SUPPORT TO CRIMINAL JUSTICE REFORM
IN UKRAINE

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COMMENTS
ON CERTAIN PROVISIONS OF THE LAW OF UKRAINE NO. 721-VII OF 16 JANUARY 2014 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

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Introductory remarks

The Council of Europe requested an analysis of certain parts of the legislative package, which was passed by the Ukrainian Verkhovna Rada on the 16 January 2014 in reaction to the demonstrations in Kyiv and elsewhere. The purpose of the analysis is to assess the impact on human rights and potential impact on cooperation initiatives between the CoE and the Ukrainian authorities, in particular within the context of the justice sector reforms. It has been prepared under the auspices of the Council of Europe Project "Support to criminal justice reform in Ukraine", financed by the Danish Government.

In view of the scope of that request this analysis does not deal with any potential violations of procedural rules of the Verkhovna Rada when adopting the laws, and neither with the question of whether they are in accordance with the Constitution of Ukraine. It is however of the utmost importance that their legitimacy is checked, due to the most extraordinary procedure of adoption.

The analysis of the compatibility of laws with the ECHR is performed *in abstracto*[1] and is thus different from the examination of the application of the Law in a specific case, where violation of the ECHR will materialize. In that respect it is of the utmost concern that most of the amendments clearly have been motivated by the desire to establish tools for the law enforcement authorities and others to restrict and control also the peaceful events of the present situation in Ukraine[2], rather than to protect citizens in enjoying their right to freedom of assembly. Overall, the law rather aims to limit the ability of citizens to engage in any form of civil protest without prior approval by the government.

As a fundamental right, freedom of peaceful assembly should, insofar as possible, be enjoyed without regulation. The state should always seek to facilitate and protect public assemblies. When designing or amending assembly laws, Council of Europe member states should reflect the fundamental principles of "presumption in favor of holding assemblies", "proportionality" and "non-discrimination" in their wording[3].

Restrictions on public assemblies should not be based upon the content of the message they seek to communicate. It is especially unacceptable if the interference with the right to freedom of assembly could be justified simply on the basis of the

[1] See for instance *Berladir and others v. Russia*

[2] This is clear from the "Comparative Analysis of the Legislation in Some Foreign States" prepared by the Ukrainian government and from the title of one of the other laws, together with which the present law was decided by the Verkhovna Rada: "Law on Amendments in the Law of Ukraine on Elimination of Negative Consequences and Preventing Persecution and Punishment of Persons in Relation to Events which Took Place during Peaceful Assemblies".

[3] Venice Commission Opinion No. 686/2012 on the Russian Law on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences (CDL-AD(2013)003 §6)

authorities´ own view of the merits of a particular protest. Any restrictions on the message of any content expressed should face heightened scrutiny and must only be imposed, if there is an imminent threat of violence.[4]

Reference is made to the four prior Opinions from the Venice Commission and OSCE on freedom of assembly in Ukraine[5], and to the OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly. A main point of reference for this analysis has been the Venice Commission Compilation of Opinions concerning Freedom of Assembly[6].

The analysis of the Code of Administrative Offences and the Code of Administrative Procedures have been made jointly by Ian Leigh, UK, and Mikael Lyngbo, Denmark, and of the Law on Security Service by Mikael Lyngbo.

[4] CDL-AD(2010)031 Joint Opinion on the on the Public Assembly of Serbia by the Venice Commission and OSCE/ODIHR, §45

[5] CDL-AD(2006)033 Joint Opinion on the Draft Law on Peaceful Assemblies in Ukraine by the Venice Commission and OSCE/ODIHR, CDL-AD(2009)052 Joint Opinion on the order of organising and conducting peaceful events of Ukraine by the Venice Commission and OSCE/ODIHR, CDL-AD(2010)033 Joint opinion on the law on peaceful assemblies of Ukraine by the Venice Commission and OSCE/ODIHR, and the CDL-AD(2011)031 Joint opinion on the draft law on freedom of peaceful assembly of Ukraine by the Venice Commission and the OSCE/ODIHR.

[6] CDL(2012)014 rev

1. Code of Administrative Offences

1) Article 122

1. Article 122 of the CAO relates to speeding and other examples of careless driving. The amendment makes it an offence to drive in a motor convoy of more than 5 vehicles, creating hindrances to the road traffic, unless the driver has had the "conditions and order of traffic" approved by the police[7]. Violations are to be punished by 40-50 minimum incomes (a minimum tax exempted income is 17 UAH, corresponding to 1.5€) or deprivation of the right to drive for 1-2 years. Additionally the car can be seized, even if driven by someone else than its owner.

2. There is an issue of quality of law in the amendment, as they are drafted in vague terms, e.g. in Article 122.5 what does it mean "creation of obstacles for road traffic" or how can a convoy of more than five cars be identified?

3. The provision penalizes drivers who take part in unauthorized motor convoys of more than five vehicles. The reference to 'hindrances to the road traffic' does not appear to be a pre-condition for liability but rather appears to be an indication of the purpose of restriction.

4. Avoiding hindrances to traffic could potentially be a legitimate reason for introducing a restriction of this kind. However, under the wording of the offence it is merely driving in convoy that constitutes the offence, regardless of whether any hindrance to other traffic is caused in fact. For this reason the offence should be regarded as a simple restriction on expressive conduct or association.

5. Causing a certain disruption of traffic is an unavoidable element in many events and should be handled with tolerance as expressed by the Court in the *Ashughyan* case[8]: Where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Oya Ataman v.Turkey*, no. 74552/01, §§ 38-42, ECHR 2006-...).The Court further reiterates that the freedom to take part in a peaceful assembly is of such importance that a person cannot be subjected to a sanction – even one at the lower end of the scale of

[7] "…the respective authority of the Ministry of Interior…"
[8] *Ashughyan v. Armenia* (No. 33628/03)

disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as this person does not himself commit any reprehensible act on such an occasion (see *Ezelin*, cited above, p. 23, § 53).

6. Moreover, in the case of these amendments the penalties for the offence suggest that deterring or breaking up motor convoys is the underlying purpose, rather than preventing disruption or ensuring that other traffic is unhindered. The level of penalties clearly exceed the level for other traffic violations of Article 122; the fines range among the highest, deprivation of the rights to drive requires in other cases, that the driver has caused an accident and even then cannot exceed one year; no other violation of Article 122 can lead to the seizure of the car. The provisions can lead to sanctioning each driver of a funeral procession for unintentionally and briefly blocking a part of an intersection. By comparison offences that endanger the lives or safety or other road users, such as driving through a pedestrian crossing or through a red traffic light have a maximum penalties (respectively) of fifteen to twenty or twenty to twenty five tax exempt incomes. Nor has it been found necessary to disqualify drivers who are found guilty of these offences for these longer terms or to seize their vehicles in relation to the other road traffic offences under Article 122, notwithstanding that a number of them appear to pose significantly greater danger to other road users than driving in an unauthorized convoy.

7. The impression that the purpose of the provision is to regulate the use of motor convoys as a form of protest is reinforced by the notice requirements. Although it is true that permissions could be used to impose conditions for the speed or route of convoys to prevent traffic disruption, the specified authority to issue authorization is the Ministry of Interior, rather than the Ministry of Transport.

8. The regulation evidently targets the specific initiative of demonstrations by car called Automaidan, and must thus be assessed in the light of Article 11 of the ECHR on Freedom of Assembly and Association.

9. This negates the claim of the Ukrainian government in its “Comparative Analysis of the Legislation in Some Foreign States”, that the amendment only serves to bring the Law on Administrative Offences into conformity with the 2001 paragraph 25 of the Traffic Rules: “A group that moves unescorted by police vehicles must be divided into groups (not more than five vehicles in each), distance between them must provide a possibility of passing such group by other vehicles”.

10. The legitimate aims as provided for in the international and European instruments, the State Constitution and the relevant legislation,[9] are not a licence to impose restrictions, and the onus rests squarely on the authorities to substantiate any justifications for the imposing of restrictions. Reasons to justify restrictions should be relevant and sufficient as well as convincing and compelling and always based on assessment of the relevant facts.[10]

11. The state may be required to intervene to secure conditions permitting the exercise of the freedom of assembly and this may require positive measures to be taken to enable lawful demonstrations to proceed peacefully. This necessarily means that laws regulating assemblies must not in any circumstances create unjustifiable restrictions in relation to holding peaceful assemblies. Rather, the state must act in a manner calculated to allow the exercise of the freedom[11].

12. Proportionality is one of the key criteria that should guide the State when imposing restrictions, and which is sometimes not taken properly into account. Proportionality requires the State to adopt the least intrusive means for achieving set objectives. The legitimate interest of the State is to guarantee general interests of the community and public order on the one hand, and to ensure the proper exercise of freedom of assembly on the other. To this effect, some positive measures are permissible in order to enable lawful demonstrations to proceed peacefully[12].

13. The sanction of seizure of the car provided for under the amendments is likely to amount to a violation of Article 1 of Protocol 1 to the ECHR, due to its disproportionality. In the Gabric case[13] (about confiscation of money, which had not been declared) the Court found that in order to be proportionate, the interference should correspond to the severity of the infringement, and the sanction to the gravity of the offence it is designed to punish, rather than to the gravity of any presumed infringement which has not, however, actually been established. The confiscation measure in

[9] Preventing disorder can constitute a legitimate aim under Art. 11.2 ECHR. See*Eva Molnar v. Hungary* (2008), para.34: "The Court notes that restrictions on freedom of peaceful assembly in public places may serve the protection of the rights of others, with a view to preventing disorder and maintaining the orderly circulation of traffic."

[10] CDL-AD(2010)049 Interim Joint Opinion on the Draft Law on Assemblies of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, §26

[11] CDL-AD(2004)039, Venice Commission Opinion on the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia, §12

[12] CDL-AD(2009)034 Joint Opinion on the Draft Law on Assemblies of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR, §29. See also CDL-AD(2006)034 Opinion on the Law on Freedom of Assembly in Azerbaijan, §33

[13] *Gabric v. Croatia* 5.2.2009 (No. 9702/04)

question was not intended as pecuniary compensation for damage, as the State had not suffered any loss, but was deterrent and punitive in its purpose[14]. In these circumstances, the confiscation of the entire amount of the money that should have been declared, as an additional sanction to the fine was, in the Court's view, disproportionate, in that it imposed an excessive burden on the applicant.

14. The restrictive application of the regulation in the context of an assembly, as is evidently its purpose, without due respect of the fundamental principles of "presumption in favor of holding assemblies", "proportionality" and "non-discrimination" is likely to constitute a violation of Article 11 of the ECHR.

2) Article 126

15. This amendment Increases the penalties for driving without documents, failing to produce documents, and delegating a vehicle to someone without a proper license or driving while disqualified. The penalties are more than doubled and the possible penalty is introduced of seizing a vehicle being driven by a person who is committing this conduct

16. Legislation requiring drivers to carry or produce documents identifying them as licensed to drive is commonplace in many countries and is obviously capable of furthering the aim of road safety. However, an unconstrained discretion for officials to demand to see documents that identify a driver is also capable to being abused as a means of harassing individuals or interfering with their private life contrary to Article 8 of the ECHR. Moreover, the penalties introduced in this instance are severe and disproportionate- there is no option, for example, to comply with the request by production within 7 days at a police station.

17. In both cases (here and under the amendments to Art. 122) penalties against the vehicle owner rather than the driver (seizure of the vehicle from the owner) are hard to justify with regard to the ostensible purpose of the offence. In many instances the owner will not be the driver.

18. The restrictive application of the regulation in the context of an assembly, as is evidently its purpose, without due respect of the fundamental principles of "presumption in favor of holding assemblies", "proportionality" and "non-discrimination" is likely to constitute violations of Article 8 and 11 of the ECHR.

[14] Compare *Bendenoun v. France*, 24 February 1994, § 47, Series A no. 284

19. The sanction of seizure of the car most likely amounts to a violation of Article 1 of Protocol 1 to the ECHR, due to its disproportionality[15].

3) Article 164

20. Article 164 requires anyone, who engages in business activities, to be state registered and for some types of business to have a license and/or a special permission. The amendment adds " as well as business activities of an information agency having no state registration, upon termination of its activities, or in case of evasion of registration, if legal grounds for this exists"

21. Fines for violation have been increased considerably from 20-100 minimum incomes to 600-1000 (each of 17 UHR). Fines for repeated similar offence within a year have been raised from 100-500 minimum incomes to 1000-2000. Additionally, produced commodities, tools, raw material and money obtained can be confiscated.

22. Mass media, which provide "information product" to the public and are not registered as print media or broadcasters, must register with the state as "information agencies". Taken together with the amendments in the Law on Information Agencies this will increase the Government control over internet media. Those conducting such activity without registration can be fined, have their property confiscated and their access to websites can be blocked through the separate amendments on the power of the state agency to issue blocking orders for web-sites with "illegal" information.

23. General duties to register all business potentially interfere with the right to enjoy one's possessions under Article 1 of Protocol 1 of the ECHR but could be justified by legitimate aims relating, for example, to the collection of taxes and the enforcement of employment legislation. The Court has usually afforded a wide margin of appreciation to restrictions under this provision in deference to the socio-economic goals of the state and for this reason a general registration requirement cannot be seen as a violation of the Convention per se.

24. The amendment, however, specifically deals with the position of information agencies. Although no specific definition is given in the Article of what activities fall within the scope of an information agency, the name would suggest that they clearly fall within the scope of Article 10 of the ECHR on freedom of expression. The text of Article 10 of the ECHR refers to the right 'to receive and impart information and ideas without

[15] See arguments in §12 with the reference to *Gabric v. Croatia* No. 9702/04

interference by public authority and regardless of frontiers'. The Court has treated the provision of information services as covered by Article 10[16].

25. A registration requirement of this kind before an information agency can operate, should be regarded as a 'prior restraint' on freedom of expression and for that reason is especially suspect[17]. In particular any use of the registration powers under Article 164 to prevent the operation of an information agency because of the content of the material that it disseminates or its political views will undoubtedly breach Article 10.

26. Any confiscation of material of an information agency (for example, computers containing data) could similarly be within the scope of Article 10 (2), which covers ''penalties', 'restrictions', 'conditions' and 'formalities'[18].

4) Article 185.1.

Part 1:

27. Article 185.1 makes **violation of the established procedure** for the organization or holding of meetings, rallies, street procession and demonstrations an administrative offence. The amendment has added the words "by their participant, including in the proximity to government agencies, local self-government authorities, institutions, enterprises, organizations, residence or other property of citizens".

28. These Amendments to Article 185.1 prima facie interfere with the right of peaceful assembly under Article 11 of the ECHR. The right of peaceful assembly under Article 11 covers both private meetings and meetings on public thoroughfares, as well as static meetings and public processions; this right can be exercised both by individual participants and by those organising the assembly.[19] The amendments therefore need to be considered in the light of conditions allowing restrictions on that right under Article 11.2 and the related jurisprudence of the Court. The term "restrictions" in paragraph 2 of Article 11 must be interpreted as including both measures taken before or during the public assembly, and those,

[16] *(Open Door Counselling and Dublin Well Woman v. Ireland, Apps. 14234/88 and 14235/88 (1993) 15 EHRR 244*

[17] *The Observer and Guardian Newspapers Ltd v United Kingdom*, App. 13585/88 (1992) 14 EHRR 153 and *Sunday Times v United Kingdom* (No. 2), App. 13166/87 (1992) 229.

[18] *Vereinigin Weekblad Bluf! v. Netherlands,* App. 16616/ 90 (1999) 20 EHRR 189.

[19] See *Djavit An v. Turkey*, no. 20652/92, § 56, ECHR 2003 III, and *Christians against Racism and Fascism v. the United Kingdom*, no. 8440/78, Commission decision of 16 July 1980, Decisions and Reports 21, p. 138, at p. 148

such as punitive measures, taken after the meeting.[20] Limitations on the right of assembly are permitted under Article 11. 2 if they are limited to a legitimate aim, non-discriminatory, prescribed by law and proportionate. Even if a limitation on the right of peaceful assembly meets the conditions of legality and is in pursuit of a legitimate aim, the severity of the methods used to disperse demonstrators or of the punishments may nonetheless be disproportionate and so fail the requirement of 'necessary in the interests of a democratic society' under Article 11(2).

29. This amendment to Article 185 is to an existing provision requiring demonstrations to be *authorized.* Whereas requirements to give *advance notice* of a demonstration are permitted under Article 11,[21] a legal regime imposing a duty to obtain prior permission for a demonstration, rally etc. interferes with the right.[22] If there is a presumption that permission will be granted, an authorization procedure can be treated as a notice procedure de facto. There is, however, no such presumption apparent in the relevant Ukrainian provisions, which must therefore be treated as inconsistent with the right of peaceful assembly. As the OSCE Guidelines on Peaceful Assembly emphasize (para. 119): 'Any permit system must clearly

[20] See *Ezelin v. France*, judgment of 26 April 1991, Series A no. 202, § 39.

[21] Provided they are not so onerous as to encroach upon the essence of the right and provided the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering (see *Bukta and Others v. Hungary*, no. 25691/04, § 35, ECHR 2007 ...; *Oya Ataman v. Turkey,* no. 74552/01, 5 December 2006, § 39; *Rassemblement Jurassien Unité v. Switzerland*, no. 8191/78, Commission decision of 10 October 1979, DR 17, p. 119; and also *Plattform "Ärzte für das Leben" v. Austria*, judgment of 21 June 1988, Series A no. 139, p. 12, §§ 32 and 34).

[22] OSCE Guidelines, para. 118: 'Any legal provisions concerning advance notification should require the organizers to submit a notice of the intent to hold an assembly, but not a request for permission. A permit requirement is more prone to abuse than a notification requirement, and may accord insufficient value to the fundamental freedom to assemble and the corresponding principle that everything not regulated by law should be presumed to be lawful. It is significant that, in a number of jurisdictions, permit procedures have been declared unconstitutional.' (notes omitted)

And see also 64th plenary session (21-22 October 2005) of the European Commission for Democracy through Law (the Venice Commission) which adopted an opinion interpreting the OSCE/ODIHR guidelines on drafting laws on freedom of assembly with regard to the regulation of public meetings, including the requirement of advance notice of demonstrations in public places:

"29. Establishing a regime of prior notification of peaceful assemblies does not necessarily extend to an infringement of the right. In fact, in several European countries such regimes do exist. The need for advance notice generally arises in respect of certain meetings or assemblies – for instance, when a procession is planned to take place on the highway, or a static assembly is planned to take place on a public square – which require the police and other authorities to enable it to occur and not to use powers that they may validly have (for instance, of regulating traffic) to obstruct the event."

prescribe in law the criteria for issuance of a permit. In addition, the criteria should be confined to considerations of time, place and manner, and should not provide a basis for content-based regulation.'

30. Article 39 of the Constitution of Ukraine respects this distinction between notification and authorisation in giving a right to hold peaceful demonstration (with notice): "*Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, marches and demonstrations, after notifying the executive authorities and bodies of local self-government beforehand*.

31. Restrictions on the exercise of this right may be established by a court in accordance with the law − in the interests of national security and public order only − for the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons."

32. In considering whether this interference with the right of peaceful assembly can be justified the uncertainty surrounding the 'established procedure' referred to in Article 185 presents an immediate further difficulty. No such established procedure that is applicable to the peaceful assembly, currently exists, and any administrative offence based on Article 185.1 will subsequently violate Article 7 of the ECHR[23].

33. In a decision of the Constitutional Court of Ukraine of 19 April 2001 in a case regarding timely notification of peaceful assembly[24], the Constitutional Court held inter alia:
" ... the Ministry of the Interior of Ukraine applied to the Constitutional Court of Ukraine for an official interpretation of the provisions of Article 39 of the Constitution of Ukraine regarding timely notification to executive authorities or bodies of local self-government of planned meetings, rallies, marches or demonstrations.
In this constitutional application it is noted that, under Article 39 of the Constitution of Ukraine, citizens have the right to assemble peacefully without arms and to hold meetings, rallies, marches or demonstrations following prior notification to the executive authorities or bodies of local self-government. However, it is stressed that the current legislation of Ukraine does not provide for a specific time-limit within which the executive authorities or bodies of local self-government are to be notified about such actions...
... the Constitutional Court holds as follows:

[23] A similar example from Armenia is *Mkrtchyan v. Armenia* (6562/03)
[24] *Vyerentsov v. Ukraine* 11.4.2013 §31

The provisions of the first part of Article 39 of the Constitution of Ukraine on the timely notification to the executive authorities or bodies of local self-government about planned meetings, rallies, marches or demonstrations relevant to this constitutional application shall be understood to mean that where the organisers of such peaceful gatherings are planning to hold such an event they must inform the above-mentioned authorities in advance, that is, within a reasonable time prior to the date of the planned event. These time-limits should not restrict the right of citizens under Article 39 of the Constitution of Ukraine, but should serve as a guarantee of this right and at the same time should provide the relevant executive authorities or bodies of local self-government with an opportunity to take measures to ensure that citizens may freely hold meetings, rallies, marches and demonstrations and to protect public order and the rights and freedoms of others.

Specifying the exact deadlines for timely notification with regard to the particularities of [different] forms of peaceful assembly, the number of participants, the venue, at what time the event is to be held, and so on, is a matter for legislative regulation ..."

34. In a Review of 1 March 2006 of the practice of the Supreme Court in cases concerning administrative offences[25] (Articles 185-185-2 of the Code on Administrative Offences) the Supreme Court noted inter alia as follows:

"... No legislation has been enacted in Ukraine establishing a mechanism for fulfilling the right to freedom of peaceful assembly. According to the Resolution of the Verkhovna Rada of Ukraine of 12 September 1991 no. 1545-XII on temporary application of certain legislative acts of the Soviet Union, the normative acts of the USSR remain in force, applying in order of legal rank, for example, the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 on the procedure for organising and holding meetings, rallies, street marches and demonstrations in the USSR ..."

35. In an Information note of April 2012 by the Higher Administrative Court of Ukraine[26] on a study and summary of the jurisprudence of administrative courts applying the relevant legislation and deciding cases concerning the exercise of the right to peaceful assembly (meetings, rallies, marches, demonstrations, etc.) in 2010 and 2011, it is mentioned, inter alia, that:

"...The legislation of Ukraine does not currently have a special law regulating public relations in the sphere of peaceful assembly. One of the urgent problems to be settled by such a law is the time-limits for notifying the authorities of a planned peaceful gathering in order to ensure that it is held in safe conditions. Article 39 of the Constitution of Ukraine, while

[25] *Vyerentsov v. Ukraine* 11.4.2013, §32
[26] *Vyerentsov v. Ukraine* 11.4.2013, §33

providing that the executive authorities or bodies of local self-government must be notified in a timely manner that a peaceful gathering is to be held, does not establish specific deadlines for such notification. The uncertainty of this matter results in the relevant constitutional norm being applied inconsistently and thus requires legal regulation ...

... The judicial practice contains instances of cases restricting the right to peaceful assembly being decided on the basis of the procedure for organising and holding meetings, rallies, street marches and demonstrations laid down by the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 No. 9306-XI on the procedure for organisation and holding of meetings, rallies, street marches and demonstrations in the USSR. This approach is incorrect.

Since the norms of this Decree establish the procedure for authorising (registering) peaceful assembly and empower the authorities and bodies of local self-governments to ban such events, whereas the norms of the Constitution of Ukraine provide for a procedure whereby the authorities are notified that a gathering is to be held and provides that only the courts have power to ban a peaceful gathering, the above-mentioned legal act should not be applied by courts when deciding such cases ..."

36. In April 2013 in the Vyerentsov Case the Court found that because of discrepancies between Article 39 of the Ukrainian Constitution and the text of Article 185, together with the failure to clarify in law the 'established procedures' mentioned in Article 185, the relevant procedure governing regulation of demonstrations did not reach the threshold of being prescribed by law (see *Vyerentsov*, para. 54):

'it cannot be concluded that the "procedure" referred to in Article 185-1 of the Code on Administrative Offences was formulated with sufficient precision to enable the applicant to foresee, to a degree that was reasonable in the circumstances, the consequences of his actions (see, mutatis mutandis, Mkrtchyan, ibid.). Nor do the procedures introduced by the local authorities to regulate the organisation and holding of demonstrations in their particular regions appear to provide a sufficient legal basis, for the same reason – there was no general Act of Parliament on which such local documents could be based and the domestic courts moreover doubted the validity of such local decisions (see paragraph 34 above).'

37. Accordingly the Court found Article 7 to have been violated: "In the absence of clear and foreseeable legislation laying down the rules for the holding of peaceful demonstrations, his punishment for breaching an inexistent procedure was incompatible with Article 7 of the Convention. In these circumstances, it is not necessary to examine separately whether the police orders could be considered lawful and therefore foreseeable

from the viewpoint of the same provision. There has accordingly been a violation of Article 7 of the Convention."

38. The applicant in this case did not argue that his Article 11 rights had been interfered with since the primary focus was on contesting the conviction but there is little doubt that had he done so his claim would have succeeded. The Court's finding concerning the lack of precision with regard to the 'established procedure' equally applies to the question of whether it is a restriction that is 'prescribed by law' for the purposes of Article 11.2.

39. No other regulation on procedure for organising and holding assemblies has later been approved in Ukraine.

40. A prosecution based solely on breach of the formality will in itself violate Article 11 of the ECHR. In the Kasparov case the Court stated: "It follows that the applicants were arrested and charged with administrative offences for the sole reason that the authorities perceived their demonstration to be unauthorised. The Court therefore concludes that the Government have failed to demonstrate that there existed a "pressing social need" to arrest them"[27].

41. The "established procedure", based on which Article 185 can be applied to sanction violations, therefore does not comply with Article 7 of the ECHR (No Punishment without Law). For the same reason, even without examining the questions of legitimate aim and proportionality, the amendments to Article 185.1 perpetuate the violation of Article 11 ECHR. If those aspects are examined, however, it is unlikely that the procedure could satisfy the requirements.

42. The intention behind and the effect of the amendment´s addition of the words **"…including in the proximity to government agencies, local self-government authorities, institutions, enterprises, organizations, residence or other property of citizens"** is not clear. In fact they add nothing to the regulation (as these places were already included), but they leave the fear that they will be understood as encouragement to prevent manifestations in such places and either forbid them or move them to other places.

43. This would violate the fundamental principles of the freedom of assembly in Article 11 of the ECHR. The OSCE/Venice Commission Guidelines on Freedom of Peaceful Assemblies in point 2.4 states that the principle of proportionality requires that authorities do not routinely impose

[27] *Kasparov and others v. Russia 3.10.2013, §95.*

restrictions that would fundamentally alter the character of an event, such as relocating assemblies to less central areas of a city. The Venice Commission has stated "The alteration of the place of the assembly by the authorities means that events cannot be held in places chosen by the organizer within sight and sound of their targeted audiences or at a place with a special meaning for the purpose of the assembly. The Venice Commission recalls that respect for the autonomy of the organizer in deciding on the place of the event should be the norm. The Constitutional Court (of Russia) has rightly specified that the newly proposed time and place must correspond to the social and political objectives of the event, and this requirement provides some safeguard against depriving the proposed public event of any impact. But even assuming that the alternative proposals do comply with this principle, it must be underlined that in principle the organisers should be permitted to choose the venue and the format of the assembly without interference"[28].

Part 2

44. The punishments have been raised considerably. For first time offenders from a warning or a fine of 10-25 minimum incomes to 100-200 minimum incomes and now also with the possibility of administrative arrest for up to ten days. For repeated similar offence within a year or committee by an organizer the fines have been raised from 20-100 minimum incomes to 250 to 500 minimum incomes and additionally still also correctional labor in 1-2 months (against deduction of 20% revenues) or administrative arrest up to 15 days.

45. These massive and disproportionate punishments for mere violation of procedure will be prohibitive to many people for the exercise of their freedom of assembly and will potentially violate one of the basic principles on the authorities´ administration of that freedom, that of proportionality[29]. On several occasions, the Human Rights Committee and the European Court of Human Rights have found subsequent sanctions to constitute disproportionate interference with the right to freedom of assembly or expression[30].

Part 3 and 4

[28] CDL-AD(2012)007 Opinion on the Federal Law on assemblies, meetings, demonstrations, marches and pickets of the Russian Federation, §23

[29]. The Court has found that a decision to disband a meeting solely because of lack of prior notification (where there is no other illegal conduct by the demonstrators) constitutes an unjustified interference with freedom of peaceful assembly- *Bukta and Others v. Hungary* 17 July 2007.

[30] For example, *Patrick Coleman v. Australia* (the Human Rights Committee considered a fine and five day custodial sentence to be a disproportionate penalty for making a speech without a permit). Also *Ezelin v. France* 26 April 1991*and Incal v.Turkey* 9 June 1998.

46. Using a **mask, helmet or other ways of camouflage to prevent identification** has been made an offence, punishable with a fine of 150-250 minimum incomes or up to 15 days administrative arrest.

47. The prohibition of the use of masks and other means of disguise, which is part of Assembly Laws of several other countries, can, in principle, be justified. However, the test of proportionality has to be applied in this field as well. The Venice Commission and OSCE/ODIHR have previously expressed the view that "the wearing of a mask for expressive purposes at a peaceful assembly should not be prohibited so long as the mask or costume is not worn for the purposes of preventing the identification of a person whose conduct creates probable cause for arrest and so long as the mask does not create a clear and present danger of imminent unlawful conduct." In the Commission's view, a blanket ban on wearing any kind of mask at a peaceful assembly represents a disproportionate restriction of freedom of assembly[31].

48. Following this approach the amendments should be treated as potentially compatible with Article 11 where it can be shown that the purpose of wearing the mask etc. is to disguise the wearer's identity (since it is not clear that there is a right to anonymous participation in a peaceful assembly). Equally, however, there is no warrant for an automatic treatment of all mask-wearing as a form of disguise. A court applying the amended offence would therefore need to consider the purpose for which the mask was being worn.

49. Following the same approach, the amendments against carrying a **uniform that can be mistaken for law enforcement or military** should be treated as compatible with Article 11 only where it can be proven that the purpose of the uniform is to cause mistakes on the wearer's identity. Equally an automatic treatment of all uniforms or uniform-like clothes as a form of disguise would violate Article 11. A court applying the amended offence would therefore need to consider the purpose for which the uniform was being worn.

50. The prohibition on installation of **tents, stages, sound amplification equipment** etc. during events is also Convention compatible, at least in the case of longer lasting protests. Their use may indeed facilitate freedom of assembly but it is not clear that they are an integral and protected part of the right. Moreover the Court has treated freedom of assembly as a relatively short-term phenomenon, so that for example the removal of demonstrators who occupy public squares for prolonged

[31] Venice Commission Opinion CDL-AD (2013) 003 Item 28

periods to the disruption of passers-by may be justified under Article 11[32]. Erection of structures by demonstrators in public places is therefore unlikely to be protected particularly if they continue for some days[33].

51. Assemblies are held for a common expressive purpose and, thus, aim to convey a message. Restrictions on the visual or audible content of any message should face a high threshold and should only be imposed if there is an imminent threat of violence (OSCE/VC Guide 3.3.). On this basis it might be argued that it is unnecessary to restrict erection of stages or sound amplification if the disruption caused is of short duration and no more than is implicit in exercising the right of peaceful assembly and they are removed promptly at the conclusion of the meeting.

5) Article 185.2

52. Anyone, who **grants premises, vehicles or technical media** in violation of established procedures or create other conditions for holding events, commits an offence. Until now it has only been officials; the circle of persons has thus been considerably enlarged.

53. For the reasons discussed above relating to 'established procedures' this extension of liability violates Articles 7 and 11 of the ECHR.

6) Article 185.3

54. Penalty for contempt of court (willful failure to appear, refusal to obey the orders of the judge, causing disturbance during a court session and other blatantly disrespectful actions) has been raised from fines of 20-100 minimum incomes to fines of 20-300 minimum incomes and administrative arrest for up to 15 days[34].

7) Article 185.6

55. Fines for failure to take action in response to a court decision, judge´s ruling or prosecutor´s motion have been raised.

8) Article 185.8

56. Fines for willful failure to comply with lawful requests of the Prosecutor have been raised. The changes to the penalties for disobeying the lawful

[32] *Friedl v. Austria* (1995) 21 EHRR 83.

[33] For *discussion* of the relevant Article 11 jurisprudence and examples see the analysis of the (UK) Court of Appeal in *The Mayor Commonality and Citizens of London v. Tammy Samede and others* [2012] EWCA Civ 160 http://www.bailii.org/ew/cases/EWCA/Civ/2012/160.html

[34] See comments to Article 134 Part 2 of the Administrative Procedure Code (from para. 72 of this Analysis) on the consequences of that raise.

demands of the prosecutor need to be read subject to the rights contained in Articles 6 (right to fair trial) of the ECHR. The right to a fair trial under Article 6.1 includes freedom from self-incrimination and the Court has found that the threat or imposition of a criminal sanction for failure to provide information may violate this right, whether or not a person is later prosecuted or convicted of an offence.[35] Certain demands of a prosecutor under this Article for information or documents that might require a person to disclose self-incriminating information would therefore potentially violate this right.

57. The increase in penalties for a subsequent conviction within a year (introduced by Article 185.8) do not of themselves violate Article 7 of the ECHR (freedom from retroactive penalties) since the relevant events giving rise to the enhanced penalty take place after the introduction of the amendments.[36]

9) Article 188.7

58. As well as increasing the general penalties for this offence the amendment extends the existing categories of liability so that failure by Internet Service Providers to comply with instructions to limit or revoke the internet access of particular customers will become an offence.

59. No further information has been provided about the composition and powers of the national commission performing state regulation in communications and information. Nevertheless it is clear that directions to Internet Service Providers that are legally enforceable constitute an interference with the right of freedom of expression (in particular the right to receive and impart information) of internet users under Article 10 ECHR. (The responsibilities of states towards Internet Service Providers and the position of Internet Service Providers with regard to users have been covered in recommendations of the Council of Ministers but these do not address this situation in detail).[37] Any such directions will only be

[35] *Saunders v UK* (1996) 23 EHRR 313 (Grand Chamber); *Funke v France* (1993) 16 EHRR 297.
[36] Cf. *Achour v France* (2006) 41 EHRR 651.

[37] See Declaration on freedom of communication on the Internet *(Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies)*, Principle 6: Limited liability of service providers for Internet content:

'Member states should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.

compatible with the Convention therefore to the extent that they meet the standards of being prescribed by law, in pursuit of legitimate aim under Article 10.2 and necessary in democratic society. Directions based on political content of the material posted or accessed by customers or upon the use of communications by them to facilitate the right of peaceful assembly (itself protected by Article 11 ECHR) would be in clear violation of Article 10.

10) Article 188-31

60. The amendment deletes the words "and technical". The purpose and the effect is unclear.

11) Article 188-43

61. The amendment makes it an offence not to follow legitimate demands of Ukrainian Security Service officers, as well as impeding them from performing their duties. There is no explanation as to the background and the scope of the provision.

Member states should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.

In cases where the functions of service providers are wider and they store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, of facts or circumstances revealing the illegality of the activity or information.

When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information.

In all cases, the above-mentioned limitations of liability should not affect the possibility of issuing injunctions where service providers are required to terminate or prevent, to the extent possible, an infringement of the law.'

See also Declaration of the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers, adopted on 7 December 2011
https://wcd.coe.int/ViewDoc.jsp?Ref=Decl%2807.12.2011%29_2&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

And see *Human Rights Guidelines for Internet Service Providers Developed by the Council of Europe in co-operation with the European Internet Services Providers Association (EuroISPA)* (2008)http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282008%29009_en.pdf

62. This is a potentially very wide-ranging provision, since such demands could be used, for example: to require the person concerned to incriminate themselves (contrary to Article 6) or to give information about close relatives (so interfering with the right to private and family life under Article 8); or to seek access to information concerning a person's private life or correspondence protected by Article 8 of the ECHR. It could also have a chilling effect on the exercise of the rights of freedom of expression protected by Article 10 or of peaceful assembly or association protected by Article 11. Similarly, actions understood to be 'impeding' Security Service officers in their duties (for instance, officers engaged in monitoring peaceful assembly) could themselves be protected under Articles 10 or 11 ECHR.

    In a 2010 report on good practice on legal and institutional and measures that ensure respect for human rights by intelligence agencies to the United Nations Human Rights Committee the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combating Terrorism Based on a wide-ranging international survey of the legislation governing intelligence agencies found that:

    - Intelligence services are prohibited from using their powers to target lawful political activity or other lawful manifestations of the rights to freedom of association, peaceful assembly, and expression.[38]

    Moreover a series of recommendations in the same report emphasised the desirability of law enforcement and intelligence activities being separated and that intelligence services should not be mandated to conduct law enforcement activities.[39]

12) Article 221

63. The amendment is of an administrative character and a consequence of other amendments.

13) Article 222

64. The amendment is of an administrative character and a consequence of other amendments.

14) Article 254

[38] UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combating Terrorism 2010, Compilation of good practice on legal and institutional and measures that ensure respect for human rights by intelligence agencies, UN General Assembly, A/HRC/14/46, 17 May 2010, Practice 13.

[39] Ibid.,, Pp. 24-27.

65. The amendment is on the details when drawing up an administrative protocol and is of an administrative character.

15) Article 255

66. The amendment is of an administrative character and a consequence of other amendments.

16) Article 256

67. The amendment relates to situations, where a person refuses to sign an administrative protocol and is of an administrative character and a consequence of other amendments.

17) Article 258

68. The amendment relates to situation where an administrative protocol is compiled and is of an administrative character and a consequence of other amendments.

18) Article 265-2

69. The amendment serves the purpose of authorizing temporary detention of vehicles and is a consequence of other amendments, discussed above.

19) Article 277-2

70. The amendment serves the purpose of securing evidence that notification of a person to court has been delivered and is of an administrative character.

5. Code of Administrative Procedure

1) Article 134 Part 2:

71. Article 134 relates to law and order in the courtroom and part 2 thereof to the remedies of the judge to hold persons liable for demonstrating disrespect.

72. In the amendment the words "by this" provide for specification that the same court which holds a hearing shall decide on the contempt of the court.

73. The amendment introduces simplified procedures for bringing to immediate administrative responsibility those, who demonstrate contempt of court in courtrooms. The amendment has provisions to the effect that in the case of contempt of court, in which the judge shall be entitled to immediately impose a fine of up to 300 minimum incomes or administrative detention of up to 15 days, the ruling of the judge is **final and subject to no challenge**. This amendment has similarly been introduced to the procedure codes on civil, economic and criminal cases.

74. It is likely that this procedure violates Article 6 ECHR (the right to a fair trial by an independent and impartial tribunal). The main risk in relation to the summary procedure to punish contempt or disrespect directed at it is the potential for the tribunal to lack impartiality – whether objectively or subjectively (see the findings of violation of Article 6 in *Kyprianou v Cyprus*[40] and *Lewandowski v Poland*[41]). Furthermore, even where the judge may not be the direct target of the contempt he or she may nevertheless lack impartiality because he or she witnessed the conduct or because he or she is effectively acting as prosecutor in initiating the contempt proceedings. This may give rise to a risk that the presumption of innocence in article 6(2) will be violated.[42] The absence of any appeal removes a possible safeguard against lack of impartiality. Article 13 of the Convention does not as such guarantee a right of appeal or a right to a

[40] (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision).

[41] Lewandowski v Poland App No 66484/09 at [45] to [50].

[42] In *Kyprianou v. Cyprus* (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision), the Chamber held that there had been a violation of art 6(2) but the Grand Chamber did not this aspect of the complaint in view of its finding of a a violation of art 6(1).

second level of jurisdiction[43]. Nevertheless, should the impugned proceedings be characterized as "criminal" for ECHR purposes[44], the applicant's complaint can be examined under Article 2 of Protocol No. 7 to the Convention.

75. In the Gurepka case[45], the Government maintained that the proceedings, in which the defendant had been imposed seven days' administrative detention for contempt of court as manifested by his repeated failure to appear, were administrative and that the domestic law made a clear distinction between a criminal offence and an administrative offence. The Court however had no doubt that, by virtue of the severity of the sanction, the case against Gurepka was criminal in nature and the purported administrative offence was in fact of a criminal character attracting the full guarantees of Article 6 of the Convention and, consequently, those of Article 2 of Protocol No. 7[46]. In the light of those considerations, the Court concluded that there had been a violation of Article 2 of Protocol No. 7 to the Convention[47].

76. The amendment will violate Article 6 ECHR and since the ruling of the judge in general is final and subject to no challenge will thus most likely be considered to violate Article 2 of Protocol no. 7, depending on the severity of the sanction.

2) Article 169, part 3:

77. Article 169 relates to the possibility of the court to, after a hearing, issue a ruling correcting typos or evident arithmetical errors in judicial decisions. The court´s ruling concerning corrections can be appealed. The amendment is to the effect that the decision of the court to correct those mistakes come into force immediately, when the decision has been declared. This is uncontroversial.

3) Article 182

78. Article 182 relates to the procedure when executive authorities and local self-governance bodies request the court to prohibit or restrict gatherings, manifestations, marches, demonstrations etc. The procedure has hitherto been that those authorities, after having received a notice about the

[43] *Kopczynski v. Poland* (dec.) 1 July 1998, and *Csepyová v. Slovakia* (dec.) 14 May 2002
[44] *Ravnsborg v. Sweden* 23 March 1994.
[45] *Gurepka v. Ukraine* 6.9.2005
[46] *Engel and others v. the Netherlands* 8 June 1976 §§ 82-83; *Öztürk v. Germany* 21 February 1984 §§ 48-50; *Escoubet v. Belgium* judgment [GC], no. 26780/95, § 32, ECHR 1999-VII; *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, ECHR 2003-X.
[47] See also *Galstyan v. Armenia* 15.11.2007

event, can lodge a claim in the district administrative court on prohibition or restrictions as for place, time etc. Such a claim can be supported by the court in the interest of national security and public order, if the arrangement may create a real threat of any disturbance or crimes, threat to the public health or to rights and freedoms of other persons. The decision of the court can be enforced immediately, and copies of the decision are served to the interested parties.

79. The amendment of **Article 182 Part 2** changes the words "The claim, which was received on the day of the events defined by Part One of this Article, or later, is left without consideration" to the words "The claim received after the date of completing of events described in part one of this Article will not be considered". This has the effect, that the authorities can make a claim of prohibition or limitations on the same day as the event, and have it considered by the court. The provision is as such not against European standards, but time pressure must not restrict the organizers from enjoying their full legal rights, including to let their arguments be known by the court in order to secure, that only such restrictions are applied, which are necessary in a democratic society.

80. The amendment of **Article 182 Part 4** is to the effect, that the court is to make its decision within 24 hours after having received the claim, and if received less than 24 hours before the event is to take place, to make its decision immediately. Until now the court has had three days after having received the claim to make its decision, and if the claim was received less than three days before the event, the case was to be decided immediately[48]. The amendment is as such not against European standards, but the risk to unduly restrict the organizer´s rights has been increased.

81. The amendment of **Article 182 Part 7** opens up the option of the court to postpone the issuance of its full ruling on prohibition or limitation in "case of complexity". This brings these cases in compliance with the general rule in Article 160 Part 3 of the Code of Administrative Procedure, which in all complex administrative cases allows the drawing up of the decision in full to be postponed for a period of not more than five days. In that situation the court must immediately deliver an abbreviated version of its decision, which can be enforced, as if it were the full version. In order to comply with the ECHR it must be understood that it is only the practical writing, which may be postponed, and that the formal demands on procedure are

[48] According to the Comparative Table the amendment will replace the words:" "three days upon instigation of proceedings, in case such proceedings have been instigated" by a new text; the quoted words are however not to be found in the English version of the former law. It is presumed that it refers to the words:" three days after initiation of the proceedings, and if the proceedings are initiated", but the difference in translation between the old and the new text is confusing.

not compromised, and that the court after careful consideration has reached its verdict.

11. Law on Security Service

1) Article 24

82. Article 24 paragraph 7 relates to the duties of the Security Service inter alia in the areas of document security and technology and industrial espionage.

83. The amendments redistribute the powers among agencies, taking "technical protection" of information, including within telecommunication, from the State Service of Special Communications and transferring it to the Security Service with powers described in more detail. This is not inappropriate.

2) Article 25

84. Article 25, paragraph 2 gives the Security Service the right to submit proposals for consideration concerning national security, including on the protection of state secrets. The amendment specifies its competencies and is of a technical character, not related to the present situation or to the issue of human rights and is not inappropriate.

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