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

AND

ON TWO OTHER LAWS (NO.728-VII & NO.729-VII OF 16 JANUARY 2014)

AMENDING CERTAIN PROVISIONS OF THE CRIMINAL CODE OF UKRAINE

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Introduction

1. This opinion analyses certain provisions of the following Laws of Ukraine[1] adopted by the Verkhovna Rada of Ukraine on 16 January 2014 and entered into force the day after their publication, i.e., 22 January 2014:

- *The Law of Ukraine 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*
- *The Law of Ukraine on amending Article 297 of the Criminal Code of Ukraine regarding the Responsibility for Desecration or Destruction of Monuments Erected in Commemoration of Those Who Fought Against Nazism During the Great Patriotic War – the Soviet Military Men-Liberators, Participants of the Partisan Movement, Undergrounders, Victims of Nazi Persecutions, Soldiers-Internationalists and Peacekeepers*
- *The Law of Ukraine on amending the Criminal Code of Ukraine regarding the Responsibility for Denial or Excuse of Fascist Crimes*

2. The analysis is concerned with the compatibility of some of the provisions of the above laws ('the Amendments') with European standards and, in particular, the European Convention on Human Rights ('the Convention'), as well as their impact on criminal justice reform in Ukraine. 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.

3. The Amendments make a large number of significant changes to several major pieces of legislation, namely, the Code of Administrative Offences of Ukraine, the Criminal Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine, the Tax Code of Ukraine, the Criminal Procedure Code of Ukraine, the Law of Ukraine On Police, the Law of Ukraine *On the freedom of worship and religious organizations*, the Law of Ukraine *On Prosecutor Office*, the Law of Ukraine *On Security Service of Ukraine*, the Law of Ukraine *On the state protection of court personnel and law enforcement agencies*, the Law of Ukraine *On telecommunications*, the Law of Ukraine *On information agencies*, the Law of Ukraine *On the National Council for television and radio broadcasting of Ukraine*, the Law of Ukraine *On the protection of information and telecommunication systems*, the Law of Ukraine *On the State Service of special communications and protection of information*, the Law of Ukraine *On the judicial system and the status of judges*, the Law of Ukraine *On enforcement proceeding* and the Law of Ukraine *On public associations*.

4. The opinion is, however, specifically concerned with just the changes made to the Criminal Code, the Criminal Procedure Code and the Law of Ukraine *On Public*

[1] No. 721-VII, №728-VII, №729-VII

Prosecutor's Office ('the relevant changes'). It first examines the nature of the relevant changes before considering their compatibility with the European standards and their impact on criminal justice reform in Ukraine. It concludes with an overall assessment of the acceptability of the relevant changes.

The relevant changes

5. The relevant changes to the Criminal Code concern increases in the penalties that can be imposed for certain existing offences and the creation of new offences, amendments to the scope of many other offences. The amendments to both the Criminal Procedure Code Law of Ukraine *On the Public Prosecution Service* are also significant.

6. The increase or variation in penalties concerns the following offences in the Criminal Code:
   - actions aimed at forceful change or overthrow of the constitutional order or take-over of government (Article 109);
   - violation of security of residence (Article 162);
   - wilful destruction or endangerment of property (Article 194);
   - blocking of transportation routes and capturing of transport enterprise (Article 279);
   - group violation of public order (Article 293);
   - riots (Article 294);
   - call to actions that pose a threat to the public order (Article 295);
   - hooliganism (Article 296);
   - capturing of government or public buildings or constructions (Article 341);
   - resistance to a representative of public authorities, law enforcement officer, state executive officer (bailiff), a member of community formation for the protection of public order and state border, or a military servant, an authorised person of the Fund of individual deposits guarantee (Article 342);
   - interference with activity of a law enforcement officer, state executing officer (Article 343);
   - threats or violence against a law enforcement officer (Article 345);
   - wilful destruction or impairment of property owned by a law enforcement officer (Article 347);
   - trespass against life of a law enforcement officer, a member of a community formation for the protection of public order and state border, or a military servant (Article 348);
   - interference with activity of judicial authorities (Article 376);
   - threats of violence against a judge (Article 377); and
   - failure to comply with a judgment (Article 382).

7. The increases in the penalties involve extending the maximum fine by between 100-300 tax-free minimum incomes and the maximum sentence of imprisonment by between one to four years. In two cases - Articles 347 and 377 - the option of imposing a fine is removed and in one - Article 343 - deprivation of liberty is added to restriction of liberty as a penalty. The offence of group violation of public order (Article 293) that was sanctioned only with a fine provides after the amendment a sanction of deprivation of liberty for up to two years.

8. The offences that have been added to the Criminal Code concern:
   - extremist activities (Article 110-1);
   - slander (Article 151-1);
   - unauthorized interference in the operation of state electronic information resources, etc. (Article 361-3);
   - unauthorized trade or distribution of restricted information, etc. (Article 361-4); and
   - unauthorized handling of information which is processed in the state electronic information resources, etc. (Article 362-1);
   - justification of crimes of fascism and Nazi crimes and distributing materials thereof (Article 436-1).

9. In addition there are amendments to the scope of the offences in the Criminal Code concerning:
   - violation of security of residence (Article 162);
   - call to actions that pose a threat to the public order (Article 295);
   - vandalizing a grave or any other burial place or corpse (Article 297);
   - capturing of government or public buildings or constructions (Article 341);
   - interference with activity of a law enforcement officer, state executing officer (Article 343);
   - threats or violence against a law enforcement officer (Article 345);
   - wilful destruction or impairment of property owned by a law enforcement officer (Article 347);
   - trespass against life of a law enforcement officer, a member of a community formation for the protection of public order and state border, or a military servant (Article 348);
   - hostage taking of a representative of public authorities or a law enforcement officer (Article 349);
   - interference with activity of judicial authorities (Article 376);
   - threats of violence against a judge (Article 377);
   - wilful destruction or impairment of property owned by a judge, assessor or juror (Article 378); and
   - trespass against the life of a judge, assessor or juror in connection with their activity related to the administration of justice (Article 379); and
   - failure to ensure safety of persons taken under protection (Article 380).

10. The other changes concern the Criminal Procedure Code and the Law of Ukraine *On the Public Prosecution Service*.

11. In the case of the former there is:
    - an enhancement of the authority of prosecutors who are heads of headquarters, offices and their deputies under Article 36.6 to refute illegitimate and unjustified orders issued by investigation officers and subordinated prosecutors;
    - an extension of the competence of investigators of bodies of security to conduct pre-trial investigation of crimes to all but one of the new offences added to the Criminal Code;
    - the preclusion of appeal or challenge to findings of contempt of court; and
    - an extension of the possibility of bringing criminal proceedings to slander, i.e., the fifth new offence added to the Criminal Code.

12. The amendment to the Law of Ukraine *On the Public Prosecution Service* involves a purported extension of the authority of the prosecutor to bring proceedings concerning hindrances to the exercise of the right to use public and community property or the property of public associations.

Increased penalties

13. Sentencing is primarily a matter for individual states and the only sentence that is unquestionably precluded by European standards is the death penalty[2]. Furthermore, the imposition of imprisonment and financial penalties following a conviction by a court are permissible restrictions respectively on the right to liberty and security under Article 5(1) of the Convention and on the right to property under Article 1 of Protocol No. 1

14. Particularly long sentences could be seen as inhuman and thus in violation of Article 3 of the Convention. However, this has only been found by the European Court of Human Rights ('the Court') to be the case with life imprisonment without any possibility of release[3]. Similarly, the circumstances in which a penalty is imposed might also be considered as disproportionate and thus also in violation of Article 3 of the Convention but this only seems to have been raised as a possibility with respect to an indeterminate life sentence[4] and is unlikely to be upheld as an objection to the

[2] By virtue of Protocol No. 6 and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
[3] *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008 and *Vinter and Others v. United Kingdom* [GC], no. 66069/07, 9 July 2013.
[4] *Weeks v. United Kingdom*, no. 9787/82, 2 March 1987, at para. 47.

extent to which the possible penalties for the offences listed in paragraph 6 have been increased.

15. Furthermore, the Court has emphasised that

> Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. As the Court has stated, it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court (see T. v. the United Kingdom [GC], no. 24724/94, § 117, 16 December 1999; V. v. the United Kingdom [GC], no. 24888/94, § 118, ECHR 1999-IX; and Sawoniuk v. the United Kingdom (dec.), no. 63716/00, ECHR 2001-VI)[5].

16. At the same time, the penalties imposed in particular cases - especially the use of imprisonment - might have implications for the enjoyment of other rights guaranteed by the Convention, notably, freedom of expression under Article 10 and freedom of assembly and association under Article 11. In particular, their severity when taken with the specific impact of the conduct concerned might lead to a finding that there was a violation of the right concerned. For instance, participating in acts "that disrupt significantly the operation of any enterprise or institution" (Article 293 CC), with the possibility of a potentially excessive custodial penalty of up to two years entails risks for the right to assembly and demonstrate.

17. Thus, in *Ceylan v. Turkey* it was stated that:

> 36. The Court observes, however, that the applicant was writing in his capacity as a trade-union leader, a player on the Turkish political scene, and that the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection. In the Court's view, this is a factor which it is essential to take into consideration.
> 37. The Court also notes the severity of the penalty imposed on the applicant – one year and eight months' imprisonment plus a fine of 100,000 Turkish liras (see paragraph 11 above). It is mindful, further, of the fact that, as a result of his conviction, the applicant lost his office as president of the petroleum workers' union as well as a number of political and civil rights (see paragraphs 14 and 17 above).
> In this connection, the Court points out that the nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference.
> 38. In conclusion, Mr Ceylan's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.[6]

18. This is especially pertinent to the particular offences for which the penalties have been increased since the scope of the former is wide and they could be invoked in respect of conduct which may or may not be protected by the rights under Articles 10 and 11 of the Convention.

19. Whether or not the particular conduct does not actually enjoy that protection will, of course, be a matter of judgment in individual cases but enhancing the penalties in the

[5] *Vinter and Others v. United Kingdom* [GC], no. 66069/07, 9 July 2013, para. 105.
[6] [GC], no. 23556/94, 8 July 1999.

very midst of difficult circumstances - such as has been effected by the relevant changes - runs the risk of having an undue influence on how judges deal with the specific cases brought before them, leading them to disregard the need for proper consideration of their specific circumstances and exacerbate the possibility not only of giving the offences a wider reach than is appropriate but also of imposing disproportionate punishment and thereby leading to a violation of rights under the Convention.

20. This is all the more so given that the changes were made without any serious reflection in the course of the legislative process as to the particular need for the increases.

21. Indeed, these increases run counter to the approach to sentencing policy encouraged by the Committee of Ministers, namely,

> 6. Sentencing rationales should be consistent with modern and humane crime policies, in particular in respect of reducing the use of imprisonment, expanding the use of community sanctions and measures, pursuing policies of decriminalisation, using measures of diversion such as mediation, and of ensuring the compensation of victims[7].

22. It cannot be said that the increased penalties are in themselves objectionable but the offences to which they relate and the circumstances of their adoption and use make it highly likely that their imposition will result in violations of the Convention.

New offences

23. Six new offences[8] have been created by the relevant changes, one of which - slander - involves the re-criminalising of an activity that had been de-criminalised when the Criminal Code was adopted in 2001.

24. Apart from slander, which is discussed further below, the titles of the new offences do not give the impression of an inappropriate use of the criminal law.

25. However, the offences relating to extremist activities[9], justification of Nazi and fascism crimes during the Second World War[10], unauthorized interference in the

[7] Appendix to Recommendation No. R (92) 17 of the Committee of Ministers to Member States concerning consistency in sentencing (adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies).
[8] See para. 8.
[9] 1. Fabrication, storage for trading purposes or distribution of extremist materials, including via mass media, Internet, social networks, use or demonstration of extremist materials in front of public gatherings, including meetings, street processions or demonstrations, making statements or calls of extremist nature in public, as well as funding of subject actions or other contribution into their organization or implementation, including through provision of financial services, monetary resources, real estate, educational, printing or infrastructure facilities,

operation of state electronic information resources, etc.[11] unauthorized trade or distribution of restricted information, etc.[12] and unauthorized handling of information

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telephone, facsimile or other types of communications where no elements of a more severe offence exist , -Shall be subject to penalty in the amount of two hundred to eight hundred minimum non-taxable incomes of citizens, including confiscation of the extremist materials. 2. Similar actions, if recurrent - Shall be punished by penalty in the amount of one to three thousand 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. Note: the extremist materials should be understood as documents for the purpose of publication on paper, electronic or any other media containing information of extremist nature, i.e. if they call, substantiate or justify the need to plan, organize, incite, prepare or implement actions for the purpose of violent change of the government or overthrow of the constitutional system, offences against territorial integrity, inviolability, sovereignty of the state, violent seizure or retention of power or official powers, 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, call, substantiate or justify the need to excite social, racial, national, ethnic, language or religious enmity and hatred, mass riots, disturbances of public order, violence and acts of vandalism motivated by social, racial, national, ethnic, language or religious enmity and hatred, breech of the rights, freedoms and legitimate interests of persons, including direct or indirect limitation of rights or establishment of direct or indirect privileges of a person and citizen based on race, skin color, political, religious or other beliefs, sex, ethnic and social origin, property status, place of residence, language or other factors, propagation of exclusivity, superiority or inferiority of a person (social group) based on their social, racial, national, ethnic, language or religious status or attitude to religion.

[10] Article 436-1. Public objection or justification of the crimes of fascism, neo-Nazi propaganda ideology, production and (or) distribution of materials , which are justifying the crimes of the Nazis and their supporters. Public denial or justification of fascism crimes against humanity committed during the Second World War, including crimes committed by the organization " Waffen-SS ", its subordinated bodies, those who fought against the anti-Hitler coalition and collaborated with the Nazi occupiers and neo-Nazi propaganda ideology production and (or) distribution of materials , which are justifying the crimes of the Nazis and their supporters Shall be punishable by a fine of five hundred to a thousand tax-free minimum incomes or restraint of liberty for a term up to two years or imprisonment for the same term.

[11] An unauthorized interference in the operation of state electronic information resources or information, telecommunications, information and telecommunications systems, critical national information infrastructure facilities 1. An unauthorized interference in the operation of state electronic information resources or information, telecommunications, information and telecommunications systems, critical national information infrastructure facilities resulting in the leakage, loss, forgery, blocking of information, distortion of information processing procedure or violation of existing routing process, - 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 and hardware equipment involved in the unauthorized interference owned by a guilty person. 2. Similar actions, if recurrent or carried out by a group of persons engaged in prior conspiracy, or if a significant damage has been caused by them, - shall be punished by deprivation of liberty for a period of three to six 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 and hardware involved in the unauthorized interference owned by a guilty person. Note. in Articles 361^3 and 362^1 of this Code a critical national information infrastructure facility should be understood as a facility having at least one information (automated), telecommunications or information and telecommunications system, where impediment to its operation may result in a man-made emergency or may affect the environmental safety of the state; or it may affect energy security of the state; or it may affect the economic security of the state, or disrupt sustainable operation of banking and financial systems of the state; or disrupt sustainable operation of transport infrastructure of the state; block operation or destroy enterprises that are strategically important for the economy and security of the state, life sustaining systems and higher risk facilities; block activities of public authorities or local self-government; disrupt sustainable operation of information or telecommunications infrastructure of the state, including its cooperation with the appropriate infrastructures of other countries; block activities of military forces of other entities in the sector of national security and defense, military command components, Armed forces of Ukraine on the whole, weapons control systems; result in mass disturbances; disclosure of the state secret.

[12] 1. The unauthorized trade or distribution of restricted information which is processed within the state electronic information resources, - 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

which is processed in the state electronic information resources, etc.[13] are all potentially problematic with respect to rights under the Convention, namely the right to freedom of expression under Article 10 and the right to freedom of assembly and association under Article 11.

Extremist activities

26. It is clear that restrictions on activities involving the use of force to overthrow the government or the constitution and to undermine territorial integrity can be imposed consistently with the Convention[14]. Furthermore, restrictions can similarly be imposed on incitement to violence and to hatred without violating the right to freedom of expression[15]. However, both the breadth of the manner in which the restrictions are framed and the way in which they are applied in individual cases can entail violations of the Convention, not only of the rights under Articles 10 and 11[16] but also of the prohibition on punishment without law in Article 7[17].

27. This risk is particularly great where measures are based upon concepts such as terrorism and enmity, as is the new Article 110-1 of the Criminal Code. Although this provision attempts to give the concept of extremism some precision, the reality is that - as the case law of the Court noted above indicates - it is very easy for statements and activities to be misconstrued and unjustifiably subjected to criminal sanction. To draw the line between social discomfort or protesting against political decisions, and

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subject information, as owned by a guilty person. 2. Similar actions, if recurrent or involving prior conspiracy of a group of persons, if causing significant damage, - shall be punished by deprivation of liberty for a period of three to six years, including the confiscation of software or hardware equipment involved in such unauthorized trade or distribution of subject information, as owned by a guilty person.

[13] 1. The unauthorized adjustment, destruction or blocking of information which is processed in the state electronic information resources or information, telecommunications and information telecommunications systems of critical national information infrastructure entities committed by a person having the right of access thereto, - 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 a guilty person. 2. The unauthorized interception or copying of information which is processed in the state electronic information resources or information, telecommunications and information telecommunications systems of critical national information infrastructure entities, if resulting in its leakage, committed by a person having the right of access to such information, - shall be punished by deprivation of liberty for a period of three to six 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 equipment involved in such unauthorized interference, as owned by a guilty person. 3. The actions specified in parts one and two of this Article, if recurrent or involving prior conspiracy of a group of persons, if causing significant damage, - shall be punished by deprivation of liberty for a period of five to seven 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 equipment involved in such unauthorized interference, as owned by a guilty person."

[14] See, e.g. *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998 and *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no.. 41340/98, 13 February 2003.

[15] See, e.g., *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997 and *Vejdeland v. Sweden*, no. 1813/07, 9 February 2012.

[16] See, e.g., *Incal v. Turkey* [GC], no. 22678/93, 9 June 1998 and *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998.

[17] See *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008.

"inciting to social enmity" is very difficult and can undoubtedly lead to abusive interpretations, contrary to freedom of speech and freedom of assembly and association.

28. This is well exemplified by the following extract from the Court's judgment in *Incal v. Turkey*, which concerned a similar measure of similar range to that in Article 110-1:

> 49. The National Security Court held that, by describing the State as terrorist, by drawing a distinction between citizens even though all of them were of Turkish nationality and by criticising certain municipal measures as operations in a special war, the authors of the leaflet had knowingly incited the people to hatred and hostility and, to that end, had urged them to have recourse to illegal methods.
> 50. The Court notes that the relevant passages in the leaflet criticised certain administrative and municipal measures taken by the authorities, in particular against street traders. They thus reported actual events which were of some interest to the people of İzmir.
> The leaflet began by complaining of an atmosphere of hostility towards citizens of Kurdish origin in İzmir and suggested that the measures concerned were directed against them in particular, to force them to leave the city. The text contained a number of virulent remarks about the policy of the Turkish government and made serious accusations, holding them responsible for the situation. Appealing to "all democratic patriots", it described the authorities' actions as "terror" and as part of a "special war" being conducted "in the country" against "the Kurdish people". It called on citizens to "oppose" this situation, in particular by means of "neighbourhood committees" (see paragraph 10 above).
> The Court certainly sees in these phrases appeals to, among others, the population of Kurdish origin, urging them to band together to raise certain political demands. Although the reference to "neighbourhood committees" appears unclear, those appeals cannot, however, if read in context, be taken as incitement to the use of violence, hostility or hatred between citizens[18].

29. The application of Article 110-1 will certainly give rise to a very serious risk of violations of Articles 10 and 11 of the Convention, particularly in the present context, even if it will not necessarily do so.

30. Furthermore, the scope under Article 110-1 for portraying legitimate attempts to point out failings on the part of the government as inciting enmity and hatred between elements of the population - as seen also in the *Incal* case - undoubtedly means that this provision could not be regarded as satisfying the foreseeability criterion for offences under Article 7.

31. It should also be noted that the following sentence has been added to part ten of Article 5 of the Law of Ukraine on the freedom of worship and religious organizations: Religious organizations are forbidden to engage in extremist activities.

32. The remarks indicated with respect to the ambiguities inherent in the definition of "extremism" included in the addenda to Art. 110 of the Criminal Code are equally applicable to the reference to "extremist activities" in this new provision. In addition, in view of the general prohibition of extremist activities by the new Art. 110-1 of the Criminal Code, and in view also of the existing restrictions on the activities of religious organizations contained in Art. 5 of the 1991 Law on freedom of conscience

[18] [GC], no. 22678/93, 9 June 1998.

and religious organizations (as amended in 1996), this new explicit restriction on religious organizations seems unnecessary and might open the door to interpretive abuses in practice.

Justification of Nazi and fascism crimes

33. The new Article 436-1 of the Criminal Code sanctions the public objection or justification of the crimes of fascism, neo-Nazi propaganda ideology, production and (or) distribution of materials, which are justifying the crimes of the Nazis and their supporters.

34. Article 436-1 is, in principle, in conformity with CoE Recommendation (97) 20 on hate speech[19], and with the case law of the European Court of Human Rights, which has held that:
1) hate speech is not protected by freedom of expression (Art. 10 of the European Convention on Human Rights)[20]; and.
2) freedom of expression does not protect the negation of "clearly established historical facts", such as "the Holocaust" or "Nazi atrocities and persecutions"[21].

35. However the convenience of approving this legal amendment at this precise moment and without parliamentary debate should be questioned. Moreover, the need to interpret this provision in line with the protection of the freedom of expression, freedom of speech and freedom of press has to be recalled, as stated under Principle 3 of the aforementioned CoE Recommendation (97)20[22].

State electronic information resources

36. The three offences created by the new Articles 361-3, 361-4 and 362-1 are all concerned with state electronic information resources and, in particular the disclosure, distribution and handling of state information.

37. Restrictions designed to protect official information are not inherently incompatible with the right to freedom of expression under Article 10 of the Convention[23] and

[19] CoE Recommendation R (97) 20 of "Hate speech", adopted by the Committee of Ministers on 30 October 1997.

[20] See, for instance, *Jersild v. Denmark*, 23 September 1994, para. 35; *Sürek v. Turkey (no. 1)* [GC], 8 July 1999, para. 62; *Gündüz v. Turkey*, 4 December 2003, paras. 40–41

[21] See *Lehideux and Isorni v. France* [GC], 23 September 1998, paras. 47 & 53. See also *Roger Garaudy v. France* (dec.), no.. 65831/01, 24 June 2003..

[22] Principle 3.The governments of the member states should ensure that in the legal framework referred to in Principle 2,interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others.

[23] See *Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007.

indeed they can be necessary to protect the right to respect for private life[24]. However, it is essential that there be a proper balance between the public interest in having access to the information - especially for the purpose of holding the government to account - and the interest of the government in preventing disclosure.

38. Furthermore, sanctions may cease to be warranted once the information has been disclosed, even if the disclosure was unauthorised[25].

39. In the light of the foregoing, it cannot be said that the aim of the three offences is, in principle, incompatible with the Convention or indeed the practice in other member States of the Council of Europe.

40. However, the formulation of the offences is certainly broad and may result in disclosure and distribution, as well as handling, of information being sanctioned in circumstances where that would be contrary to Article 10 of the Convention in circumstances where there is no clear recognition in the offences that is a consideration that must be taken into account when seeking to determine whether or not an offence has occurred. Furthermore, some of the concepts used - notably 'critical national information infrastructure' - particularly on account of the way it is defined - and 'distortion' have a character which could result in the foreseeability criterion that Article 7 of the Convention requires not being fulfilled.

41. In addition, the penalties that may be imposed are also significant so that there may well be instances where their application at or near the maximum level authorised would be disproportionate and in that regard give rise, in the circumstances of a particular case, to a violation of Article 10 of the Convention.

Slander

42. The imposition of criminal responsibility for defamation will not necessarily be contrary to Article 10 of the Convention[26].

43. However, this may be found to be the result where the penalty is considered to be disproportionate and this may be the case even where only a fine is involved.

44. Thus, the Court stated in *Lewandowska-Malec v. Poland*:

> 70. In the instant case, the applicant was sentenced to a fine of 7,500 PLN (1,900 EUR) and ordered to publish the judgment on the Internet site of the Polish Press Agency for a period of two weeks and once in a local edition of the daily Dziennik Polski. She was further ordered to

[24] See, e.g., *Z v. Finland*, no. 22009/93, 25 February 1997.
[25] See, e.g., *Sunday Times v. United Kingdom* (No. 2), no. 13166/87, 26 November 1997.
[26] See, e.g., *Lewandowska-Malec v. Poland*, no. 39660/07, 18 September 2012 and *Radio France and Others v. France*, no. 53984/00, 30 March 2004.

> reimburse various costs in the aggregate amount of EUR 740. The Government pleaded that the sanctions at issue were proportionate in the circumstances. However, the Court considers that the sanctions imposed on the applicant constituted a reprimand for the exercise of her right to freedom of expression. The cumulative effect of a criminal conviction and the aggregate amount of the financial penalties could be considered as having had a chilling effect on the exercise by the applicant of her freedom of expression as it was capable of discouraging her from making statements critical of the mayor's handling of his duties in the future (see, mutatis mutandis, Lombardo and Others, cited above, § 61).
> 71. In the light of the above considerations and taking into account the fact that the case concerned political speech, the Court finds that the use of the passage in issue, referring to the mayor's conduct, did not exceed the limits of acceptable criticism. The reasons adduced by the courts were not "relevant and sufficient" to justify the interference in issue and the standards applied by them were not fully compatible with those embodied in Article 10. Therefore, the Court considers that the domestic courts overstepped the narrow margin of appreciation afforded to them to restrict political speech. It must be concluded that the interference was disproportionate to the aim pursued and not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

45. Moreover, it should be noted that, in judging the proportionality of restrictions on freedom of expression, the Court has taken into account the suitability of other means of intervention and rebuttal, particularly through civil remedies[27]. This is of particular relevance to the re-criminalisation of slander as it is accompanied by the extension of the power of private prosecution under the Criminal Procedure Code to this offence.

46. In these circumstances, it must be questionable whether any public interest is served by making slander a criminal offence since its effect is to give the victim of the remarks an additional means of taking action when there is already an adequate means - a civil action - of restoring any damage done to his or her reputation. At the same time it provides for the possibility of imposing a potentially considerable penalty - not just a substantial fine but imprisonment for up to two years - on the person making the slanderous remarks.

47. There is, therefore, every likelihood that the exploitation of the power to prosecute for slander under the changes made in combination to the Criminal Code and the Criminal Procedure Code will result in a finding of a violation of Article 10 of the Convention.

Conclusion

48. Thus, all these new offences pose considerable risks for ensuring respect for rights under the Convention. Genuine public interests engaged by the conduct affected by the new offences other than slander would clearly be better served by much more specific restrictions, which most probably is already provided by existing offences that do not put Convention rights at risk. In the case of slander, the more appropriate remedy would be civil proceeding as was recognised in the reform of the Criminal Code in 2001.

[27] See *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998, at para. 57.

Expanded offences

49. With regard to the thirteen offences whose scope has been expanded[28], there are two - those in Articles 343 and 376 - in which the offences have been substantially rewritten and are really unrecognisable when compared to their original versions.

Interfering with judges and law enforcement officers

50. Thus, as regards the former the exercise of any influence on a law enforcement officer for the purpose of interfering with his official duty or obtaining any unlawful decisions has become one about the

> illegal collection, storage, use, disposal, distribution of confidential information concerning such an officer, employee of the State, their close relatives or family members, distribution of materials or information of apparently slanderous nature and demonstration of impudent disrespect of a law enforcement officer or employee of the State Enforcement Service, pressure, intimidation or influence of any other form on a law enforcement officer or employee of the State Enforcement Service with the purpose of revenge, impediment to their performance of duties or in order to obtain an unlawful decision, or public calls or distribution of materials containing the calls to commit such actions

51. Similarly, as regards Article 376, any interference with the activity of a judge for the purpose of preventing him or her from the performance of his or her official duties or obtaining an unlawful judgment has become

> The unauthorized collection, storage, use, disposal and distribution of confidential information concerning a judge, his/her close relatives or family members, distribution of materials or information of an apparently slanderous character and demonstrating impudent disrespect of a judge or justice, pressure, intimidation or interference of any other form with activities of a judge with the purpose of revenge, impediment to performance by the judge of his/her official duties or in order to have an illegal decision rendered, or public calls or distribution of materials containing the calls to commit such actions.

52. In both instances, the range of prohibited activity is not only wide but is uncertain as to what might actually be covered in terms both of the type of information - with the phrase 'apparently slanderous character and demonstrating impudent disrespect' being most egregious example - and the motive for the activity concerned.

53. As a consequence it is not really conceivable that such offences would satisfy the foreseeability requirement for criminal liability required by Article 7 of the Convention, as well as by Articles 10 and 11 for restrictions on freedom of expression and of assembly and association.

[28] See para. 9.

54. Furthermore, although confidential personal information may require protection under Article 8 of the Convention, its disclosure may be protected under Article 8 where this is in the public interest[29].

55. The substantial recasting of these offences cannot, therefore, be regarded even on their face as compatible with the Convention.

Other offences

56. A new paragraph 2 has been added to Article 297[30] granting explicit protection to monuments and memorials of the victims of the Second World War, precisely those fighting against Nazism. This amendment is in line with the new offence sanctioning the justification of Nazi crimes, already commented. In principle, apart from the formal incorrectness of including this provision under the title of "vandalizing burials" as memorials are not necessary graves or burials, this provision does not raise concerns with regard to the Convention.

57. The other offences for which their scope has been expanded are ones in which additions have been made to the prohibited activity (either blocking access in the case of Articles 162, 295 and 341 or adding 'family members' to those affected by the activity proscribed in the case of Articles 345, 347, 348, 349, 377, 378, 379 and 380) or introducing a factor that aggravate the offence, namely, commission by a group of persons in the case of Article 162.

58. The amendment introduced in Art.162 CC is manifestly disproportionate. The provision was meant to sanction the entry or unlawful search into a residence or a property, with a deprivation of liberty of up to three years. The amendment equalizes the "blocking of access" to the property as an entry into it, which is not appropriate and cannot be considered as a "violation of the security of the residence". The second paragraph provided for an aggravating circumstance: that an official had committed the entry. The same applies to Art. 295 CC: calling to the blocking the access of a building can be sanctioned with a restraint of liberty up to 6 years.

59. The addition of blocking access to the offences of violation of security of residence, calls to actions that pose a threat to public order and the capturing of government or public buildings or constructions does not seem to involve an activity of comparable

[29] See, e.g., *Dammann v. Switzerland*, no. 77551/01, 25 April 2006 and *Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007.

[30] Article 297.2 Desecration or destruction of the grave or tomb of the Unknown Soldier, a monument erected in memory of those who were fighting against Nazism during the Second World War - the Soviet soldiers-liberators, members of the partisans movement, the undergrounders, the victims of Nazi persecutions and warriors- internationalists and peacekeepers, shall be punishable by restraint of liberty for a term of three to five years, or imprisonment for the same term.

gravity to the activities originally covered by them and for which lengthy terms of imprisonment can be imposed.

60. There is, therefore, the potential for the application of these extensions - but probably not the prohibition on blocking access in itself[31] - to infringe upon the right to freedom of assembly under Article 11 of the Convention.

61. The addition of 'family members' to prohibitions on threats or violence against a law enforcement officer, wilful destruction or impairment of property owned by a law enforcement officer, trespass against life of a law enforcement officer, a member of a community formation for the protection of public order and state border, or a military servant, hostage taking of a representative of public authorities or a law enforcement officer, threats of violence against a judge, wilful destruction or impairment of property owned by a judge, assessor or juror, trespass against the life of a judge, assessor or juror in connection with their activity related to the administration of justice and failure to ensure safety of persons taken under protection is of questionable necessity since the activities thereby covered must constitute serious offences even without the aggravating family connection of the object of them to law enforcement officers. This is not, however, a basis for considering the extensions objectionable. Nonetheless, they might be thought unwise since they could exacerbate a possible feeling of distance between the police and the population that they are meant to serve.

Enhancement of the authority of certain prosecutors

62. The amendment to Article 36.6 of the Criminal Procedure Code adds heads of headquarters, offices and their deputies to the list of more senior prosecutors who, when monitoring the compliance of pre-trial investigation, are authorised to 'refute illegitimate and unjustified orders issued by investigation officers and subordinated prosecutors within the time limits of pre-trial investigation' that are specified in Article 219 of the Code.

63. The dependence on prosecutors of investigators has been a matter of concern since Ukraine became a member of the Council of Europe and was a concern during the preparation of the Criminal Procedure Code that entered into force on 20 November 2012.

64. Thus, it was observed in respect of an early draft that:

[31] See, *Bukta and Others v. Hungary*, no. 25691/04, 17 July 2007 and *Éva Molnár v. Hungary*, no. 10346/05, 7 October 2008.

> As a rule the control over the investigator's compliance with their professional duties should lie primarily within the relevant agency and only in certain cases should he or she be appointed or removed from a case by the public prosecutor[32].

65. This provision should be seen as a backward step in the efforts to change the relationship between prosecutors and investigators since it entails enhancing the authority of much lower level prosecutors over investigators.

66. This step is all the more of concern given the enhancement of criminal liability discussed above, which necessarily increases the potential for improper exercise of power, particularly by persons less likely to have the sense of responsibility that should accompany seniority.

67. It is especially regrettable that this enhancement of authority has been given at a time when the draft Law to replace the Law of Ukraine *On the Public Prosecution Service* that entered into effect on 5 November 1991 remains unadopted but pending before the Verkhovna Rada despite it embodying many of the changes needed to bring about the transformation of the Public Prosecution Service that Ukraine undertook to secure when it joined the Council of Europe[33].

68. It would, therefore, have been more appropriate for the need for the amendment to Article 36.6 to have been considered in the context of the adoption of that draft Law rather than being precipitously enacted.

Extension of the competence of certain investigators

69. The amendment to Article 216 of the Criminal Procedure Code provides for investigators of bodies of security to conduct pre-trial investigation of crimes in respect of all of the new offences that have been created other than slander.

70. This extension of the competence of these investigators should be a matter of concern because of the unsatisfactory breadth of the offences themselves, which could result in significant violations of rights under the Convention. Certainly, the risk of applying these offences in a manner that fails take due account of rights to freedom of expression and to freedom of assembly and association will undoubtedly increase as a result of having effectively characterising them as matters of security.

71. However, the principal concern remains with the scope of the offences themselves rather with those who will be investigating their alleged commission.

[32] *Opinion on the Draft Criminal Procedure Code of Ukraine*, (DG-I(2011)16, 2 November 2011), para. 106.
[33] See the Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine endorsed by the Venice Commission at its 96th plenary session (Venice, 11-12 October 2013) (Opinion no. 735/2013, CDL-AD(2013)025).

Preclusion of appeal or challenge

72. The amendment to Article 330.4 of the Criminal Procedure Code has the effect of rendering final and subject to no challenge rulings on liability for contempt of the court that have been rendered without issuing an administrative offense report and contain the information specified in Article 283 of the Code of Administrative Offences of Ukraine.

73. It also provides that, where the court renders a ruling involving imposition of administrative charges in the form of penalty, the enforcement of such ruling will be monitored by appropriate agencies responsible for income and fees related issues.

74. It is the first part of the amendment that must be a source of concern.

75. There is no question that it is appropriate that action be taken to maintain the authority of a court and to secure compliance with its order. Indeed, this is specifically recognised in Article 5(1)(b) of the Convention in that it allows for the arrest of a person for non-compliance with the lawful order of a court, as well as restrictions on freedom of expression authorised under Article 10 for maintaining the authority and impartiality of the judiciary.

76. However, the present provision would seem either to remove the possibility of appeal that currently exists under Article 287 of the Code of Administrative Offences of Ukraine or to render it pointless given that there will be no administrative offence report, without any evident explanation as to why this should be necessary.

77. As Article 260 of the Code of Administrative Offences of Ukraine makes clear, drawing up an administrative offence report is required to 'ensure timely and correct case trial'. This is especially important where a finding of contempt of court can now result in detention for up to 15 days.

78. The Convention does not require there to be a right of appeal against criminal convictions - which rulings on liability for constitute of contempt of court - but it is required under Article 2 of Protocol No. 7, which Ukraine ratified on 11 September 1997.

79. As the case law of the Court indicates[34], proceedings in cases of contempt of court can be particularly fraught since their subject matter concerns a direct challenge to the authority of the court and this can result in a loss of objectivity. This is especially so where the court before which the contempt is alleged to have occurred can make the finding, as is the effect of the amendment. It is, therefore, all the more important in

[34] See, e.g., *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005.

cases of alleged contempt that rulings be subject to impartial scrutiny so that no injustice is done to those found to be contemnors.

80. Furthermore, a finding of contempt which relates either to an accused or to his or her lawyer, can ultimately impact on the fairness of the trial proceedings and lead to a violation of Article 6 of the Convention[35].

81. Thus, apart from the apparent disregard of the obligation to allow appeals in criminal cases under Article 2 of Protocol No. 7, this amendment clearly has the potential to give rise to violations of Article 6 of the Convention. Furthermore, the amendment cannot be regarded as serving any legitimate purpose.

Extension of the private prosecution power

82. The amendment of Article 477 of the Criminal Procedure Code has, as has already been seen of extending power to bring a private prosecution to allegations that the new offence of slander has been committed.

83. As has already been noted, it is questionable whether any public interest is served by making slander a criminal offence since the effects to give the victim of the remarks an additional means of taking action when there is already an adequate means - a civil action - of restoring any damage done to his or her reputation but at the same time imposing a potentially considerable penalty on the person making the slanderous remarks. As a result the offence is potentially inconsistent with the protection of the right to freedom of expression under Article 10 of the Convention.

84. The possibility of the victim securing the imprisonment of the person who has slandered him or her may give some satisfaction but the right of access to court under Article 6 of the Convention does not require the possibility of bringing a private prosecution to be established. Moreover, while Article 479 of the Code does envisage the possibility of damage that has been caused to the victim in a private prosecution being repaired by a reconciliation agreement under the Code, this is something that can effectively also be achieved through the institution of civil proceedings.

85. There does not seem, therefore, to be any compelling reason why slander should be added to the offences for which a private prosecution can be brought. Indeed, the scope for vindictiveness and oppression that it undoubtedly creates only makes it more likely that proceedings brought under this power will result in a finding of a violation of Article 10 of the Convention.

[35] See, e.g., *Kakabadze and Others v. Georgia*, no. 1484/07, 2 October 2012.

Extension of the prosecutor's authority to bring proceedings

86. The amendment to Article 36-1 of the Law of Ukraine *On the Public Prosecution Service* provides for an apparent extension of the prosecutor's power of representation of the interests of the State in court in order to protect those interests, namely,

> 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.

87. However, it is questionable whether this extension is needed in view of the broad scope of the power of representation already provided by Article 36-1.

88. Thus part 1 provides that representation of the interests of the State means "performance of procedural and other acts" aimed at protection of those interests and part 3 provides that

> The reason for representation of interests of the state in court shall be the fact of violations or threat of violation of the State interests.

89. However, despite being concerned with hindrances to the exercise of the right to use public and community property or the property of public associations, this amendment does not address the concerns identified with respect to the draft Law that is pending before the Verkhovna Rada to replace Law of Ukraine *On the Public Prosecution Service*, namely,

> 84. The need to restrict the representation by public prosecutors of state interests to the specific legal rights of the state has already been notedand this provision should thus be amended to achieve this by providing a power of representation 'in the cases of violations or threat of violation of the state's *specific legal interests*' Furthermore, it should be confirmed that the term 'threat of violation' is no wider than the circumstances warranting anticipatory relief in civil proceedings.
> 87. It should also be noted that, although the capacity of public prosecutors to represent the interests of the state under paragraph 3 of Article 24 is supposedly just a fallback position in that they should not intervene where other governmental entities have that role, this limitation is qualified by the specification that public prosecutors can act where the protection of state interests is not 'duly carried out', which could leave considerable leeway to public prosecutors as to the assessment made by these other governmental entities as to the need to bring proceedings in court and indeed allow the former to override the latter's judgment. This does not seem appropriate and this paragraph should be amended to restrict the power of representation simply to situations in which no other governmental entity has the capacity to provide representation. **In analogy to the procedure provided for in Article 24.2, the prosecutor should be allowed to take over the representation of state interests from other state bodies under Article 24.3 only after the approval by a court**[36]**.**

90. Thus, there is no clear indication that the State has a specific legal interest in all aspects of the situation envisaged, there are others - not least the public associations with competence to act on their own behalf and there is no requirement of prior court

[36] Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine endorsed by the Venice Commission at its 96th plenary session (Venice, 11-12 October 2013) (Opinion no. 735/2013, CDL-AD(2013)025); emphasis added in para. 84.

approval for the prosecutor to usurp the capacity of other entities to bring proceedings.

91. Not only does this provision seem unnecessary but it disregards not just the concerns mentioned above but even steps back from the advances seen in the draft Law to fulfill the commitment made to transform the Public Prosecution Service. Again it is regrettable that the need for the amendment to Article 36-1 was not considered in the context of the adoption of the draft Law.

Conclusion

92. Almost all of the relevant changes have the potential to give rise to one or more violations of the Convention. In several instances the risk of this occurring is extremely high, at the very least.

93. This is not the case with some of the amendments made to the Criminal Procedure Code and the one to the Law of Ukraine *On the Public Prosecution Service*. However, those particular changes cannot be regarded as having either enhanced the operation of the criminal justice system or brought Ukraine any nearer to fulfilling the commitment it made almost twenty years ago to transform the Public Prosecution Service.

94. Apart from the potential and actual problems posed by individual provisions, the packaging of all these changes together in the present manner, particularly without consideration for important reform measures which the Government itself has brought about or proposed, points to the existence of regrettable limitations on the extent to which the standards and values of the Council of Europe have been fully embraced.

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