard to Events That Have Occurred during Peaceful Rallies", that the exemption from liability shall not apply to officials, at least not in the cases mentioned above, for which they should be held fully accountable.

2.3 Restrictions on Wearing Masks and Uniforms during Assemblies

40. A new part 3 was added to Article 185-1 of the Code of Administrative Offences of Ukraine, which sanctions the wearing of "masks, helmets or other means or types of camouflage to prevent identification" during assemblies, and also the possession, during such events, of weapons, explosives, flammable or otherwise dangerous substances, or "specifically customized or pre-fabricated items for unlawful actions". The new provision likewise bans the wearing of uniforms "similar or appearing to be similar to uniforms of law enforcement officers or military servicemen", unless authorized by interior authorities (according to the amendments to Article 10, part 1, par 13 of the Law on the Police, this will be the police, based on a procedure established by the Cabinet of Ministers). Violations of the above bans are subject to penalties of 150-250 minimum non-taxable incomes of citizens or administrative arrest for up to fifteen days.

41. Since human rights law protects only peaceful assemblies, it is legitimate for the State to ban the possession, during such events, of weapons, explosives, flammable or

[18] See *Assenov v. Bulgaria*, EctHR judgment of 28 October 1998, appl. no. 24760/94, par. 102, *Labita v. Italy*, ECtHR judgment of6 April 2000, appl. no. 26772/95 par. 131 and *Tahirova v. Azerbaijan*, EctHR judgment of 3 October 2013, appl. no. 47137/07, par 51-61.
[19] See *Gladyshev v. Russia*, ECtHR judgment of 30 July 2009, appl. no. 2807/04, par 49.
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otherwise dangerous substances. As a matter of legal clarity, however, it is recommended to specify more closely the term "specifically customized or pre-fabricated items for unlawful actions", which could cover a wide range of items, not all of them necessarily intended for violent purposes.

42. The other provisions of the amendments to Article 185-1, on "masks, helmets or other means or types of camouflage to prevent identification" as well as those on "uniforms similar or appearing to be similar to uniforms of law enforcement officers or military servicemen" deal, in essence, with the appearance of individuals participating in peaceful assemblies, which raises a number of serious concerns.

43. As previously pointed out by ODIHR and the Venice Commission, individuals have the right to determine their own appearance, and restrictions on this right have been found to violate the right to freedom of expression and also the right to personal identity, which are protected by Article 10 of the ECHR and19 par 2 of the ICCPR, and Article 8 of the ECHR and Article 17 of the ICCPR respectively.[20] As the Guidelines also note, "uniforms, [...] should not, in themselves, be a reason to restrict freedom of peaceful assembly".[21]

44. It is true that certain types of clothing, like uniforms and masks, could be used by individuals to hide their identity for the purpose of preventing their identification for conduct creating probable cause for arrest. In this case, there is a legitimate reason for the state to interfere with the freedom of peaceful assembly, as long as this interference remains proportionate. At the same time, especially in cases where assemblies are being filmed by police, or where there is substantive media coverage of an event, individuals with purely peaceful and lawful intentions may still wear masks or similar clothing simply because they do not want their identity to be known. Moreover, in some situations, uniforms or masks may also be worn by participants in assemblies to convey (part of) the message of the assembly. The latter conduct would then become part of the expressive purpose of the assembly, which can only be restricted in very rare circumstances.[22]

45. The above addition to Article 185-1 does not distinguish between these various scenarios, but instead imposes a blanket ban on the wearing of masks, helmets, and other forms of camouflage, as well as uniforms resembling those worn by law enforcement officers, thereby also including cases where these items are worn for innocent reasons, or for expressive purposes. In the case of uniforms, while it is understandable that the state may wish to avoid confusion as to who is a participant in an assembly, and who is actually part of law enforcement, this issue could perhaps be resolved more aptly via provisions generally banning the impersonation of government officials.[23]

46. Moreover, a blanket ban combined with a permission procedure, obliging participants to always ask for permission before wearing such items would appear to be quite onerous, requiring as it does very significant additional bureaucratic steps. Moreover,

[20] OSCE/ODIHR-Venice Commission *Joint Opinion on the Law of Mass Events of Belarus*, CDL-AD(2012)006, par 108.

[21] Guidelines on Freedom of Peaceful Assembly, par 97.

[22] For a discussion of these issues, see Guidelines on Freedom of Peaceful Assembly, par 98.

[23] Such behaviour could potentially fall under Article 353 of the Criminal Code banning the unauthorized assumption of an office or title.

the Law does not specify in which circumstances permission to wear uniforms or masks, or similar clothing, will be granted.

47. For the reasons outlined above, it is therefore recommended to avoid general bans on wearing masks, helmets or other means or types of camouflage to prevent identification, as well as blanket limitations on wearing uniforms. At the very least, any ban on these items should take the potentially peaceful and/or expressive purposes of wearing such items fully into account.

2.4 Freedom of Peaceful Assembly and Temporary Installations

48. In the amendments, a new part 4 was added to Article 185-1 of the Code of Administrative Offences, which bans the "installation, unless authorized by interior authorities, of structures, tents or other minor architectural works, items or structures that may be used as a stage, or sound amplification equipment for or during meetings, street processions or demonstrations". Violations of this provision are subject to a penalty in the amount of 250-300 minimum non-taxable incomes of citizens or administrative arrest for up to fifteen days. In addition, according to amendments made to Article 10, part 1, par 13 of the Law on the Police, permits for the use of the above types of installations or structures during public events will be issued by the police, according to a procedure established by the Cabinet of Ministers.

49. Bearing in mind the circumstances in which the right to freedom of peaceful assembly may be limited under Article 39 of the Ukrainian Constitution, and under international law (Article 11 of the ECHR, Article 21 of the ICCPR and par. 9.2 of the Copenhagen Document), it is noted that while this limitation is clearly set out in law, it also needs to be necessary in a democratic society for the reasons outlined in these provisions. As discussed in par 19 *supra*, these include national security, public safety, public order, the prevention of disorder and crime, health and morals, and the rights and freedoms of others.

50. It is reiterated here that assemblies are organized for a common expressive purpose. The means used to achieve that common expressive purpose, such as sound installations, podiums and the like, are also protected under the freedom of peaceful assembly. The amendments introduce a permission system for a number of means of organizing assemblies, meaning that any kind of structure or sound equipment used for assemblies, be it a more short-term structure such as a stage, or amplifiers, or a potentially longer-term structure such as tents, would require prior authorization by the interior authorities. Such regulation significantly affects the ability to organize large-scale assemblies, which rely on stages, and sound amplifiers to convey their message. It is, after all, essential that participants in a public assembly are able to effectively communicate their message to those to whom it is directed – in other words, within "sight and sound" of the target audience.[24]

51. The limitations affecting tents or other semi-permanent structures mean that all longer-term assemblies can only take place pursuant to the authorities' permission (since the duration of an assembly is often extended spontaneously, depending on ongoing developments, this could mean that an assembly that is originally legal may turn illegal with time). This is so despite the fact that such temporary structures may form a relatively minor hindrance to third parties.

[24] Guidelines on Freedom of Peaceful Assembly, par 45.

52. While it is assumed that, depending on the circumstances, stages and sound equipment could affect the public order, or the rights and freedoms of others, this would need to be examined for each individual case. Requiring authorization for each assembly that wishes to use a stage, and/or sound equipment, regardless of existing imminent threats to the public interest, or to rights and freedoms of individuals, would not appear to always be necessary. Rather, the use of such structures and equipment should be part of the general notification process. The blanket limitation of such devices, which practically renders every large-scale public assembly dependent on the authorization of the police, is a disproportionate, and thus not justifiable restriction of the right of peaceful assembly.[25]

53. The matter of structures of longer duration, e.g. tents, or "minor architectural works" is also directly linked to a wider discussion on the duration of public assemblies. The ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly point out that the question of when, or at which point an assembly can no longer be regarded as a temporary presence (thus exceeding the degree of tolerance that authorities shall maintain towards all peaceful assemblies) must be assessed according to the individual circumstances of each case. Nonetheless, the touchstone established by the ECtHR is that demonstrators ought to be given sufficient opportunity to manifest their views, in sight and sound of their intended audience.[26] Also, where an assembly causes little or no inconvenience to others, the authorities should adopt a commensurately less stringent test of temporariness. [27]

54. Finally, the above bans of structures or sound equipment from public assemblies without the prior authorization of the police essentially provides the police with unfettered powers of authorization. Such authority is not compatible with the wording of Article 39 of the Constitution, which speaks of a notification procedure for assemblies, and requires that restrictions on the exercise of freedom of peaceful assembly shall be imposed only by a court. Moreover, the Law, or relevant secondary legislation, should outline standards and criteria on (at least large-scale) temporary installations in public spaces.

55. For the reasons outlined above, blanket bans on the use of specific equipment and structures during assemblies should be avoided, as they constitute disproportionate interferences with Article 11 ECHR and Article 21 ICCPR.

2.5 Freedom of Peaceful Assembly and Blocking Access to Property

56. The amendments passed on 16 January 2014 include a new addition to Article 295 of the Criminal Code of Ukraine, namely a ban on "blocking of access to residences, buildings, structures or other property of persons, enterprises, entities or organizations", punishable by restraint of liberty for up to five years or deprivation of liberty for two to six years. Additionally, Article 341, par 2 of the Criminal Code has been revised to criminalize the "blocking of buildings or structures supporting activities of public agencies, local self-government authorities or public associations in order to hinder regular operation of enterprises, entities and organizations". Such

[25] See also the OSCE/ODIHR-Venice Commission *Joint Opinion on the Law on Mass events of the Republic of Belarus*, CDL-AD (2012)006, par 110.
[26] Guidelines on Freedom of Peaceful Assembly par 45.
[27] Guidelines on Freedom of Peaceful Assembly, par 18.

behavior "shall be punished by restraint of liberty for up to five years or deprivation of liberty for a similar period."

57. In a related provision, Article 36-1 of the Law of Ukraine on the Prosecutor's Office now provides that the prosecutor "where he/she substantiates the need to protect interests of the state, may also represent the interests of the state in court through lodging claims (requests and motions) in order to remove hindrances to the exercise of the right to use public and community property or the property of public associations."

58. These amendments, while phrased in a general way, have the potential to significantly affect the exercise of the freedom of peaceful assembly. In this context, it should be borne in mind that public protest, and freedom of assembly in general, should be regarded as equally legitimate uses of public space as the more routine purposes for which public space is used (such as pedestrian and vehicular traffic).[28] While only peaceful assemblies are protected by international human rights law, the term "peaceful" should be interpreted to include conduct that temporarily hinders, impedes or obstructs the activities of third parties.[29]

59. In practice, although it would be legitimate to take certain proportionate measures to dissuade individuals from deliberately blocking access to certain properties, imposing criminal liability for all activities that block access to public and private buildings, however temporary, would potentially criminalize any larger assembly that takes place near a building. At the same time, depending on the circumstances, smaller assemblies would also be affected, e.g. if there is only one access road to a particular government building which forms the target of the message of participants in a peaceful assembly.

60. In particular, the revised Article 295 does not define the notion of "blocking", nor does it mention the necessary duration for "criminal blockage", which means that participants in assemblies inadvertently blocking access to property could arguably become criminally liable even if the assemblies only last for a few hours. The vagueness of the concept of "blocking" makes it very difficult for assembly organizers and participants to foresee the consequences of their actions, leading to a potential chilling effect on participation in larger-scale assemblies in particular.

61. It is noted, in this context, that the amendments to Article 295 of the Criminal Code, and Article 36-1 of the Law of Ukraine on the Prosecutor's Office do not foresee any measure of weighing the communicative and expressive aspect of the assembly against any hindrance (inadvertently) caused by the blockages. Moreover, even if access to a building would be blocked by a peaceful assembly for a lengthy amount of time, criminal liability potentially amounting to up to five years of prison is harshly disproportionate to an action that is more of a nuisance than a crime. For this reason, the amended versions of Article 295 and 341, par 2 of the Criminal Code of Ukraine, as well as Article 36-1 of the Law of Ukraine on the Prosecutor's Office, constitute an unjustified interference with the right to freedom of peaceful assembly. It is recommended to avoid such types of provisions in future legal reform efforts.

2.6 Freedom of Peaceful Assembly and Motorcades

62. The amendments introduce a new part 5 to Article 122 of the Code of Administrative Offences, which bans motorcades of more than five vehicles "where the movement

[28] Guidelines on Freedom of Peaceful Assembly, par 20.
[29] Guidelines on Freedom of Peaceful Assembly, par 1.3.

terms and procedure have not been coordinated with an appropriate road traffic safety division of the Ministry of Interior of Ukraine, thus, creating hindrances to road traffic". Those who violate this provision are subject to a penalty in the amount of 40-50 minimum non-taxable incomes of citizens, or to the deprivation of the right to operate vehicles for a period of one to two years, with or without the seizure of the vehicle. The amendments also provide for a simplified procedure to establish administrative liability of individuals engaging in such behavior, including a duty to report who was driving the vehicle at the time of committing the offence.

63. The European Court of Human Rights has always stressed that Article 10 ECHR on the freedom of expression also protects the form in which ideas are conveyed,[30] and the same would apply to assemblies, which also involve gatherings to express a common opinion. Indeed, processions, including processions of motor vehicles, are frequently used as a means of expression of a common opinion during public assemblies.[31] The use of cars driving in procession has been recognized by the ECtHR as a protected form of peaceful assembly.[32] Thus, Article 122 must be seen as a potential restriction to the exercise of the right to freedom of peaceful assembly, which, to be justified, must be necessary in a democratic society to achieve a legitimate aim, as well as proportionate in nature.

64. At the outset, it is already questionable whether such a measure is necessary. While public order and public safety could be seen as potential legitimate aims, it is difficult to see how the low number specified in the article ("more than five vehicles") would be sufficient to cause any major traffic disruption. Even if this were the case, such disruption would be of a temporary nature, and would normally not go beyond the level of disruption expected during an assembly, which public authorities should treat with a certain degree of tolerance.[33] Requiring authorization from the state for every such undertaking would constitute an onerous and overly bureaucratic limitation to the manner in which individuals choose to express themselves publicly.

65. Furthermore, as stated in Article 39 of the Constitution, and noted in the ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly, any legal provisions concerning advance notification may require the organizers to submit a notice of the intent to hold an assembly, but shall not demand a request for permission.[34] The amendments to Article 122, however, clearly establish such a permit requirement, even though it is difficult to see why a simple notification would not suffice for the authorities to make the necessary preparations to facilitate motorcades and similar events. In addition, the Code does not require the authorities to respond promptly to such a request, which could lead to delays, and render impromptu assemblies wishing to respond to current events impossible.

66. In addition, the punishment for violation of this provision, namely the potential loss of the permission to drive one's vehicle for one-two years, or the seizure of the vehicle, appear to be quite high sanctions for merely hindering road traffic. The new part 5 of

[30] See *Thoma v. Luxembourg*, ECtHR judgment of 29 March 2001, appl. no. 38432/97, par 45.
[31], Guidelines on Freedom of Peaceful Assembly, par 17.
[32] *Barraco v. France*, ECtHR judgment of 5 March 2009, appl. no. 31684/05, par 41.
[33] See *Kudrevicius and Others v. Lithuania*, ECtHR judgment of 26 November 2013, appl. no. 37553/05; *Galstyan v. Armenia*, ECtHR judgment of 15 November 2007, appl. no. 26986/03, par 116-117; *Bukta and Others v. Hungary*, EctHR judgment of 17 July 2007, appl. no. 25691/04, par 37, ECHR 2007 III; *Oya Ataman v. Turkey*, ECtHR judgment of 5 December 2006, appl. no. 74552/01, par 38-42; and *Barraco v. France*, EctHR judgment of 5 March 2009, appl. no. 31684/05, par 43, 5 March 2009.
[34] Guidelines on Freedom of Peaceful Assembly, par 118.

Article 122 of the Criminal Code therefore constitutes a disproportionate and thus unjustified interference with the exercise of the right to freedom of peaceful assembly.

3. Amendments Primarily Affecting the Freedom of Expression

3.1 The Criminalization of Defamation

67. In the amendments, a new Article 151-1, entitled "Defamation" was added to the Criminal Code of Ukraine. It provides that "defamation, i.e. intentional dissemination of untrue statements damaging to the honor and dignity of another person, shall be punished by penalty in the amount of up to 50 minimum non-taxable incomes of citizens or community service for up to two hundred hours, or correctional work for up to one year."

68. In addition, par 2 of Article 151-1 calls for more severe punishment for defamation where it is published in the mass media or in writings on the Internet and for defamation committed by a person having been convicted for defamation in the past. In these cases, the person shall be punished by a penalty in the amount of 50 to 300 minimum non-taxable incomes of citizens, or community service for 150-240 hours, or correctional work for up to one year. An even higher level of punishment is foreseen for defamation "in conjunction with the allegation of having committed a grave offense or felony" which in accordance with par 3 of the law shall be punished by correctional work for one to two years, or restraint of liberty for up to two years.

69. This provision raises concerns with regard to Article 10 of the ECHR, Article 19 of the ICCPR, as well as par 9.1 of the OSCE Copenhagen document, which protect the freedom of expression. Limitations to the freedom of expression may be justified only when they are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder, crime, health or morals, or the reputation or rights of others. Other justifications are the prevention of the disclosure of information received in confidence, or to maintain the authority and impartiality of the judiciary (Article 10, par 2 ECHR).

70. It has been the constant approach of the ECtHR to require very strong reasons to justify restrictions on political speech, since broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.[35] The Court has also reiterated that "the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion."[36]

71. As to matters of public interest, the Court has held that states may only criminalize actions of the media, and thereby restrict the right of the public to be informed of matters of general interest, with reference to maintaining public order and safety,

[35] See *Feldek v. Slovakia*, ECtHR judgment of 12 July 2001, appl. no. 29032/95 par 83, *Karman v. Russia*, ECtHR judgment of 14 December 2006, appl. no. 29372/02, par 36.
[36] See *Incal v. Turkey*, EctHR judgment of 9 June 1998, appl. no. 22678/93, par 54.

where publications incite to violence or instigate ethnic hatred[37]; otherwise, the mere protection of individuals' reputations will never justify actions that unduly hinder public debates on such matters, in particular prison sentences. The Court noted that such sanctions would inevitably have a chilling effect on public discussion[38].

72. The UN Human Rights Committee has also pointed out that defamation laws must be crafted with care to ensure that they do not serve, in practice, to stifle freedom of expression.[39] Moreover, it has stated, at least with regard to comments about public figures, that "consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice", in particular in relation to excessively punitive measures and penalties.[40] In fact, the Committee has urged states to consider the decriminalization of defamation, and to apply criminal law in only the most serious cases, which should never lead to imprisonment.[41] Equally, the OSCE Representative on Freedom of the Media has consistently called for the decriminalization of defamation.[42]

73. Given the wide application of this new provision, which could conceivably include discussions on political matters, and the work of journalists, and the above concerns relating to the criminalization of defamation in general, it is recommended to not reintroduce criminal liability for defamation, a crime which has not existed in Ukraine since 2001. In particular the option of receiving a prison sentence for publicly accusing another person of a grave offence or felony (Article 151-1, par 3) would appear to be unnecessary, and highly disproportionate. The new provision to the Criminal Code also fails to specify that individuals shall be exempted from liability if they believed their statements to be true.

74. In this context, it should be noted that numerous other OSCE and Council of Europe states, such as Armenia, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Moldova, Montenegro, and the United Kingdom have abolished criminal defamation.

3.2 The Criminalization of 'Extremist Activities'

75. The amendments have added a new Article 110-1, entitled "extremist activities" to the Criminal Code of Ukraine. It bans the "fabrication, storage for trading purposes or distribution of extremist materials" via mass media, the Internet, social networks, but also their use in front of all public gatherings, and making statements or calls of an extremist nature in public. The funding of the above activities is likewise prohibited, as is any other contribution to their organization or implementation. Next to the provision of financial services, this includes monetary resources, real estate, educational, printing or infrastructure facilities, telephone, facsimile or other types of communications where no elements of a more severe offence exist.

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[37] See *Sürek and Özdemir* v. Turkey, ECtHR judgment of 8 July 1999, appl. nos. 23927/94 and 24277/94, par 63 and *Erdogdu and Ince v. Turkey*, EctHR judgment of 8 July 1999, appl. nos. 25067/94 and 25068/94, par 54.
[38] See *Marchenko v. Ukraine*, ECtHR judgment of 19 February 2009, appl. no. 4063/04, par 52.
[39] UN Human Rights Committee, *General Comment 34 on Freedom of Opinion and Expression*, par 47, available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf
[40] Ibid.
[41] Ibid.
[42] See e.g. the 2002 Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression; see the compilation of Declarations, available at http://www.osce.org/fom/99558?download=true. See also: OSCE Representative on the Freedom of the Media, *Legal Analysis of Law No. 925 of 17 October 2013 concerning the defamation legislation in Italy*, available at http://www.osce.org/fom/108108.

76. Those acting in violation of this provision are subject to a penalty in the amount of 200-800 minimum non-taxable incomes of citizens, including confiscation of the extremist materials. Paragraph 2 foresees aggravated sanctions for recurrent similar actions (1000-3000 minimum non-taxable incomes of citizens, or restraint of liberty for a period of up to three years, or deprivation of liberty for a similar period, including confiscation of extremist materials).

77. A Note appended to the new provision defines extremist materials as "documents for the purpose of publication on paper, electronic or any other media containing information of extremist nature", in other words calling, substantiating, or justifying the need to plan, organize incite, prepare or implement actions such as, *inter alia*, a violent change of government, or the overthrow of the constitutional system, or offences against territorial integrity or sovereignty of the state. At the same time, such illegal actions also include "illegitimate intervention into activities or impediment to legal activities of public agencies, local self-government authorities and other public entities, election commissions, non-government organizations, their officers or officials".

78. Moreover, the Note further specifies that this may also mean any call, substantiation or justification of enmity or hatred, mass riots, disturbances of public order, violence and acts of vandalism motivated by enmity and hatred, and breach of the rights, freedoms and legitimate interests of persons, as well as discriminatory behavior and propagation of superiority towards certain groups.

79. In addition, the amendments add a new part ten to Article 5 of the Law on the Freedom of Worship and Religious Organizations, which provides that "[r]eligious organizations are forbidden to engage in extremist activities". At the same time, this law provides no definition of extremist activities, nor does it include a specific link to Article 110-1 of the Criminal Code.

80. These new provisions raise serious concerns under the rights to freedom of expression and to freedom of religion or belief. At the outset, it is noted here that the freedom of expression protects a wide range of statements and other forms of expression. This includes not just ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.[43]

81. As noted above, in order to be justified, a restriction to the freedom of expression needs to be prescribed by law and necessary in a democratic society for an enumerated aim (par 2, Article 10 ECHR). In line with the ECtHR's requirements that laws need to be precise and foreseeable, the UN Human Rights Committee has noted that offences relating to "extremist activity" should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with the freedom of expression.[44] Considering the fact that the amended provision also affects expression on the internet, it is reiterated that the freedom of expression applies both online and off-line.[45]

[43] See *Handyside v. United Kingdom*, ECtHR judgment of 7 December 1976, appl. no. 5493/72, par 49; cf. also Human Rights Committee, General comment 34, par 11: "The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive."
[44] UN Human Rights Committee, General Comment 34, par 46.
[45] UN Human Rights Committee, General Comment 34, par 12.

82. In light of these principles, the new provision on extremism raises a number of serious concerns. While the ban of violent change of government, overthrow of the constitutional system, and offices against territorial integrity, inviolability and sovereignty of the state appears to be legitimate, other activities considered as "extremist activity" are formulated too broadly to satisfy the requirement of foreseeability enshrined in Article 10.

83. In particular, it is not clear what is meant by "illegitimate intervention into activities or impediment to legal activities of public agencies, local self-government authorities and other public entities, election commissions, non-government organizations, their officers or officials". Since many things may intervene, intentionally or otherwise, with the activities of governmental or non-governmental organizations, including various forms of individual or group protest, this provision could capture a wide array of peaceful forms of expression.

84. In cases of "extremism" that are not clearly linked to an intent to commit acts of violence or the threat to commit such acts, this provision could conceivably be used to excessively restrict the freedom of expression and the freedom of peaceful assembly. The same applies to the ban on "calling for, substantiating or justifying […] disturbances of public order [..]". Given the hefty fines[46], and the possibility of imprisonment for up to three years, such a broad and vague formulation of a criminal provision could lead to extreme, unnecessary and disproportionate limitations of the freedoms of expression, and of peaceful assembly.

85. In addition, while it is clear that States need to protect their interests and values, it remains unclear whether the provision introducing the offence of extremist activities is necessary, and responds to any existing gap in Ukrainian legislation. The Criminal Code already contains several provisions which allow the state to prosecute persons seeking to overthrow the democratic regime (Article 109 on "Actions aimed at forceful change or overthrow of the constitutional order or take-over of government"; Article 113 on "Sabotage") as well as persons advocating hatred, discrimination or violence (e.g. Article 161 on "Violation of citizens' equality based on their race, nationality or religious preferences"; Article 258 on "Act of terrorism; Article 300 on "Importation, making or distribution of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination"). The added value of the new provision is therefore not clear.

86. As to the new part 10 of Article 5 of the Law on the Freedom of Worship and Religious Organizations, it is pointed out here that if the ban on extremist activities is meant to be applied to religious communities or organizations as such, this could raise issues under the freedom of thought, conscience, religion or belief (protected by Article 9 ECHR, Article 18 ICCPR and the Copenhagen Document of 1990, par 9.4), and the freedom of association. In this context, it is noted here that religious organizations or communities should not be held accountable for the actions of their members. Criminal liability should, in order to be proportionate, lie with the individual members of the community, rather than with the organizations and communities. Moreover, it is not clear why religious organizations, as opposed to other organizations, should be especially prohibited from committing extremist acts as defined in 110-1 of the Criminal Code, which, in any event, are in part too broadly and

[46] As of 2014, this minimum is 609 hryvna, or about 52,71 EUR, which means that fines could reach over 150.000 euros.

vaguely worded to constitute a proportionate interference with the freedom of religion or belief.

87. It is therefore recommended to refrain from introducing new provisions on extremism such as Article 110-1 into the Criminal Code; the same applies to Article 5, part 10 of the Law on the Freedom of Worship and Religious Organizations.

3.3 The Requirement for Information Content Providers to Register

88. Article 164 ("Violation of carrying out economic activities") of the Code of Administrative Offences of Ukraine was amended to prohibit "carrying out business activities of an information agency without state registration, upon termination of its activities, or in case of evasion of re-registration, if legal grounds for this exist". The violation of this provision is punishable by a fine ranging from 600-1000 untaxed minimum incomes, along with the possible seizure of products made, means of production, raw materials, and money received as a result of committing the administrative offense. Part 2 of Article 164 foresees aggravated penalties if the actions specified in paragraph 1 of this Article are repeated during one year, or are related to making a significant profit.

89. The transitional provisions of the Law "On Amending the Law of Ukraine on the Judicial System and the Status of Judges, as well as Procedural Laws Concerning Additional Measures to Protect the Safety of Citizens" specify the obligations of persons carrying out activities of a public association, including the distribution of information agency products via Internet resources, with no certificate of state registration of an information agency as an entity involved in information activities. These persons must obtain such a certificate within three months upon the enactment of this Law or terminate their activities. The relevant provisions also state that "[t]the subject persons may not be held accountable for the issuance and distribution of information agency products without its state registration within the said period of three months."

90. Furthermore, the Law "On Information Agencies" has been amended by complementing Article 5 with a list of exceptions, outlining which websites do not perform the activities of information agencies and are thus not subject to mandatory registration. In accordance with Article 5 of this law, the "[d]istribution (dissemination) of information products via Internet resources" is not considered to be part of an information agency's activities, if they duplicate registered print media, are carried out by government agencies on their official websites, by enterprises, institutions or organizations with regard to their own operations, or by business entities promoting their products or services for purposes of trade. This also applies to the online distribution of information products if it is "carried out by a person on a non-systematic and non-professional basis pursuing no goal of rendering information services'.

91. This means that information agencies (including also individuals) which do not meet one of the above criteria for exemption from the law are subject to mandatory registration. Such a registration requirement constitutes an interference with Article 10 ECHR, and Article 19 ICCPR and as such, needs to be prescribed by law and be necessary in a democratic society for a purpose enumerated in the above instruments.

92. In this context, it is noted that for individuals, the exemption from the requirement to register contained in the Law on Information Agencies is rather limited, and requires cumulatively that information is distributed on a non-systemic and non-professional

basis, and that such distribution does not pursue the "goal of rendering information services". For example, this means that if an individual is blogging on current events in a more or less systematic manner, or with the intent of rendering information services, then he/she would be obliged to register, even if this is not his/her profession.

93. It is not clear why such a wide array of information providers, including bloggers and those sharing information through internet websites, should need to register. In addition, the level of punishment, including the high minimum level of punishment, appears particularly severe.[47] As the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression have noted in a joint statement, "[n]o one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting".[48]

94. Article 164 ("Violation of carrying out economic activities") of the Code of Administrative Offences of Ukraine, especially when combined with the requirement to register and the insufficient list of exemptions contemplated in Article 5 of the Law "On Information Agencies", thus constitutes a disproportionate interference with the freedom of expression. These, and all other provisions requiring registration of information content providers, and banning unregistered media-related activities, should not be included in any legislation. In particular, where internet websites cover matters of public concern, it does not seem necessary to require them to first register with the government. To the extent that information published on internet websites may be harmful, for example to the reputation of others, a wide array of less intrusive measures could be contemplated, such as, for example, civil actions for damages, or other more specific and targeted measures.

3.4 Unauthorized Interferences with, and Distribution of, State Information

95. The amendments introduce a series of new provisions dealing with the protection of state information and state electronic resources to the Criminal Code of Ukraine.

96. Article 361-3 of the Criminal Code of Ukraine prohibits unauthorized interference with the operation of state electronic information resources or information and telecommunications systems, as well as "critical national information infrastructure facilities", if this results in the leakage, loss, forgery, blocking, or distortion of the information processing procedure or in a violation of the "existing routing process". Such offences may be punished by a deprivation of liberty for a period of two to five years, including a divestment of the right to hold certain positions or engage in certain

[47] As of 2014, the minimum untaxed income is 609 hryvna, or about 52,71 EUR, which means that while the minimum fine is over 30,000, the maximum lies at about 50,000 EUR.

[48] 2005 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, available at http://www.osce.org/fom/99558?download=true. See also the Council of Europe Parliamentary Assembly Resolution 1372 (2004), P*ersecution of the press in the Republic of Belarus*, available at http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17212&lang=en, which considered the requirement for media registration in Belarus to violate the "fundamental principle of the separation of powers between the executive and the judiciary, and contrary to Article 10 [of the ECHR]". Special government registration of print media outlets was also questioned in the cases of *Gawęda v. Poland*, ECtHR judgment of 14 March 2002, 26229/95, par 40 and *Dzhavadov v. Russia*, ECtHR judgment of 27 September 2007, appl. no. 30160/04, par 40.

activities for a period of up to three years, as well as confiscation of software and hardware equipment involved in the unauthorized interference and owned by the convicted person. Paragraph 2 of this provision contains an aggravated penalty of three to six years' imprisonment for recurrent or group actions (if the individuals were engaged in a prior conspiracy), or if the action caused significant damage.

97. Article 362-1 of the Criminal Code prohibits "the unauthorized adjustment, destruction or blocking of information" processed in state electronic information resources or information and telecommunications systems of critical national information infrastructure entities "committed by a person having the right of access thereto." This shall be punished by deprivation of liberty for a period of two to five years, including divestment of the right to hold certain positions or engage in certain activities for a period of up to three years, as well as confiscation of software or hardware involved in such unauthorized interference, as owned by the convicted person. Aggravated punishment (deprivation of liberty for three to six years) applies where this results in information being leaked, and even harsher prison sentences are foreseen if the actions are recurrent or involve prior conspiracy of a group of persons, if causing significant damage.

98. The above provisions aim to protect government information from outside interference, and from cases where government employees, or others with authorized access unduly share such information. It is presumed that such behavior would require intent, given the harsh penalties imposed – to enhance clarity of this provision, it may be advisable to specify this in both provisions (it is noted that this is specified in numerous other Criminal Code provisions where intent is required[49]).

99. As to the "leaking" of information, it is noted here that sending and receiving information is protected by Article 10 ECHR and Article 19 ICCPR. This applies, as discussed above, *a fortiori* to information which is of public concern, or which discusses political matters. Article 362-1 does not contemplate the possibility of "whistleblowers" (i.e. individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy) releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law. These individuals should be protected against legal, administrative or employment-related sanctions if they act in "good faith".[50]

100. Articles 361-3 and 362-1 of the Criminal Code, if reintroduced, should thus be amended to require intent as a constitutive element of the crime; Article 362-1 should also provide protection to individuals releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law.

101. Article 361-4 of the Criminal Code bans the unauthorized trade or distribution of restricted information which is processed within state electronic information resources. The Article further provides that those responsible shall be punished by deprivation of liberty for a period of two to four years including the confiscation of software or hardware involved in such unauthorized trade or distribution of the subject

[49] See, e.g., Articles 115-118 (murder) and 121-126 (bodily injury, battery and torture), as well as Article 383 (intended misreport of a criminal offense) and Article 145 (unlawful disclosure of confidential medical information), all from the Criminal Code.

[50] See the 2005 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. .

information, as owned by the convicted person. It introduces a harsher punishment for recurring acts, or acts involving a group conspiracy, or causing significant damage, namely three to six years, including the confiscation mentioned above.

102. It is, in principle, possible for legislation to legitimately limit access to secret information on the grounds of national security or protection of other interests listed in Article 10, par 2 ECHR. However, such legislation (this will usually be legislation specifically on state secrets, and the classification of information) should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label "secret" for purposes of preventing disclosure of information which is in the public interest.[51] In addition, as indicated by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information. Criminal law provisions that do not restrict liability for the dissemination of State secrets to those who are officially entitled to handle those secrets should be repealed or amended.[52]

103. It is noted in this context that Article 361-4 also does not mention that only intentional behaviour shall be punished – for the sake of clarity, this should perhaps be specified in the provision (see par 98 *supra*), since already the minimum level of punishment is quite harsh. Moreover, Article 361-4 should also be expressly limited to cover those (e.g. government employees) who distribute restricted information in an unauthorized manner, and should not cover those individuals who then go on to distribute that information more widely. For example, where a whistleblower leaks information of public concern to a newspaper, and the newspaper then publishes that restricted information, the newspaper should not be criminally prosecuted. This would otherwise be a clearly disproportionate interference with the freedom of expression, which covers both the right of individuals to distribute information, and the public's right to receive it. Provisions such as Article 361-4 should thus not be included in the Criminal Code, unless substantially revised in the manner described above.

3.5 Access to the Internet

104. Amendments to Article 18, part 1 of the Law of Ukraine on Telecommunications add a new par 23-1 to this provision, allowing the National Commission on Communications to restrict access to internet resources for information agencies which carry out their activities "having no certificate of state registration of information agency required by law" and to those who distribute information "contrary to the law". The interpretation of whether an agency/individual has distributed information contrary to the law is left to an expert opinion. The amendments also empower the National Commission on Communications to renew access to the Internet where the breach of the law has been addressed.

[51] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression 6 December 2004, available at http://www.osce.org/fom/99558?download=true.
[52] Ibid.

105. An amendment is also made to Article 39 (part 1), by adding par 18-2 of the Law of Ukraine on Telecommunications, according to which providers are obliged to comply with decisions of the National Commission on Communications on the restriction of access of their subscribers to Internet resources.

106. Access to the Internet is part of the freedom of expression protected by Article 10 of the ECHR[53] and Article 19 of the ICCPR. As the UN Human Rights Committee has pointed out, "States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto."[54]

107. In addition, the Human Rights Committee noted that "[g]iving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet. Access to the Internet is also necessary to promote respect for other rights, such as the rights to education, health care and work, the right to assembly and association, and the right to free elections". It stressed that denying individuals the right to access the Internet was an extreme measure that could be justified only as a last resort, and based on a court decision.[55] Moreover, the Human Rights Committee considered other measures limiting access to the Internet, such as imposing registration or other requirements on service providers, to not be legitimate, "unless they conform to the test for restrictions on freedom of expression under international law".[56]

108. Bearing this in mind, the amended Article 23-1 poses a number of concerns. First, it allows the state to restrict access to the Internet in cases where information agencies "distribut[e] information contrary to the law", which is a quite vague formulation that is open to a wide range of interpretations. The provision does not specify what type of information would be considered as "contrary to the law", and there is no indication of any threshold of proportionality; this would be necessary given the extensive sanctions set out in Article 23-1, namely the complete denial of access to the Internet. Moreover, the nature of the "expert opinion" required by Article 23-1 is also unclear, in particular on which basis it takes its decisions, how the experts are selected, and what kind of criteria would need to be taken into account.

109. In addition to the above, and to ensure the proportionality of sanctions in this area, consideration may be given to introducing other, less invasive forms of punishment in cases where laws have been violated in this context. This could be achieved by introducing fines, or limited access restrictions, which would not be as intrusive as a complete access ban, which severely limits individuals from receiving and imparting a wide range of information, including in the personal sphere, and also encroaches

[53] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, ECtHR judgment of 5 May 2011, appl. no. 33014/05, par. 63-66*; Times Newspapers Ltd. (Nos. 1 and 2) v. the United Kingdom*, ECtHR judgment of 10 March 2009, appl. nos. 3002/03 and 23676/03, par 27.
[54] UN Human Rights Committee, *General Comment 34 on Freedom of Opinion and Expression*, available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf, par. 43.
[55] Ibid.
[56] Ibid.

significantly on their ability to send and receive information of public concern. Moreover, any more serious penalties such as higher fines, or blocking access to the Internet should be imposed only by courts, following appropriate court procedures that allow both sides to be heard (with the burden of proof on the Commission).

110. Based on the above, the amendments to the Law of Ukraine on Telecommunications would appear to constitute a disproportionate interference with Article 10 ECHR and Article 19 ICCPR. Their wording, and that of similar provisions that may be introduced in the future, should be reconsidered, and enhanced in the manner described above.

3.6 On the "Collection and Use of Apparently Slanderous Materials"

111. Article 343 of the Criminal Code of Ukraine, in its new reading, criminalizes the "[i]llegal collection, storage, use, disposal, and distribution" of confidential information, or of materials or information "of an apparently slanderous nature" concerning a law enforcement officer or an employee of the State Enforcement Service, or their families. Moreover, it bans the "demonstration of impudent disrespect" towards a law enforcement officer or employee of the State Enforcement Service, or any other form of pressure, intimidation or influence against such persons, including public calls/distribution of materials calling to commit such actions, with the purpose of revenge, impede the performance of duties, or obtain an unlawful decision.

112. This amendment limits both the collection of information and its dissemination, and therefore has a significant effect on the freedom of expression protected by Article 10 ECHR. In this context, it is noted that it covers a wide variety of situations which may be of public concern, as well as an equally wide range of people, e.g. journalists, editors, bloggers, or persons interviewed in the media.

113. While it is acknowledged that this provision may be inspired by the legitimate goal of protecting law enforcement officers in the discharge of their official duties, the vague formulations used therein give rise to a wide, potentially arbitrary interpretation. Words such as "apparently slanderous", "impudent disrespect" or "influence of any other form" are prone to varying interpretations and fail to circumscribe with sufficient precision which type of behaviour they address, in particular when "disrespectful" or other behaviour would be considered sufficiently serious to warrant criminal liability. This is particularly worrying in light of the fact that such actions are punishable by the deprivation of liberty ("arrest for up to six months"). The provision furthermore raises concerns from the perspective of the freedom of expression, since the mere "collection" of true or false information, should not be a matter of state concern. For these reasons, such amendments to Article 343 of the Criminal Code should be avoided, unless they are significantly reworded.

114. Article 376 of the Criminal Code, in its amended version, proscribes similar "illegal" actions taken in respect of a judge (and his or her close relatives or family members); individuals engaging in such actions are liable to even harsher punishment, namely imprisonment of up to two years. This could significantly reduce the scope for legitimate discussion of whether a particular judge is independent, or to raise credible allegations of corruption. For these reasons, and those outlined above, it is strongly recommended that such amendments to Article 376 of the Criminal Code be similarly reconsidered. That would protect against a potentially arbitrary and abusive

application of the law, deriving from the literally unfettered discretion enjoyed by executive authorities in the implementation of these vaguely-worded provisions.[57]

3.7 Provisions on the Dismissal of Members of the National Council for Television and Radio Broadcasting of Ukraine

115. The amendments introduce a new paragraph to Article 8, part 1 of the Law on the National Council for Television and Radio Broadcasting of Ukraine. This new provision allows for the dismissal of members of the regulatory authority "based on the decision of the authority" that is competent for the appointment.

116. According to international standards,[58] the independence of broadcasting regulatory authorities requires that the mandate of board members, as well as the criteria for ending such a mandate, are clearly established by law and are not dependent on political or discretionary decisions. If this principle is not respected, the possibility to dismiss and to change board members would transform regulatory authorities into mere dependent political bodies, controlled by the incumbent political party, the Government or the Head of the State. This could severely compromise media pluralism and the free flow of information and ideas in the public sphere.

117. Therefore, the new provision of the Law introducing the possibility to dismiss members of the regulatory authorities without specifying the criteria and underlying causes (such as inability to perform the duties due to health reasons, serious violations of law, etc.) is not acceptable, as it alters the independence and normal institutional performance of the regulatory authority. For these reasons, it is recommended to avoid similar amendments to the Law on the National Council for Television and Radio Broadcasting in future.

4. Amendments Primarily Affecting the Freedom of Association

118. The recently passed amendments also added new provisions to the Tax Code of Ukraine (Article 14) and to the Law on Public Associations (Article 1), which introduce the concept of a "foreign agent" into Ukrainian legislation. This term covers public associations receiving any form of monetary contributions or assets from foreign countries. This includes public authorities and non-governmental organizations from such countries, but also international non-governmental organizations, foreign nationals, stateless persons or their authorized representatives receiving monetary contributions or other assets from the above subject sources. Funds received from

[57] The ECHR requires that laws affecting human rights and fundamental freedoms, and particularly regulations on restrictions thereto, be worded with sufficient precision so as to avoid unfettered executive discretion in their implementation. See, for instance, "The Standard Approach under Articles 8-11 ECHR",, by Prof. Douwe Korff, available at http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf

[58] Recommendation No. R (2000) 23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector clearly establishes that "The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence". Particularly regarding the status of board members, it stresses that "precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure".

these sources may not support the operation of such organizations, which may then not be involved in political activities in Ukraine, "including in the interest of foreign sources". Organizations deemed to be "foreign agents" are subject to a set of special, more burdensome, regulations; in particular, they are obliged to pay taxes, and need to publicly report on their activities every three months, among others.

119. Paragraph 2 of the amended Article 1, part 6 of the Law on Public Associations specifies that the term "taking part in political activities in Ukraine" covers all situations where an organization, irrespective of the goals and objectives specified in its constituent documents, engages in the organization and the implementation of political campaigns that aim to influence public decision-making, the modification of state policy, or shape public opinion.

120. Under the amended Article 10 of the Law on Public Associations, public associations "performing the functions of a foreign agent" need to specify this in the title of their association, while the amended Article 14 states that "foreign agents" and stand-alone branches of foreign non-governmental organizations shall, prior to commencing activities funded by foreign sources, register as "foreign agent" organizations with the authorized registration agency. Finally, such organizations are obliged to report separately on the amount of financial resources received from foreign sources, and on their planned activities on a monthly basis, and shall publish similar reports on their activities online, and in certain newspapers every three months (amended Article 23).

121. In this context, it is reiterated that the right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources. The Committee of Ministers of the Council of Europe also stated, in a 2007 recommendation, that this right applies to institutional or individual donors, other state or multilateral agencies, "subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties."[59] Moreover, the fact that public associations might receive funding from abroad, or from foreign (or especially stateless) individuals is not sufficient reason to automatically assume that they are acting on behalf of a foreign power, as is implied by the term "foreign agent", in particular in relation to funds received from international organizations. Therefore, measures which compel recipients of foreign funding to adopt negative labels such as "foreign agents" constitute undue impediments on the rights of associations to seek, receive and use funding.[60]

122. Furthermore, the stigma associated with the term "foreign agent" may well have negative effects on the ability of such organizations to plan activities and raise awareness on key issues. The special registration and onerous reporting requirements, and the obligation to pay taxes, could similarly greatly hamper organizations in their daily activities, and their ability to organize events. On the point of financial reporting

[59] Council of Europe Committee of Ministers, *Recommendation CM/REC(2007)14 on the Legal Status of Non-Governmental Organizations in Europe*, available at https://wcd.coe.int/ViewDoc.jsp?id=1194609

[60] See the OSCE/ODIHR-Venice Commission *Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic* (CDL-AD(2013)030), par 57, available at http://legislationline.org/download/action/download/id/4857/file/239_FOASS_KYR_16%20Octt%202013_en.pdf; A/HRC/23/39, second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, par 8, section V. Conclusion and Recommendations, pars 20, and 82 letter (d)

and accountability, it is reiterated that associations should be accountable to their donors, and at most, subject by the authorities to a notification procedure. This procedure should be the same for all organizations, and should focus on the receipt of funds and the submission of reports on the associations' accounts; states should take all requisite measures to protect individuals and associations against defamation, disparagement, undue audits and other attacks in relation to funding they allegedly received.[61]

123. Legislation on "foreign agents" has been criticized by OSCE/ODIHR and the Venice Commission in a recent Joint Opinion[62], but also by the OSCE Representative on Freedom of the Media[63], and UN Special Rapporteurs.[64] As stated above, legislation subjecting such organizations to a special legal regime interferes with the right to freedom of association[65], but also with the right to freedom of expression[66] of associations and individuals. While such interference might aim to pursue the legitimate aim of ensuring the openness and transparency of non-commercial organizations, and their sources of funding, the measures used are ultimately disproportionate to this, and thus incompatible with international standards on the protection of human rights and fundamental freedoms.[67]

124. Moreover, it is noted that the amended provisions on "foreign agents" fail to clearly and unambiguously define the term "political activities", which is crucial for determining the newly introduced status of public associations performing the functions of a "foreign agent". The definition put forward in the amendments to the Law on Public Associations is overbroad, somewhat tautological, and fails to acknowledge the truism that many if not all actions taken by a wide array of organizations may – inadvertently or even inevitably, but in any case legitimately – shape public opinion. In this context, it may be noted that the ECtHR has cautioned that the term "political" is in and of itself "inherently vague and could be subject to largely diverse interpretations".[68] The "foreign agent" label is thus not only unduly pejorative and discriminatory, but also insufficiently precise (because of the unclear and overbroad definition of what constitutes "political activities"), and therefore not in keeping with the ECtHR demands of legality and foreseeability of laws.

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[61] See the OSCE/ODIHR-Venice Commission *Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic*, par 70; see also the Second report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/23/39), par 37, section V. Conclusion and Recommendations, par 82 letter (e).

[62] See the OSCE/ODIHR – Venice Commission *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic*..

[63] See OSCE Representative on Freedom of the Media's statement of 9 April 2013, available at http://www.osce.org/fom/100569. It bears recalling that Ukraine is not the only country to have adopted (or considered adopting) such "foreign agents" provisions. Similar amendments were adopted in the Russian Federation in 2012 and tabled in the Jogorku Kenesh of the Kyrgyz Republic in 2013.

[64] See the Second report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/23/39, section V. Conclusion and Recommendations, paras 20, and 82 letter (d).

[65] See Article 11 ECHR, Article 22 ICCPR, and pars 7.6, 9.3, 10.3 and 32.6 of the OSCE 1990 Copenhagen Document, as well as the OSCE 1989 Vienna Document and the OSCE 1990 Paris Document.

[66] See Article 10 ECHR and Article 19 ICCPR, as well as par 9.1 of the OSCE 1990 Copenhagen Document and the OSCE 1989 Vienna Document.

[67] For a detailed analysis of similar amendments tabled in the Kyrgyz Republic, see the OSCE/ODIHR – Venice Commission *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic*.

[68] See *Zhechev v. Bulgaria*, ECtHR Judgment of 21 June 2007, appl. no. 57045/00, par 55.

125. Finally, amended Articles 28 and 30 state that associations that violate, *inter alia*, the amended Articles 14 and 23 on registration and reporting outlined above may be banned (and presumably dissolved) by court decision. In this context, it is noted that the ban/dissolution of an association is a very serious and intrusive restriction of the exercise of the freedom of association, that should only be applied in grave circumstances, where associations pose serious threats to, e.g. national security, or the rights and freedoms of others.

126. Generally, in cases where associations violate the legal requirements applicable to them (including those concerning the acquisition of legal personality), relevant legislation should respond to this with a variety of proportionate sanctions, including administrative decisions requiring them to rectify their affairs, and/or the imposition of administrative, civil or criminal penalties on the associations and/or any individuals directly responsible.[69]

127. Based on the above, it is once more reiterated that these types of provisions that label a wide group of associations as "foreign agents", that impose onerous registration and reporting requirements on such associations, and that allow for harsh and undifferentiated sanctions in case of non-compliance, do not adhere to key international standards and commitments on freedom of association. They should thus be avoided in all future legal reform initiatives in Ukraine.

5. Amendments Primarily Affecting the Right to a Fair Trial

5.1 On "Contempt of Court" Provisions

128. Several amendments to the Economic Procedure Code (Article 74), the Civil Procedure Code (Article 162), the Code of Administrative Procedure (Article 134) and the Criminal Procedure Code (Article 330) provide that courts may adopt rulings on contempt of court, which in many cases "shall be deemed final and subject to no challenge". While the need to ensure the proper conduct of court proceedings, and to maintain the authority of the judiciary, is duly acknowledged, these provisions could raise certain fair trial concerns.

129. On the issue of contempt of court, it has to be acknowledged that because of significant differences in the criminal proceedings of various countries, there are no international obligations or best practices relating specifically to the question of how to deal with acts of contempt of court. Instead, the main parameters for the proper handling of such cases are to be found in general human rights principles, namely the right to liberty, the right to fair trial and the right to freedom of expression, as well as the right to a legal remedy.

130. An overview of relevant laws from a range of OSCE participating States shows that the definitions and ways of dealing with acts of contempt of court vary extensively throughout the OSCE region. For the most part, common law countries tend to criminalize acts of contempt of court, while many civil law countries define such

[69] Council of Europe Committee of Ministers, *Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe*, available at https://wcd.coe.int/ViewDoc.jsp?id=1194609, par. 72.

actions as disciplinary matters that are usually sanctioned by removal from the courtroom or a fine. [70]

131. The ECHR demands that if contempt of court is classified as a criminal offence or otherwise incurs a severe, punitive sanction, the offender must benefit from all minimum fair trial rights specified under Article 6 ECHR,[71] while the judge presiding over the contempt of court proceedings must give the appearance of being impartial and objective.[72] In cases of less severe punishment, where the purpose is mainly to restore order in the courtroom rather than punish the offender, Article 6 ECHR may not always be applicable due to the lack of a "criminal charge",[73] and the offender may consequently not necessarily be entitled to all the fair trial guarantees. It should be emphasized, however, that even where the contempt of court is not criminalized, the relevant proceedings still provide for basic fair trial guarantees, including the possibility of providing offenders with the opportunity to apologize and to defend themselves – if desired with the help of legal counsel. Any sanctions applied in cases of acts of contempt of court should be proportionate to the offensive behaviour. These principles should be borne in mind in any provisions on contempt of court.

132. As concerns the possibility of appealing against rulings on contempt of court, it must be stressed that in all instances affecting a person's human rights, he or she needs to be granted the right to appeal, since international law (specifically Article13 of the ECHR, and Article 2 par 3 of the ICCPR) provides that every person has the right to an effective remedy in cases of alleged human rights violations. It is therefore recommended to reconsider provisions such as the above amendments on contempt of court, and to ensure that a proper balance is struck between ensuring the proper administration of justice and safeguarding the human rights and fundamental freedoms of individuals.

5.2 *On Criminal Proceedings* in absentia

133. The package of recently adopted laws also included amendments to the Criminal Procedure Code of Ukraine, particularly as regards criminal proceedings conducted *in absentia*. Thus, the new Article 139 par 4 of the Criminal Procedure Code states that

[70] For a comparative overview of contempt of court provisions in Armenia, Germany, Sweden, Bulgaria, Austria, Moldova, France, Canada, the United Kingdom, Scotland, Ireland, and the United States, see paragraphs 10-12 and 28-44 of the OSCE/ODIHR *Note on Modifications to Armenian Criminal Legislation Related to Acts of Contempt of Court*, available at http://www.legislationline.org/documents/id/16018.

[71] See the ECtHR's *Ravnsborg v. Sweden* judgment of 23 March 1994, appl. no. 14220/88, par 34.

[72] See the ECtHR's *Kyprianou v. Cyprus* Grand Chamber judgment of 15 December 2005, appl. no. 73797/01, par. 127, where the Court noted that in proceedings of contempt of court directed at the judges personally, these same judges then took the decision to prosecute, tried the issue, determined the applicant's guilt and imposed the sanction of imprisonment. It found that in such a situation, "the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench".

[73] For example, in the case of *Ravnsborg v. Sweden*, the European Court of Human Rights found that measures ordered by the court to ensure the proper and orderly functioning of court proceedings were more akin to the exercise of disciplinary powers than the imposition of punishment for the commission of a criminal offence. Additionally, in this case the possible amounts of fines did not attain a level such as to make them criminal sanctions. For this reason, and also due to the restrictive circumstances of converting these fines into punishments, the Court found that what was at stake for the applicant was not sufficiently important to warrant classifying the offence as a criminal offence. For this reason, the case fell outside the ambit of Article 6 of the ECHR.

"[i]n the cases specified in this Code, the failure of a suspect or an accused to appear upon being summoned may entail criminal proceedings against them being conducted in absentia". According to the new Article 523[1] of the Criminal Procedure Code, this relates to cases where a suspect or accused, upon being duly notified about the date, time, and place of procedural actions or court sessions, fails repeatedly to appear before pre-trial investigation bodies or courts, if there are no valid reasons for such absence, if such reasons were not notified, or if the reasons specified are considered invalid. Article 523[1] specifies that procedures *in absentia* shall only take place if "criminal proceedings have been found possible to be conducted in [the] absence [of the suspect or accused]", but does not specify when this shall be the case.

134. These provisions introduce into Ukrainian law the possibility of criminal trials *in absentia*. Previously, under Article 323 of the Criminal Procedure Code, trials in the absence of the defendant could not be held. Courts, in such cases, were obliged to postpone hearings and order measures to secure the defendant's appearance before the court.

135. The new provisions raise concern as regards their compliance with international law, first and foremost with Article 6 pars 1 and 3 (c) - (e) of the ECHR. It is a general fair trial principle that in criminal proceedings, the defendant must be present at the trial hearing.[74] While certain exceptions from this rule are allowed, they must be formulated with sufficient precision, and shall only apply to narrowly phrased circumstances. Thus, the ECtHR has recognized that a criminal trial may exceptionally be conducted in the absence of the defendant, if the state authorities have acted diligently but have still not been able to notify the relevant person of the hearing.[75] Trials in absentia may also be permitted in the interests of the administration of justice in cases of illness (provided that defence counsel is present);[76] or if the defendant has himself or herself, freely and unequivocally, waived the right to attendance.[77] Moreover, a person who was convicted *in absentia* must have the possibility to obtain a full retrial merely by asking for it, or the law must contain the option for an automatic retrial – so that the person obtains "a fresh determination of the merits of the charge".[78]

136. Under the new provisions of the Criminal Procedure Code, any defendant who, upon being summoned, fails "more than one time" to appear before the relevant authorities, without reason or with reasons which are found invalid, may be tried *in absentia*, if this has been found to be possible. Given the serious repercussions that this has on the exercise of fair trial rights of individuals, not only during court proceedings, but also in the pre-trial stage, this formulation is excessively vague. It is also not clear, from the amendments, in which cases the absence of the accused or defendant shall be considered justified. As outlined above, conducting investigations and trials *in absentia* shall only be possible if the circumstances where this will be permissible are specified clearly, and in detail in the text of the Criminal Procedure Code. Moreover, as suggested by the ECtHR in its case law, the Code should allow for the possibility of a retrial, either by automatic decision of the court, or upon request of the person convicted *in absentia*.

[74] See *Ekbatani v. Sweden*, ECtHR judgment of 26 May 1988, appl. no. 10563/83, par 25.
[75] See *Colozza v. Italy*, ECtHR judgment of 22 January 1985, appl. no. 9024/80.
[76] See *Ensslin and Others v. the Federal Republic of Germany*, Admissibility Decision of the European Commission on Human Rights, appl. no. 7572/76, 8 July 1978.
[77] See *Poitrimol v. France*, ECtHR judgment of 23 November 1993, appl. no. 14032/88.
[78] See *Colozza v. Italy*, ECtHR judgment of 22 January 1985, appl. no. 9024/80, par 29.

137. Finally, it should be borne in mind that under settled ECtHR case law the provisions of paragraph 3 (a) of Article 6 of the ECHR point to the need for special attention to be paid to the notification of the "accusation" to the defendant.[79] Moreover, the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the basic features of a fair trial. The accused does not lose this right merely on account of not attending a court hearing.[80] Thus, if the possibility of trials *in absentia* are introduced into the Criminal Procedure Code, then potential fair trial violations should be pre-empted by ensuring that the Code requires extra efforts to notify or summon defendants that, for whatever reason, do not reply to summons issued by the prosecution service, or by court. Moreover, in such cases, the rights of the accused or defendant should always be guaranteed by court-appointed defence counsel, already in pre-trial proceedings.

138. These arguments should be borne in mind in future legal reform efforts involving the re/introduction of provisions on trials *in absentia.*

6. Amendments to the Parliamentary Rules of Procedure Affecting Parliamentary Immunity

139. The amendments passed on 16 January have also introduced changes to the Rules of Procedure of the Verkhovna Rada (Parliament) of Ukraine. Articles 218-221 were amended to provide that a request for the consent to the criminal prosecution, the detainment or the arrest of a member of parliament shall be included into the agenda of a session of the Verkhovna Rada as a matter of priority and without voting, and that it shall be considered as a matter of priority at a plenary session of the Verkhovna Rada without the provision of opinions by a committee.

140. The amendments also provide that the Chairman of the Verkhovna Rada shall invite the people's deputy in whose respect the request for the consent to the criminal prosecution, the detainment or the arrest has been submitted, to provide written clarifications within three days of the submission of the request in question; the said clarifications shall be issued to people's deputies one day prior to the consideration of the said issue at the plenary session of the Verkhovna Rada at the latest. It is also established by the amendments that if it is ascertained at the plenary session of the Verkhovna Rada that the person in whose respect the request has been submitted, refuses to provide clarifications or is absent from the plenary session of the Verkhovna Rada, and subject to the timely notification of the said person, the Verkhovna Rada shall consider the issue of granting the consent to the criminal prosecution, the detainment or the arrest without the person's clarifications or in the person's absence. Finally, the amendments provide that the right to defence shall be secured to the people's deputy "to the full extent in accordance with the procedure specified by the Criminal Procedural Code of Ukraine and other laws."

141. In an opinion touching on parliamentary immunity, the Venice Commission has noted that the main purpose of the rules on parliamentary immunity is the protection of the Parliament itself, and in particular its proper functioning. Parliamentary immunity is

[79] See *Kamasinski v. Austria*, ECtHR judgment of 19 December 1989, appl. no. 9783/82, par 79; *Mulosmani v. Albania*, ECtHR judgment of 08 October 2013, appl. no. 29864/03, par 123.
[80] *Van Geyseghem v. Belgium*, ECtHR judgment of 21 January 1999, appl. no. 26103/95, par 34.

not a personal privilege of individual members of Parliament.[81] Rather, it ensures the independence and dignity of the representatives of the nation by protecting them against any threat, intimidation or arbitrary measure directed against them by public officials or other citizens. Immunity thus ensures the autonomy and independence of the institution of parliament.[82] Any procedure on lifting parliamentary immunity should not lead to a situation where the working of the Parliament as a whole may be affected by selective, arbitrary or even politically motivated investigations.[83]

142. In parliamentary practice, there is usually strict scrutiny of any request to lift parliamentary immunity as to its seriousness, sincerity and fairness, as well as its timeliness (particularly when the parliament's term of office is drawing to a close) and procedural correctness,[84] by an ad hoc or specialised parliamentary committee.[85] Requests for immunity to be lifted are generally refused where there is cause to suspect the existence of *fumus persecutionis*, i.e. an intention to prosecute the parliamentarian unjustly and endanger his/her freedom and independence.[86]

143. In this context, it is noted that the Constitution of Ukraine provides in Article 80 that the people's deputies of Ukraine shall be guaranteed immunity, and that they shall not be held legally liable for the results of voting or for statements made in the parliament and in its bodies, except in cases of liability for insult or defamation. Additionally, Article 80 of the Constitution provides that the people's deputies shall not be held criminally liable, detained or arrested without the consent of the Verkhovna Rada.

144. The procedure contemplated by the amendments appears to be summary in nature. First, the new system does not foresee any justifications for not participating in hearings on this matter, such as ill health or temporary stay abroad. Second, the three day notice period granted to alleged offenders will in many cases not suffice to prepare an adequate explanation of any acts the deputy may have engaged in, especially if he/she needs to obtain documents, or obtain statements from witnesses or other individuals which may not be immediately available. There is also no explicit provision providing for additional time, where this is required for the deputy to prepare a proper defence. It would thus be possible to remove members of parliament within a very short span of time, and without adequate safeguards. Such procedure could have a significantly detrimental effect on the situation of, in particular, the parliamentary minority, and, more generally, on the effective functioning of democratic institutions of Ukraine.

145. For this reason, such amendments to the rules of procedure affecting parliamentary immunity should not be introduced, or, if so, should be substantially amended.

[END OF TEXT]

[81] See the Venice Commission's *Opinion on the Draft Decision on the limitation of parliamentary immunity and the conditions for the authorisation to initiate investigation in relation with corruption offences and abuse of duty of Albania* adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006), par 10.
[82] Inter-Parliamentary Union/UN OHCHR *Human Rights Handbook for Parliamentarians*, p. 64-65.
[83] Ibid., par. 18.
[84] Venice Commission, Report on the Regime of Parliamentary Immunity, CDL-INF (96) 7, available at http://www.agora-parl.org/sites/default/files/Venice%20Commission%20-%20Report%20on%20the%20Regime%20of%20Parliamentary%20Immunity%20-%201996%20-%20EN%20-%20PI.pdf, p. 14.
[85] Ibid., p. 13.
[86] Ibid., p. 14.

Annex 1: List of Laws passed on 16 January 2014

1. Law No. 721-VII “On Amending the Law of Ukraine on the Judicial System and the Status of Judges, as well as Procedural Laws Concerning Additional Measures to Protect the Safety of Citizens”

2. Law No. 724-VI "On Amendment to Verkhovna Rada (Parliament) Rules and Procedures"

3. Law No. 725-VII "On Amendments to the Criminal Procedure Code in Respect of Criminal Proceedings in Absentia"

4. Law No. 723-VII "On Responsibility for Administrative Offenses in the Field of Road Safety, Recorded Automatically"

5. Law No. 726-VII “On Amendments to the Law of Ukraine on Pro-bono Legal Aid”

6. Law No. 731-VII "On Amendments to the Law of Ukraine on Elimination of Negative Consequences and Preventing the Prosecution and Punishment of Persons Regarding the Events that Took Place During Peaceful Gatherings"