Continued support to the criminal justice reform in Ukraine

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OPINION

OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULEOF LAW OF THE COUNCIL OF EUROPE

ON THE DRAFT LAW OF UKRAINE No.2897 *ON AMENDMENTS TO THE LEGISLATIVE ACTS OF UKRAINE INTRODUCING THE PROVISIONS ON CRIMINAL MISDEMEANOR OFFENCES*

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Executive summary

This Opinion is concerned with proposed amendments to the Criminal Code of Ukraine and the Code of Administrative Offences of Ukraine, as well as certain other Codes and Laws. The principal objective of these proposed amendments is to establish four categories of criminal offences – including the new concept of criminal misdemeanour – and to remove many objectionable features regarding the existing administrative offences The proposed amendments are recognised as constituting a significant reform measure but the opinion also identifies varies problems concerning legislative technique, notably as regards the definition of some concepts and the clarity, consistency and internal coherence of the changes that would be effected. Moreover, it notes problems of compliance with certain principles fundamental to the criminal justice system, particularly as regards legality, individuation of criminal responsibility and respect for proportionality of punishment. Furthermore, concern is expressed about the absence of a clear rationale for determining whether an act or omission should be categorised as a crime, a misdemeanour or administrative offence, as well as about the manner in which some offences are formulated or the penalties for them are proscribed. Finally, concern is also expressed about the whether the administrative, financial and organisational implications of the proposed reform have been adequately addressed.

A. Introduction

1. This Opinion is concerned with the amendments which would be made ("the proposed amendments") to the Code of Administrative Offences of Ukraine ("the Code of Administrative Offences", the Criminal Code of Ukraine ("the Criminal Code"), the Criminal Executive Code of Ukraine ("the Criminal Executive Code") and the Criminal Procedure Code of Ukraine ("the Criminal Procedure Code") by the Draft Law of Ukraine No. 2897 *On Amendments to the Legislative Acts of Ukraine introducing the Provisions on Criminal Misdemeanor Offences* ("the Draft Law"), prepared by several members of parliament for submission to the Verkhovna Rada of Ukraine and now under consideration by the latter.

2. The present comments review the compliance of the proposed amendments with European standards, particularly the European Convention on Human Rights ('the European Convention') and the case law of the European Court of Human Rights ('the European Court') but also certain other treaties and recommendations of the Committee of Ministers and other Council of Europe standard-setting bodies[1].

[1] Notably, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its two Protocols, the International Covenant on Civil and Political Rights ("the International Covenant", CM/Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, CM/Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures and CM/Rec (2000) 22 on improving the implementation of the European rules on community sanctions and measures.

3. Also relevant for the purpose of these comments is the need for legal certainty - the ability to act within a settled framework without fear of arbitrary or unforeseeable State interference – and the extent to which the proposed amendments satisfy the requirements of clarity and foreseeability.

4. Remarks will not be made with respect to those proposed amendments that are considered appropriate or unproblematic unless this is relevant to an appreciation either of the impact of other changes being proposed or of the overall effect that the Draft Law will have on the character of a specific Code.

5. *However, recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised*

6. The comments first address some general issues relating to the proposed amendments. They then turn to the amendments that would be made to the Criminal Code, which are the most substantial of those proposed by the Draft Law. Thereafter, they consider in turn the amendments that would be made to the Criminal Code[2], the Code of Administrative Offences, the Criminal Procedure Code and the Criminal Executive Code. Insofar as the amendments to the Code of Administrative Offences involve the transfer of provisions (with or without any modification) to the Criminal Code, the relevant amendments are addressed in the section dealing with the Criminal Code. The comments conclude with an overall assessment of the compatibility of the proposed amendments with European standards.

7. These comments have been based on English translations of the Draft Law and of the Codes to be amended, provided by the Council of Europe. The original text of the Draft Law was consulted where the language of the English translation seemed uncertain or required some further clarification.

8. The preparation of the opinion has greatly benefited from the discussions with members of the Parliamentary Committee for the Legislative Support to Law Enforcement, Verkhovna Rada, the Office of the Prosecutor General, the judiciary, the Legal Department of the Ministry of Ukraine and civil society in the course of meetings in Strasbourg on 9 November 2016. Account has also been taken of the Explanatory Note that accompanies the Draft Law ("the Explanatory Note").

9. The comments have been prepared by Jeremy McBride[3], Peter Pavlin[4] and Iva Pushkarova-Gocheva[5]under the auspices of the Council of Europe's Project "Continued Support to the

[2] The General Part and the Special Part are examined in separate sections, with the provisions in the General Part being dealt with exhaustively while the comments relating to those in the Special Part are more illustrative.
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B. General comments

10. This section is concerned with the nature of the reform being proposed, the applicability of classical concepts, the systemic rules applicable to the administrative offences being transferred into the Criminal Code as misdemeanors and rules of criminal substantive law (as well as criminal procedural law) to the new offences being introduced into the Criminal Code, i.e., misdemeanors), aspects of drafting technique and the possible impact of the reform on the operation of the criminal justice system.

The nature of the reform

11. The objectives of the reform which the Draft Law proposes for the substantive criminal law are commendable, focusing mainly on its further humanisation of the law and improving its compliance with constitutional requirements and European and international human rights standards. These objectives are to be achieved by reclassifying the existing four categories of criminal offences[6] into three categories of "crimes" – minor, grave and extremely grave - and introducing into Article 11 the concept of criminal misdemeanors (based on many of the current administrative offences, as well as some existing criminal offences) so that the Criminal Code would then be again comprised of four categories of criminal offences. This should ensure that proceedings in respect of these former administrative offences will henceforth be subject to the requirements of the Criminal Procedure Code.

12. Introducing this division of criminal offences into crimes and misdemeanors is a solution entirely within the discretion of the national legislative powers. On the other hand such a change is not required by European and international standards. Indeed, a double (or triple) division of offences is no longer common among European states, the majority of which now only have one category of offences, the decline in its use being seen since the beginning of the twentieth century.

13. Moreover, the reform being proposed in the Draft Law is much larger than its Explanatory Note suggests. Thus, it challenges a number of basic concepts in the General Part of the Criminal Code and other aspects of criminal substantive law, affecting the legal nature of classical criminal offences. The reform would also change significantly the administrative branch of the legal system.

14. Furthermore, the proposed reform seems to be trying to target certain objectives for which changes in the substantive criminal law cannot afford a solution. This is particularly true of ones concerned with caseload management, criminal procedure and the professional integrity

[6] I.e., minor offences, medium grave offences, grave offences and special grave offences.

of judges. These might be more effectively addressed through changes to other laws and policies, which would also avoid the risk of creating confusion in the formulation of the substantive criminal law.

The applicability of classical concepts

15. Any possible hypothetical argument that all the proposed misdemeanors (including certain of the former administrative offences that would be transferred in a modified form into the Criminal Code) should somehow be still seen as having a "minor nature" or being of "minor importance" and a "minor encroachment of human rights and fundamental freedoms" is certainly to be rejected. This is because they are already traditionally and undoubtedly a part of the concept of the "criminal charge" in Article 6(1) of the European Convention and thus benefitting from rights in that provision and in Articles 6(2) and (3), as is clear from the settled case law of the European Court[7].

16. Happily, there is already some legal guidance in the current case law of Ukraine`s courts which should lead to the new type of criminal offences, i.e., misdemeanors being treated as classical criminal offences for the purpose of Article 6(1) of the European Convention. Thus, on 22 December 2006 the Supreme Court of Ukraine adopted the Resolution of the Plenary of the Supreme Court on judicial practice in hooliganism-related cases by which

> "…when deciding on an applicable sanction under Article 173 of the Code of Administrative Offences, the judge must in each particular case take into account the nature of the offence committed, the character of the offender, the degree of his or her guilt, his or her property situation, as well as any mitigating or aggravating circumstances. As a rule, administrative sanctions or social measures, rather than detention, should be applied to persons involved in a socially useful activity and enjoying positive character references at their place of work, study or residence".

17. Moreover, this has been clearly relied by the European Court when dealing with administrative offences that are now being transferred to the Criminal Code as misdemeanors[8].

18. In any event, the classification by national law of an offence as criminal – the necessary consequence of introducing former administrative offences into the Criminal Code as misdemeanors – will automatically lead to them as being classified as "criminal" for the purpose of Article 6 and other related provisions of the Convention[9].

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[7]Especially starting with the case of *Öztürk v. Germany*, no. 8544/79, 21 February 1984, paras. 47-56 and also *Demicoli v. Malta*, no. 13057/87, 27 August 1991, paras. 30-35.The same general position applies with respect to Articles 9(3) and 14 of the International Covenant; as the United Nations Human Rights Committee has observed: …] Criminal charges relate in principle to acts declared to be *punishable* under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.[7]" and also that "61. If someone suspected of a crime and detained on the basis of article 9 of the Covenant is charged with an offence but not brought to trial, the prohibitions of unduly delaying trials as provided for by articles 9, paragraph 3, and 14, paragraph 3 (c) of the Covenant may be violated at the same time"; *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007 (emphasis added).

[8] E.g., *Vyerentsov v. Ukraine*, no. 20372/11, 11 April 2013.

[9] See *Funke v. France*, no. 10828/84, 25 February 1993.

Systemic rules

19. There are four systemic rules that need to be observed in respect of the administrative offences that would be transferred into the Criminal Code as misdemeanors (and indeed any new offences classified as misdemeanors) pursuant to the Draft Law, namely,

    a) elements of these offences should be described in a precise manner, as are the standards for criminal offences that are a part of Criminal Codes, stemming from the concept of criminal charge;

    b) there should be no duplication between these offences and other criminal offences on account of the prohibition of double jeopardy in Article 4(1) of Protocol No. 7 to the European Convention[10] and the principle of legality of substantive criminal law;

    c) the principle of *ultima ratio*[11](which is also a part of the principles of proportionality and subsidiarity) should be respected, namely, the starting position in deciding in the context of the repressive nature of the criminal justice system whether or not to criminalise certain acts should be that criminalisation is the last resort of the legislature and an assessment should be made of the protected legal value (protected legal good[12]) whose violation (encroachment) could be criminalised should be performed; and

    d) the principle of proportionality should – having regard to the protected legal value - be respected in prescribing punishments.

Legislative technique

20. There are several problems with the manner in which the Draft Law is formulated.

21. Firstly, it reflects a legislative technique which significantly extends its overall length by introducing solutions which do not add any legal meaning but simply direct users to other provisions, repeat the content of other provisions or contain obvious statements that have no practical value whatsoever, including observations of a theoretical nature. Notable examples of this include the proposed Articles 12-1, 12-2, 65.3 and 65.4, as well as the Note in Chapter III.

22. Such problems are also a feature of the proposed Articles 18.2, 59. 2 and 60.3.

23. Thus, by indicating that "a specific criminal offender shall mean a criminally sane natural person who, being of the age of criminal responsibility, has committed an offender-specific criminal offence", the proposed Article 18.2would refer to one of the aspects of the legality principle.However, it is beyond doubt that offenders should bear any specific features that the

[10] And indeed Article 61.1 of the Constitution of Ukraine.

[11] For a systemic position on the use of the *ultima ratio* principle in the area of criminal (!) law see for example: Peršak, Nina, *Criminalising Harmful Conduct, The Harm Principle, its Limits and Continental Counterparts*, Springer, 2007, p. 121: "The *ultima ratio* principle is first and foremost a "principle of legislative ethics" […]".

[12] Rechtsgut in German criminal law.

respective provision of the Special part requests in order to impose liability as these features are part of the *corpus delicti* of the offence.

24. Equally, the last sentence of the proposed Article 59.2 appears to make its previous parts – i.e., sub-paragraphs 1 to 3 - rather unnecessary since it is unclear what is added by the reference in those sub-paragraphs to the three groups of offences concerned. Certainly, on its face, the provision would seem to have the same legal effect were those three sub-paragraphs to be omitted unless the provision seeks to establish that asset forfeiture is applicable only in cases where this measure is provided for one of those categories of crimes. In such cases, even if it is provided for another type of crime, it will not be applied by the court.

25. Furthermore, the expression 'as a rule' in the proposed Article 60.3 is insufficiently clear and unambiguous and so would create confusion and risks for the uniformity of the judicial practice.

26. *Such provisions should, therefore, be deleted or reformulated as they compromise basic criminal law principles, namely, legality, proportionality, legal certainty and individual criminal responsibility*.

27. Secondly, there are a number of misplaced provisions.

28. For, example, the paragraph numbered 2 of the proposed Article 11 should precede the one immediately preceding it – paragraph 1-1 - as a provision dealing with the notion of criminal offence should precede one concerned with the matters of types of offences[13].

29. *There is a need, therefore, to review the proposed amendments and amend the ordering of such provisions to ensure their overall coherence*.

30. Thirdly, there are provisions whose subject-matter is not concerned with substantive criminal law and which should not, therefore, be included in the Criminal Code.

31. For example, the provisions in the proposed Articles 96-2-1 and 96-2-2 deal with procedural issues of an administrative or civil law nature.

32. *Such provisions should thus be located in other more relevant laws*.

33. Fourthly, the dictionary-like catalogue of terms in the proposed Appendix 2 covers terms whose legal meaning will have already been defined in the substantive provisions of the Criminal Code.

34. For example, the terms "theft", "robbery" and "brigandage" are defined in the relevant Articles of the Special Part as different modes (secret, open etc.) of "misappropriation". The

[13] In the English text the preceding paragraph is not numbered and last one is shown as "3".

proposed Appendix 2, in its turn, provides a definition of "misappropriation" referring to theft and robbery as its modes[14]. Thus, the definition in Appendix 2 is circular and also incomplete, as it contains no reference to brigandage. Moreover, the proposed Appendix 2 even defines the term 'negligence'[15] which - as a basic legal concept – should only be defined in the law itself, where indeed it has already been expressly defined.

35. Such repetition is likely to create confusion, injuring the legality principle.

36. *This repetition and incoherence should thus be eliminated*.

37. Fifthly, the proposed Appendix 2 would also define some new terms with no apparent practical target – such as the term "murder[16]" – which are already adequately defined in existing provisions of the Criminal Code. Although their introduction might have some analytical significance, their use is more appropriate for legislative studies than legislation itself.

38. *Such terms should, therefore, be deleted*.

39. Sixthly, some of the words and expressions which the proposed Appendix 2 defines follow from the basics of the criminal law and should not have legal definitions as they are not legal norms and do not assist the enforcement of such norms. Instead, they are defined and explained in legal theory or interpretative case law.

40. For example, the definition given for "Committing a criminal offence for the first time"[17] basically explains how the criminal legislation works, which may be suitable for textbooks but not for legal acts. A similar comment is applicable to the term "punishability"[18].

41. *Such definitions should, therefore, be deleted.*

42. *Furthermore, any remaining definitions in the proposed Appendix 2 after the foregoing changes have been made might be better given the status of a regular provision in the substantive body of the Criminal Code and not left in a mere appendix to it*.

43. Finally, the complexity of the formulations used sometimes makes it impossible to determine what is intended by certain provisions.

44. For example, the language used in the last paragraph of the proposed Article 11 – numbered as paragraph 3 – is entirely incomprehensible.

[14] Paragraph 10; e.g., theft" is defined as taking possession of non-owned property through "theft".
[15] Paragraph 35.
[16] Paragraph 7; "Murder - Unlawful causing of the death of another person with guilt (mens rea). A murder can be intentional or negligent, depending on the guilt of the subject.
[17] Paragraph 12.
[18] Paragraph 27.

45. *There is a need, therefore, not only to clarify what this paragraph means but also to simplify as much as possible the language used in the Draft Law.*

Operation of the criminal justice system

46. The introduction of the concept of misdemeanor into the framework of the criminal offences covered by the Criminal Code will - when taken with the proposed changes to the Code of Administrative Offences (notably the lightening of the procedures to be followed and of the penalties that can be imposed) - be a significant reform measure.

47. As has already been noted[19], this will do much to ensure that criminal proceedings are more generally governed by the requirements of the Criminal Procedure Code and thus minimise the risk of them being conducted in breach of the European Convention.

48. However, although the approach embodied in the Draft Law is entirely welcome, there are reasons to be concerned about the possible implications that this reform measure in its present form may have for the effective operation of the criminal justice system.

49. The fact that the reform, if adopted, will lead to a greater number of offences being governed by the procedural safeguards laid down in the Criminal Procedure Code can – if properly implemented - be expected to have consequences for the workload of prosecutors and investigators. This is because they will now be expected to handle cases that were not formerly within their remit and to do so in accordance with the exacting standards prescribed in that Code.

50. Thus, although the Explanatory Note suggests that pre-trial investigation will be carried out "in accordance with significantly simplified, in comparison to investigation of crimes, procedure in the form of investigation", the only real simplification envisaged by Chapters 25 and 30 of the Code relates to the trial procedure itself – the other differences being merely shorter deadlines and he exclusion of the use of covert investigative (detective) actions - and then this will only happen if the suspect unconditionally admits his or her guilt, does not dispute circumstances established through the pre-trial investigation, and agrees to the consideration of the indictment in his absence, and there is no objection by the victim. Certainly none of the modifications proposed for the Criminal Procedure Code in the Draft Law point to its requirements being applied in a less exacting manner.

51. The reform will also have implications – in terms both of financial costs and manpower - for the operation of the legal aid system as there will now be additional cases where the provision of legal assistance will be necessary.

[19] See para. 11 above.

52. These implications are not problematic in themselves. Indeed, the observance of the higher procedural standards that they entail – even if this occurs in some genuinely simplified form - is clearly something that should be ensured by any party to the European Convention.

53. *There is a need, therefore, to ensure that the legal framework governing the requirements for the investigation of possible misdemeanors is sufficiently simplified, while still respecting the rights of the defence under Article 6 of the European Convention*.

54. Nonetheless, it is one thing to specify that these higher standards are to be observed and quite another to ensure that this occurs in practice. Although the operation of the criminal justice system has been much improved followed the entry into force of the Criminal Procedure Code, its full potential was not achieved as a result of the failure to make all the necessary administrative and institutional changes that its provisions required[20].

55. It is, of course, not inevitable that this the fate will also befall the reform proposed by the Draft Law but it is noted that the possible implications – in terms of administrative or organisational change - for the law enforcement and legal aid services are not addressed in the Explanatory Note. Furthermore, the latter asserts without any analysis that the adoption of the Draft Law will not require any additional costs from the State budget of Ukraine. There is a suggestion that there will be cost savings from decreased expenses connected with the present system for handling administrative offences and increased income from penalties, which may indeed be justified. However, there is no indication as to the basis for this calculation and no consideration as to how – if at all – such savings will be reallocated to those handling the new misdemeanors. Nor is there any discussion of the need for some administrative and organisational change, such as an increase in the number of investigators and prosecutors.

56. In any event, due account needs to be taken of the considerable preparation that will be required by all involved in the operation of the criminal justice system in order to ensure that the reform embodied in the Draft Law is successfully implemented. This will necessitate an appropriate period to be specified in the Draft Law before its provisions come into effect following adoption. The stipulation in the Draft Law refers to a date – 1 January 2016 – rather than a period of time and that date has already passed. In the light of the experience gained from the implementation of the Criminal Procedure Code of Ukraine, it would seem that a period of six months would be insufficient for this purpose.

57. *The Draft Law should thus prescribe that its provisions are to come into effect at least a year after their adoption*.

58. It should also be noted that the Explanatory Note also does not discuss the basis on which administrative offences would either be transformed into misdemeanors or be left in the Code of Administrative Offences. Certainly, it is questionable whether some of the proposed

[20] See *Report on an evaluation of the implementation of the Criminal Procedure Code of Ukraine*, (Council of Europe, 2015).

transfers might be more appropriately handled as a regulatory matter under the Code of Administrative Offences – albeit subject to ultimate judicial control - rather than brought into the regular criminal justice system. Examples of such offences might include those under the existing Articles 122-5 (violation of the legislation on installation and use of special or sound signalling devices) and 123(violation by vehicle drivers of the rules for passing railway crossings). It is, of course, a matter for Ukraine to decide what conduct should constitute a criminal offence as opposed to an administrative one but, given the possible implications of the allocation of offences, it would be advisable to carefully consider whether the most appropriate, human rights oriented and effective allocation is being made in the changes proposed by the Draft Law.

59. Careful consideration should also be given as to the appropriateness of reclassifying certain criminal offences as misdemeanours. Thus, for example, having regard to the situation related to media freedom in Ukraine, consideration ought to be given as to whether it would be appropriate to classify [21]"hindering journalistic activity" as just a misdemeanour. Moreover, in view of corruption-related problems in the country, would it be appropriate to classifying offences such as "using knowingly false official documents or important personal documents"[22] and "violating requirements of financial control and unreliable information reporting" as misdemeanors[23]. Furthermore, such consideration would be warranted as regards the transformation of the offences of "knowingly misleading testimony"[24] and "refusal by a witness to testify or refusal by an expert or interpreter/translator to perform their duties"[25] into misdemeanors is appropriate since this risks undermining the effectiveness of the administration of justice. In addition, given the importance of respecting the principle of *ultima* ratio, it is unclear why "excess of power by an official"[26] should only be treated as a misdemeanor.

60. The re-classification of certain administrative offences as misdemeanors will also result in a significant expansion in the scope of the criminal law. Given that extensive criminal laws tend to lead to the stagnation of social and economic development, a growth in conventional crime and a decrease in public confidence in judicial institutions, the possibility of such an outcome ought also to be reflected upon and be subject to public discussion before the Draft Law is adopted.

61. *In the light of the foregoing considerations, it would, therefore, be highly desirable – before adopting the Draft Law – to review whether the conceptual, administrative, organisational and financial implications of the proposed reform have been sufficiently considered and addressed, as well as whether all the administrative offences that would be transferred to the*

[21] Article 464.
[22]Article 596.
[23] The proposed Article 602 would treat both intentional and negligent acts in this connection as misdemeanours but the former is clearly more serious. While it might be appropriate to treat negligent conduct as a misdemeanour, it is less evident that this is how intentional conduct should be treated.
[24]Article 384.
[25]Article 385.
[26] Article 607.

Criminal Code need to be placed there and thus governed by the requirements of the Criminal Procedure Code.

C. Comments to Criminal Code: General Part

62. This section deals with the substantial amendments being proposed for the general principles governing liability and punishment.

Articles 2 and 23-25. Basis for Criminal Liability, Guilt

63. In view of the changed concept of social dangerousness that would be effected by the proposed amendment of Article 2, the concepts of social dangerousness, guilt and criminal liability have become somewhat confused.

64. The concept of social dangerousness which originates in the French criminal tradition and has traditionally been used in the Ukrainian law would seem to be being changed by the Draft Law into a concept of culpability which has no defined meaning. As both concepts touch the very essence of the concept of crime, it is absolutely necessary to have the new concept clearly defined and the reason for the change thoroughly explained.

65. Social dangerousness as a concept is still effectively used in many European Union States as a basic criterion for the differentiation of penalties, the arrangement and classification of offences in the Special Part of criminal codes, the individualization of penalties, the content of guilt, the reduction of and relief from liability, concepts of recidivism, etc. Moreover, the concept of social dangerousness and the legal solutions based on it are compatible with international legal standards. Additionally, it has not even been fully extracted from the Code and still influences basic concepts and institutes (see, Art.11).

66. *The legislative choice made between culpability and social dangerousness should thus be clearly defined and motivated and should be applied universally in the Code.*

67. The retained definition of guilt deviates from the standard, continental law best tradition of guilt in that it is being the mental subjective attitude of the offender towards the *act* itself and not the *harmfulness (social dangerousness)* of the act and its consequences. This definition must be related to the provision of the proposed Article 11, according to which "an act or omission, which may have, technically, the elements of any act under this Code, shall not be a criminal offence, if due to its insignificance it neither did nor could cause significant *harm* to any natural or legal person, society, the state or the humanity". Thus, if a deed is not criminal due to its harmlessness, it cannot be committed with guilt. However, the definitions of intent and negligence under the proposed Article 24 also relate to the level of awareness of the deed's *harmfulness*. While the current formulation of the two definitions reflect classical concepts and best practices, the replacement of social dangerousness with culpability leads to a loss of clarity.

68. Furthermore, it is unclear how a combination of the classical concept of criminal liability with the concept of guilt in the amendments proposed for the Criminal Code would be workable, or what would be their possible delimitations.

69. *Although this issue might be clarified through judicial practice or the academic writing, it would be desirable for the legislative concept to be developed in a more detailed manner by the Draft Law.*

70. In addition, the text of the proposed Article 2 would have been clearer (but still need clarification) if it were meant to determine the definition of criminal offences (and not the concept of criminal liability) and proscribed the application of the concepts of legal analogy and statutory analogy.

71. It would be thus advisable to review whether the position on the analogy *intra legem* (analogy within the scope of the statute[27]) should also be stated in this provision. In the context of the Draft Law it might be exceptionally permissible to use it for procedural issues, but not for substantive (material) ones.

72. The definition of negligence in the proposed Article 25.4 also deviates from classical concepts in providing only that the need to use caution *may* be required by law. However, the need to use caution *must* be required by law as otherwise the definition of guilt becomes unstable and open to prejudicial jurisprudence. In a rule of law state legal subjects are under duty to respect and obey only to the law. Breaches of other types of duties (moral, religious, etc.) must not lead to legal liability.

73. *This provision should be amended accordingly.*

74. Similarly problematic is the specification in the proposed Article 25.4 that caution may be required by the "interests of other parties" since they are not even specified in the provision (are they, e.g., victims?) and neither are their interests. As respect for another party's interests may be considered only if there is a legal duty for such respect, there is a serious risk that the principles of legality, legal certainty and rule-of-law will be compromised.

75. *This part of the provision should thus be deleted.*

Articles 2-1 to 2-8. Principles

76. Pursuant to the best legislative examples, a system of criminal law principles should include only substantive law principles and these should be separately formulated. Such a system should not include procedural or penitentiary principles, although they might be linked to the substantive law principles or be their 'procedural/penitentiary version'. Procedural/penitentiary principles should belong in other legal acts as otherwise they would jeopardise criminal codification, with respective negative consequences for criminal

[27] In this case, within the scope of the provisions of the Draft Law.

jurisprudence, and disorganise the system of criminal law principles which should have primacy (the procedural and penitentiary principles being derived from substantive law ones).

77. Also, substantive law principles should not be formulated as overlapping. The legal status of a separate principle should not be given to demonstrations or legal effects of another principle, or to the *ratio* of a principle. One principle should not be formulated as two separate principles. Principles are basic concepts that guide judiciary practice and may not be formulated, for example, as recommendations to the legislature to be considered in law-making. Principles should preferably be prioritised or ordered in a way that shows the links among them which connect them in a system.

78. However, all these basic rules have not been fully observed in the Draft Law.

79. Thus, although the description of principles of legality and legal certainty in the proposed Article 2-1 can only be commended, the stipulation that "The law provisions on criminal liability shall define the criminally punishable act in explicit and clear wordings and shall not be subject to an expansive interpretation" is problematic for two reasons.

80. Firstly, the necessity for clear wording is not a principle but a recommendation to the legislature which contributes to the principles of legality and legal certainty but is neither of them.

81. Secondly, the prohibition on expansive interpretation may provoke injuries to the proportionality principle and the legality principle itself to the detriment of mandatory human rights standards. Such an interpretation should not be prohibited. Rather it should be allowed if - favouring putative offenders - it leads to expansion of provisions which introduce grounds for decriminalisation/depenalisation/milder punishment/etc., expansive interpretation must be allowed.

82. The principle should be the legality of crime and punishment and should be formulated with a clearer wording by, e.g., drawing on that in Article 7 of the European Convention.

83. Moreover, the principle of legality has been given priority over the principle of legal certainty. The principle of legal certainty requires by necessity crime and punishment being set out in the law – the core of the legality principle - but it also requires stable legislation which does not undergo constant or inconsistent changes.

84. *Both principles should not be defined in a single provision and it should be amended accordingly.*

85. The proposed Article 2-3 appears to establish the principle of guilt ("*nulla poena sine culpa*") but, in fact, it deals with the presumption of innocence, which is not a part of the substantive criminal law and is usually a part of criminal procedural law. However, if the proper

concept/theory of guilt is intended - maybe in the German legal manner ("*Schuldtheorie*")[28] - then it could possibly be legislated upon in this Draft Law[29]. On the other hand, account should be taken of the comments above on the issue of criminal liability and the proposed Article 2.

86. Thus, since additional revisions and corrections of the principle of guilt could re-open a lot of conceptual issues and could have influence not just on the (rights of) misdemeanor offenders, but also on the (rights of) charged persons for the usual criminal offences from the criminal substantive law, *it would be advisable not to have a special text on the guilt principle in the Draft Law*.

87. The title of the proposed Article 2-4 states that it determines the "principle of justice". However, its first part in effect describes the "principle of proportionality", while the second part describes the systemic procedural concept of double jeopardy (*non bis in idem* principle).

88. The principle of proportionality is acceptable in its proposed formulation but the text dealing with double jeopardy more properly belongs in the Code of Criminal Procedure[30].

89. *The title of the Article needs to be changed to reflect its content and the text relating to double jeopardy should be deleted and transferred to the Code of Criminal Procedure.*

90. Although it is logical that natural persons can commit criminal offences either intentionally or negligently, the proposed text of Article 2-6 is definitely unclear, since punishment is made a part of the criminal liability. Moreover, in its current wording the provision points who is liable and not for what he or she cannot be held liable. If retained, the provision should rather state that a natural person may only be held criminally liable for criminal offences he or she has intentionally or negligently committed. Or, if the intention was to re-state Article 61.2 of the Constitution of Ukraine[31], then it would might be better to simply transcribe that formulation into the Draft Law and, having regard to the interpretation of the constitutional provision, possibly adding explicit prohibitions on strict liability, collective liability and the liability of parents for the acts of their children. However, it is questionable whether there is really any need for this provision since it effectively duplicates others – notably Article 2.1 – and so would not provide any added value for the Criminal Code.

[28] See for example: H.-H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts – Allgemeiner Teil*, 1996, p. 452; C. Roxin, *Strafrecht Allgemeiner Teil – Band 1, Grundlagen, Der Aufbau der Verbrechenslehre*, 2006, § 7, marginal note No. 46.

[29] *Cf. such* elements in Articles 16, 17 and 46 of the Criminal Code of the Federal Republic of Germany. See also the Judgment of the Federal Supreme Court of the Federal Republic of Germany, No. BGHSt 2, 194, 18 March 1952.

[30] As regards the issue of *non bis in idem*, it could be clarified whether this addition is meant to state that there should be no "sameness" or too much similarity between prescribed elements of misdemeanors and elements of other (graver) criminal offences. Such a solution would have some meaning, if there would be a Draft Law on Misdemeanors legislating in one piece of legislation on the procedural and substantive issues of misdemeanors. However, this is not the case as the Draft Law aims to transfer and modernise many of the existing administrative offences into misdemeanors and include them in the Criminal Code, making them only one of the categories of criminal offences. See for example: *Maresti v. Croatia*, no. 55759/07, 25 June 2009, paras. 55-69 and differently: *Oliveira v. Switzerland*, no. 25711/94, 30 July 1998, paras. 22-29 and similarly *Sergey Zolotukhin v. Russia*, no. 14939/03, 10 February 2009, especially paras. 96-97 and 115-122.

[31] "Legal responsibility of person has individual character".

91. *The need to retain this provision should thus be reconsidered and, if retained, it should be modified in the light of the foregoing comments.*

92. Although the aim of providing a humane approach towards punishment– the "Principle of humanity" – is to be supported, its formulation in the proposed Article 2-7is too unclear and mixes goals of the punishment with a criminal law principle.

93. Thus, the stipulation in the first part of this provision that "The Criminal Code of Ukraine shall provide the protection of a human being, his health and life, honour and dignity, inviolability and security as the highest social value" is effectively guidance for the legislature as to how to draft and how to choose (in accordance also with the principle of *ultima ratio*) acts that should be determined as criminal offences in this Draft Law with respect to the protection of human persons. Such guidance cannot be a criminal law provision and has no relevance to substantive criminal law issues. It is also not directed towards potential offenders and does not help foresee the legal consequences of a criminal conduct.

94. *This part of the provision should thus be deleted*.

95. Furthermore, the second part of the text deals with the aim (purpose) of punishment, stating that punishments need to be humane, pursue a rehabilitative as well as a preventive aim. It is possible that such a combination (this second part of the Article) could remain in the proposed Article 2-7 but the hierarchy of values prescribed needs to be re-thought and the title of the provision changed into "Aims of Punishments" or something similar, as it does not deal with principles. It is doubtful that goals of the punishment should be situated along with general principles as the notion of punishment is introduced later in the Criminal Code and it would be more appropriate for all basic issues of penalties to be dealt with together.

96. *The provision should thus be amended accordingly*.

97. Again the proposed Article 2-8 – the "Principle of inevitability of criminal liability" - does not contain any principle but sets out an operational consequence of the principle of legality. It is dangerous to introduce parts of one principle as separate principles as this immediately raises the question of priority and creates a complex system of principles which could lead to confusion in the development of future case law and not contribute to the uniformity of interpretation which is quite needed in this case.

98. *The provision should thus be deleted.*

99. The proposed revised paragraph 3 of Article 4 might usefully be extended to specify when a more complicated form of criminal offence is considered to have been committed (e.g., when the result of the act as stipulated by the respective provision in the Special Part occurs, when a continuing criminal deed is terminated, etc.

100. *The provision should thus be amended accordingly*.

Chapter III. Concepts of criminal offences, their types and phases

101. The proposed definitions for misdemeanours and crimes do not entail a clear distinction between these two types of criminal offences. The principle of legality requires that the perpetrator should be able to foresee the legal consequences of the deed committed. Moreover, law-enforcement authorities should be able to recognise whether they are investigating a misdemeanour or a crime at an early stage of the procedure. Furthermore, such a distinction is necessary when consideration is being given by the legislature as to how to classify any proposed new offences.

102. *A reliable differentiation criterion or a system of criteria should, therefore, be included in the Draft Law so as to secure these effects. Such a criterion might be the social dangerousness of the act which then finds expression in the gravity of the sanction to be imposed. The mechanisms and techniques for establishing and using such a system of criteria for legislative purposes would require the undertaking of preliminary criminological, statistical, etc. studies, as well as the making of an expert assessment of the relations between systems for criminal prevention, criminal justice and social reintegration.*

103. In addition, the definitions provided in the Note to be added to this Chapter are problematic in a number of respects.

104. Firstly, although the notion of "damage" relates to the consequences of the offence concerned as stipulated by the respective Special Part provisions, the circumstances listed under paragraph 1 in respect of the term "significant damage" describe deeds which might cause damage and not damages as results. This is equally true of the "consequences" found in the definitions of "grave consequences" and "extremely grave consequences" in paragraphs 2 and 3.

105. Secondly, it is not evident as to why the reference in paragraph 1 to the infringement of human rights and freedoms in connection with "significant damage" needs to be restricted to such rights and freedoms having a constitutional status. Certainly, the human rights and freedoms to be so protected should also include those in the treaties that have been ratified by Ukraine.

106. Thirdly, the phrase "significant financial/property damage" in paragraph 1 is circular as it repeats both the words "significant" and "damage" which it seeks to define and the concept is better expressed by the definition given in paragraph 4. Moreover, the latter definition is in effect repeated unnecessarily in paragraph 5. Similar comments are applicable to the relationship between paragraphs 6 and 7 and the reference to large-scale and grand-scale material damages in the definition of grave consequences in paragraph 2. It may be that this circularity in the definitions has been resolved in the case law applying the existing provisions of the Criminal Code but its existence does not facilitate a general understanding of the effect of the texts concerned.

107. Fourthly, if "grave consequences" also include "extremely grave consequences", as is stated in paragraph 2, then the introduction of two separate formulas for such consequences looks confusing and could compromise legal certainty. Certainly, if a provision stipulates that the criminal offence causes "grave consequences" but the court establishes the offence has also caused "extremely grave consequences", it must consider the offence committed and assess the extremely grave consequence as an aggravating circumstance. However, this is not addressed in paragraph 3. Moreover, such double classification will also add complexity to the system of damages with no clear vision as to how that will improve the law and help adjudication.

108. Other problems with the Note concern: the use of the expression "one, two or more persons" in paragraph 1, item 1 (the reference to "two" seems strange"); the lack of a clear distinction between the infliction of an infectious disease that is considered incurable and of one causing death (the former being a grave consequence and the latter being an extremely grave consequence); the vagueness of the concept of "failure of a military mission" for the purpose of establishing an "extremely grave consequence" (there are different kinds of missions and not all failures of all missions might be assessed similarly).

109. The stipulation in paragraph 10 that one unit of account shall equal 30 Ukrainian hryvnias in connection with the calculation of property values and fines is an unnecessary complication given that the various provisions stipulate specific units of account. Furthermore, insofar as the value of the hryvnia could change, it would be appropriate to adjust the actual value of the property or the size of the fine accordingly.

110. *There is thus a need for the paragraphs in the proposed Note to Chapter III to be revised in the light of the foregoing comments*.

111. The definition of misdemeanor in subparagraph 1 of Article 11-1.1 deviates from the general definition of criminal offence(s)[32] by introducing the notions "illegal" and "harmful". It would be more appropriate for these notions to be introduced into the general definition of criminal offences so that this covers just the common features of both types of offences, with the more specific definitions of crimes and misdemeanor then focusing only on what distinguishes them as types of offences.

112. It is also needless to state that both types of offences are committed 'by an offender'

113. The issue of harm to the "State" referred to in paragraph 1 is also unclear. Is the intention here to regulate public law and order? On one hand, the State is sometimes conceptualised as not particularly endangered by the commission of misdemeanors, but by graver (committed) criminal offences. On the other hand, in the French and other Continental systems' tradition all criminal offences are directed against the State and therefore the criminal relation occurs

[32] See especially Articles 11 and 12 of the Criminal Code.

between it and the offender. Since the concept of social dangerousness is replaced by the concept of culpability (the guilt principle), the issue of how the 'State' is conceptualised remains open. This issue is directly connected with practical issues related to the judicial assessment whether a deed qualifies as a criminal offence or not and needs to be clarified.

114. In addition, the concept of harm (arguably meant as a full expression of the harm principle?) under paragraph 1 is actually "significant" (see paragraph 2). It might be viewed as confusing to define the significant harm as a harm which encompasses neither 'significant damage', nor 'grave consequences' (this is obvious) and not stating what this harm actually is. It would be clearer if paragraphs 1 and 2 were fused so as to provide just one definition.

115. However, there is an unclear criminal policy in the official description of misdemeanors as being "likely to cause harm to a person, the general public, or the state" but providing that this is not "significant" while then providing this as an element of the second definition of these offences. If most of the new misdemeanours are not covering situations of significant harm, it would be proportionate and humane to de-penalise[33] in the sense of removing the provision for their punishment "arrest", i.e., by imprisonment.

116. *There is thus a need for the proposed Article 11-1to be revised in the light of the foregoing comments.*

Articles 12-1 to 13. Determination of criminal offences

117. The proposed Article 12-1 is an **e**xample of unnecessary and conflicting legal norms. Thus, its second paragraph informs what one may read in paragraphs 5, 6, and 7. Moreover, paragraph 1 contains a theoretical definition of some judicial activities on criminal matters and does not appear to have a clear addressee or to define anything. In addition paragraphs 3 and 4 repeat aspects of the principles of individual responsibility and proportionality and do not refer to principles of determination of criminal offences. Paragraph 5, bullet 1, refers to aspects of the principle of legality and principle of personal responsibility. The legal nature of classic general and basic criminal law principles should not also be defined as principles of something else. However, both individual responsibility and proportionality principles are contradicted by paragraph 6 in that the "more beneficial law" rule applies only if there are changes in the law after the deed has been committed and its criminal results have occurred.

118. *There is a need, therefore, to ensure that there is no repetition in these provisions and that they are consistent with other parts of the Draft Law.*

119. The stipulation in Article 12-1.7that 'If a regulation of any other area of law expressly allows certain acts then such acts may not be punishable under criminal law' is a very dangerous and incorrect legal statement. First, it follows from the definitions of criminal offences, crimes and

[33] However, even if imprisonment was not prescribed for all or most of the misdemeanors in the Draft Law, they would still come under the concept of criminal charge for the purpose of Article 6(1) of the European Convention; "The relative lack of seriousness of the penalty at stake […] cannot divest an offence of its inherently criminal character", *Öztürk v. Germany*, no. 8544/79, 21 February 1984, para. 54.

misdemeanors that all these types of deed are illegal and it is not necessary to repeat this again. Such a repetition causes confusion. Secondly, the statement is simply not true. There is no doubt that an administrative act may be "legal" in the context of the administrative law and still be part of a criminal offence. The same related to cases of misappropriation, embezzlement, money laundering, tax crime and other types of financial and economic crime where the criminal act consists of or includes civil and commercial activities which may be valid from the perspectives of civil and commercial law.

120. *This provision should, therefore, be deleted.*

121. The prohibition against double jeopardy in the second part of Article 12-1.5 is, as previously noted, a basic criminal-procedure principle. However, it should not be defined as a principle of determination of criminal offences which is a judicial activity related to legal qualification and not to legal procedure. Such an approach creates basic confusions and conflicts between substantive and procedural laws and obstacles before rational and uniform jurisprudence, there by impeding the legality and legal certainty principles. Also, the provision does not even precisely define the double jeopardy prohibition. The manner of its formulation ("articles of different volumes of this Code may not apply simultaneously to the same act") suggests that it is not possible for anyone to commit more two or more different offences with one act (the case of ideal accumulation of offences). Such a provision contradicts basic criminal law institutes and cannot survive in a modern criminal code.

122. *The second part of paragraph 5 of Article 12-1 should thus be deleted.*

123. The proposed Article 12-2 also repeats earlier provisions or contains obvious observations of theoretical nature. It is not likely that a criminal court may ever confuse a general with a special norm and even then such an indication is not suitable for a Criminal Code as it is not part of the criminal law. It belongs to the general legal theory. The provision is also unhappily situated. It is separated from Article 12-3 which relates to cases of more than one conflicting special provisions.

124. It is also beyond doubt that – as is stated in Article 12-2.2 - completed criminal offences absorb attempts and prosecutable preparations. However, even if there is a need to have it introduced in the written law, it is not a rule of qualification and it should be dealt with in provisions concerned with criminal attempt and preparation.

125. *Article 12-2 should thus be deleted.*

126. The proposed Article 12-3 relates to unlikely hypotheses. If it is possible for an offender to commit the *corpus delicti* of both an aggravated and a mitigated provision, there must be a legislative mistake. There is not even a theoretical possibility to have such provisions in conflict because they are by definition alternatives. The mitigated provision always have priority because it either contains an additional element (the mitigating circumstance) or/and does not contain one of more of the elements of the aggravated provision. However, the issue

is well established in legal theory and judicial practice and so its introduction into the Draft Law raises the questions what has been changed? what has caused the introduction? and is the old judicial interpretative practice to be followed in future at all?

127. Moreover, Article 12-3.2 contains a mistake. First, the criteria for making the legal qualification of the deed do not contain issues of punishment! The qualification relates to the elements of the offence. If the idea has been to encourage courts to choose the least onerous penalty which will satisfy the goals of the punishment, the provision in the second sentence of paragraph 2 of Article 65 suffices. Secondly, one deed may only be qualified under one provision of the same type of offence. If it is possible to qualify it under two special provisions of the same type of crime, then both provisions are the same and only differ in the punishment. That is absurd and contradicts the legality-of-crime principle. The offence should be punished according to the principles of proportionality and legality, the rules of individualization and the goals of the punishment. Courts must not be pushed to seek for the most lenient sanction at the qualification level.

128. *Article 12-3 should thus be deleted.*

129. The special rules under the proposed Article 12-4 relate to rules of qualification and interpretation of the law that cannot be regulated at legal level. However, Article 70 is clear enough on this issue and undoubtedly covers the substance of Article 12-4.

130. *Article 12-4 should thus be deleted.*

131. The rule of the proposed Article 13.3 that "An unconsummated misdemeanor (preparation for misdemeanor and attempted misdemeanor) shall not entail criminal liability" is reasonable.

132. *However, it would be appropriate – having regard to the existing Article 17.2 - to add that the perpetrator is criminally liable, if the preparation or attempt to commit one misdemeanor qualifies by itself as another, different in type and consummated misdemeanor.*

Chapters VI and VII. Participation in a criminal offence, Repeat and multiple criminal offences and repetition of crimes

133. As the proposed amendments to Article 27 deals with definitions and not with rules regulating liability and punishment, the sentence "only co-principals shall be criminally liable for complicity in a criminal misdemeanor" is a matter for a separate provision. However, the same effect could be reached changing definitions of organizer, abettor and accessory under Article 27, paragraphs 3, 4, and 5 so that these refer only to crimes.

134. *The proposed amendments to Article 27 should be modified accordingly.*

135. The "direct" commission of criminal offences is not an intrinsic feature of organized crime and criminal enterprises where offences might also be committed "indirectly" (using another

person who physically performs the *corpus delicti* acting with no criminal intent or being criminally not liable due to age, sanity, etc.).

136. *The term "direct" should thus be deleted from the proposed paragraph 4 of Article 28.*

137. Although the first sentence of the proposed Article 33.1 contains a classic definition of multiple criminal offences, the second sentence is unnecessary as it follows from the provisions related to criminal records, rehabilitation and discharge from liability.

138. *Consideration should thus be given to the need to retain the second sentence of Article 33.1.*

Article 49. Discharge from criminal liability due to expiry of the statute of limitations

139. The extension of the limitation period applicable to a crime as a consequence of the commission of a further crime that would be authorised by the proposed third paragraph of this provision seems very strange and the rationale for such a provision is not clear.

140. *The need to retain the proposed paragraph 3 should thus be reconsidered.*

Articles 51 and following. Penalties Issues

141. The proposed Article 56 does not seem to define a maximum period of time during which the working hours for community service must be executed[34]. Too lengthy a period for completion might jeopardise the effectiveness of the penalty insofar as this would undermine the aims of rehabilitation, reform and community payback[35]. Moreover, as a non-custodial penalty, community service is intended to influence citizens with no grave or persistent criminal strategies –they normally commit light offences and have no prior convictions – and such persons do not need long criminal repression to correct them. An excessive length of community service might also compromise the principle of minimum intervention as set out in the 1990 UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)[36].

142. Moreover, the overall length of any punishment which is to be served within a period of time is a basic element of the penalty's content. Leaving the definition of the overall length of the community service to courts with no legally established maximum terms within which the penalties are to be served is a deviation from the requirement of Article 7 of the European Convention that all aspects of the penalty must be defined by the law to make the penalty predictable to the accused and to prevent enforcement bodies to interfere in the penalty contents. Article 7 does not prohibit the gradual clarification of laws through judicial

[34] For example, if the perpetrator has been convicted to serve a total of 100 hours (or 25 days for 4 hours per day), it is unclear whether these 20 days are to be served within one month or over a longer period.

[35] E.g., new circumstances may appear impacting upon the sentence's appropriateness; the actual impact upon the daily life of the convicted person may become minimal or too heavy; the individual retains the status of person under sentence for longer with legal consequences should another crime be committed; re-socialisation or re-employment may be hampered, etc.

[36] Article 2(6):'Non-custodial measures should be used in accordance with the principle of minimum intervention".

decisions[37] but, the maximum term of the penalty has not been specified, it is highly doubtful whether it would be possible to fill the gap through interpretation.

143. *A maximum period within which various sentences of community service should be completed should thus be included in Article 56 if it is retained.*

144. The provision in the proposed Articles 56 and 57 for community service and correctional work to be imposed as penalties is problematic in their present form. Its use is certainly inconsistent with European best practice. More fundamentally, they are contrary to the prohibition on forced labour in Article 2 of the Convention Regarding Forced of Obligatory Labour of the International Labour Organization, Article 4 of the European Convention and Article 8 of the International Covenant since its nature as a specific penalty means that it does not come within the exception allowed for work done in the ordinary course of detention.

145. Moreover, the provision regarding correctional labour puts offenders who have stable jobs in a worse position than unstable employees and there is no reason to have the penalty divided into three degrees according to its duration.

146. In order to comply with the European Convention and the International Covenant in composing community service or correctional labour there would have to be some link between that penalty and the imposition of a sentence of imprisonment. One way of achieving this might be the willingness of the convicted person to accept the imposition of community service or correctional labour instead of a prison sentence so that this would then be effectively imposed as a condition of release and a return to prison would be possible where the community service or correctional labour obligation was not performed. Other approaches might also be considered.

147. *The inclusion of the penalties for community service and correctional work should thus be either deleted or revised to ensure that their imposition is consistent with the prohibition on forced labour.*

148. There is also no reason to have the penalties of restriction of service and arrest – respectively under the proposed Articles 58 and 60 - divided into three degrees according to their duration. These degrees are not linked to the categories of crimes and such internal classifications create needless complications and restrict judicial discretion in the process of individualization of penalties. Such a division also creates risks of unstable and unjust court practice because jobs and payments of different perpetrators of identical offences may differ. They are not related to the type and gravity of the offence but may affect the gravity of the penalty and create unjustified differences in the standing of the offender before the criminal law[38].

[37] See, e.g., the European Court's rulings in *Kokkinakis v. Greece*, no. 14307/88, 25 May 1993;*Achour v. France*, no. 67335/01, 29 March 2006; *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011; *Soros v. France*, no. 50425/06, 6 October 2011; and *Vyerentsov v. Ukraine*, no. 20372/11, 11 April 2013.

[38] Such internal divisions are used in the Dutch system. However, its specific features do not make it an example to be followed.

149. *The division of the penalties into three degrees in Articles 58 and 60 should thus be eliminated.*

150. Although the proposed Article 63.3 notes that imprisonment may only be imposed on a perpetrator of a minor crime with no previous convictions, if the offence is violent or profit-motivated, or committed under other expressly stipulated in the law circumstances, it deviates from similarly formulated provisions – e.g., Article 60.4 - by omitting the word "exceptional" (case). There seems to be no visible reason to not instruct courts to impose imprisonment in 'exceptional' cases of violent, profit-base, etc. minor first offences. Its inclusion would bring the provision into line with the Draft Law's goal of encouraging custodial penalties to be imposed only as 'last-resort' measures.

151. *Article 63.3 should be amended accordingly*.

152. The proposed Article 65 is headed as "General principles of punishment imposition" but it actually refers to rules of individualization of penalties and not principles.

153. *This provision should thus be renamed to match its content.*

154. Moreover some of this content is confusing and unnecessary. Thus, while paragraph 1(2) is an aspect of the legality principle and not a rule/principle of individualization, paragraphs 3 and 4 contain redirections to other provisions and do not have a subject of regulation of their own. In addition, paragraph 5 creates uncertainty as to what the penalty should be where there is a conciliation or plea agreement is since it seems the court is obliged to impose whatever penalty the parties have agreed upon without substantial powers to correct or deny. However, any agreement on the penalty should meet general legal requirements, including those on rules of individualization

155. Furthermore, the third sentence of the proposed Article 65.2 contains an analytical observation suitable for a legal study but not a legal provision. It also creates unsolvable confusion which one is the least severe punishment in the national system and contradicts the definitive legal provision of Articles 51 and 98 containing catalogues of punishments and stating unambiguously that fines are to be the least severe.

156. *The proposed Article 65 should thus be revised to meet these concerns*.

Article 66-70. Mitigating circumstances

157. Some of the mitigating circumstances specified in the existing Article 66 have been formulated too narrowly or are not such circumstances but grounds for limiting liability.

158. For example, the voluntariness of the reparation under sub-paragraph 1.2 may be a reason for discharge from liability but as a mitigating circumstance it does not matter why the offender has compensated the damages, whether voluntarily or otherwise. Indeed, the requirement for

voluntariness may discourage some offenders who, for example, act under legal counsel or multiple motives.

159. Furthermore, the reparation itself may be formulated a little broader so as to include also cases where the offender has provided sufficient guarantees for future payment (if, for example, the offender does not have enough cash or the amount of the damage is unclear and subject to juridical establishment, etc.).In particular, a time by which such a post-factum conduct should have occurred ought to be specified, whether this is the beginning/end of the trial before the first-instance court or other moment. Generally it is the time of closing the hearing at the first-instance court.

160. Moreover, the age of the offender should only be a mitigating circumstance if it is not a ground for limiting liability. The minor age (below 16) is a ground for limiting liability. However, the age below 20 years is usually considered mitigating. The minor age of the perpetrator at the time of committing the offence is normally a mitigating circumstance if he/she has reach legal maturity by the time of conviction.

161. In addition, the reference to the commission of the act by a pregnant woman needs some clarification: Is pregnancy a mitigating circumstance if it occurs after the deed but before sentencing? This should be expressly addressed. This is equally true of early maternity (the baby is below 1 year of age or is breastfed). The provision needs to clarify whether the existence of pregnancy or early maternity is relevant to when the offence is committed or when the offender concerned is sentenced or indeed to both of them. Settling this issue is necessary to serve the best interests of the child rather than those of the mother.

162. Furthermore, while it is appropriate to remove the possibility of mitigation based on the "improper or immoral actions of the victim" since this risks providing some sort of excuse for offences involving a sexual assault, it is insufficiently clear what intended by the introduction into paragraph 1.7 instead of "being routinely ill-treated by the victim". There is a need, in particular, to specify the basis for characterising certain conduct as "ill-treatment".

163. *The proposed amendments to Article 66 should thus be revised to meet the above concerns.*

164. It would be wiser for the proposed Article 70 to provide separate regimes respectively for cumulative crimes and for cumulative crimes and misdemeanors. Although in both situations there is at least one crime, both types of cumulative offences may have very different severity. Thus, where it is a case of a misdemeanor and a minor crime, the situation will be very close to a case of cumulative misdemeanors. Moreover, cumulative crimes usually point at very different perpetrators' profiles in comparison to those committing cumulative crimes and misdemeanors and the two sets of situations need, therefore, to be addressed by separate solutions.

165. Furthermore, the provision in Article 70.2 that allows courts to impose a final cumulative punishment within the maximum term provided for this kind of punishment in the General

Part in cases where at least one of the crimes committed is an intentional grave or extremely grave offence is not appropriate.

166. In the first place, such an option should not be available for both intentional grave or extremely grave offences since, being of a different criminal and criminological nature, their offenders react differently to criminal repression. Thus, having both in this provision needs more reasons to be convincing.

167. Secondly, such an approach could be dangerous as it might create a motive for the perpetrator to commit other crimes.

168. A wiser approach might be to insert additional limitations, e.g., allowing the court to exceed the cumulative punishment but providing that it cannot impose a punishment which exceeds the sum of the separate punishments for the cumulative criminal offences and requiring it to justify this punishment by demonstrating that a more lenient penalty would not achieve its goals (i.e., the offender is unusually dangerous and hard to correct). Without these two requirements judicial discretion could lead to breaches of the principle of proportionality and of Article 3 of the European Convention, as well as controversial court case law. Foreign experience shows that whenever courts have a possibility to impose graver penalties without justification, they usually do it and this leads to a statistical increase in less punishable criminal offences. This is against the goal of the Draft Law to significantly decrease levels of crime and to establish custodial penalties as effectively measures of last resort.

169. *The proposed Article 70 should thus be revised to meet the above concerns.*

Article74. Discharge from punishment and from serving it

170. The existing Article 74 concerns a concept (institute) of the General Part, namely, an instrument for individualization of liability after conviction which depends more on the personal reaction of the perpetrator to the consequences of his or her criminal conduct than on the gravity of the offence. However, the limitation of the scope of the proposed Article 74.4 to cases of minor offences seems unclear. Certainly, the proposed approach is harsher than the currently enforced version of the text and this change is not consistent with the aim of humanization of the Criminal Code.

171. Moreover, the exclusion of all corruption-related crimes from the scope of this provision is likely to undermine the possibility of concluding plea-agreements with those suspects in such cases who would like to cooperate with law enforcement agencies and provide evidence about serious corruption since there will not be a sufficient incentive for them to do so. This exclusion is also potentially incompatible with the requirement of equal treatment of offenders under Protocol No. 12.

172. *This provision should thus be revised accordingly.*

Article 75. Discharge on probation

173. The requirement in the proposed Article 75.1 that the offender should have pleaded guilty in order to benefit from the provision for release on probation restricts the scope of the provision and creates risks of formal guilty pleas. It is reasonable to suppose the provision is designed mainly for accidental offenders who do not need to serve effective penalties in order to get reformed and who usually repent the deed. It ought not to be turned into a privilege for a procedural conduct (guilty plea) and such requirements should not be forced upon perpetrators. Certainly, the nature of the offence and of the offender does not depend on such procedural conduct. A person must have the right to remain silent or to protest his or her innocence and still benefit from the fact that the offence committed does not create a necessity to serve an effective penalty. The judicial assessment relates to the goals of the punishment and the proportionality of the penalty and is a substantial assessment. It must not depend on formal facts which are not connected to the nature of the offence and the recidivism risk of the offender.

174. Furthermore, the exclusion of all corruption-related crimes from the scope of this provision is problematic for the reasons already noted above[39]. It is also in conflict with the goals of punishment and the principle of proportionality. If a person satisfies the requirements to be discharged on probation there is no legal *ratio* for the continuation of the effective execution of the penalty. Such a development of a case might also be challengeable from the perspective of Article3 of the European Convention. Furthermore, the proposed exclusion would also be ineffective as long as it would still be possible to pardon the convicted person.

175. *The retention of this proposed requirement should thus be reconsidered.*

Article 80. Statute of limitations

176. The reason behind the stipulation in the proposed Article 80.4 that the statute of limitations shall be terminated if a convict commits another crime before the expiry of the periods specified in paragraphs 1 and 3 seems unclear. Such statutes for each offenceshould start on the day the offence has been committed and end independently of the statutes for other offences.

177. *There is a need, therefore, to clarify the rationale for this provision.*

178. In addition, the exclusion of all corruption-related crimes from the scope of this provision is problematic for the reasons already noted above[40].

179. *These proposed stipulations should thus be deleted.*

Article 86. Amnesty

180. The proposed Article 86.4 would limit the scope of amnesties in cases of corruption-related crimes. However, the approach adopted creates risks for legal certainty, legality and equality

[39] In para. 171 above.
[40] *Ibid.*

before law. What happens, if such a law of amnesty is enforced? Would it be 'illegal'? Which law will be enforced – the Criminal Code or the Amnesty Act? Such a provision limits the constitutional powers of the legislature to give an amnesty and is both unreasonable and unconstitutional. There is also no practical need of it. If it is the policy of the state to deny amnesty to perpetrators of certain crimes, there is no need to have this policy stated expressly in a criminal provision. Also, why only corruption-related crimes? Why not also exceptionally grave crimes? What happens, if a corruption crime is decriminalized after a perpetrator has been sentenced? It seems too many problems emerge from this provision which does not actually solve any legal issue. And also, Protocol No. 12 to the Convention would in such case be applicable since there is no clear (lawful) reason to apply such discrimination (there could be a different assessment if the amnesty prohibition would apply on exceptionally grave criminal offences).

181. *Consideration should thus be given to deleting this provision.*

182. *Article 91. Revocation of a conviction*

183. It is unclear what is intended by the addition of the proposed paragraph 1.1 since it seems to cover exactly the same point as that addressed by the existing paragraph 2.

184. *The need to retain the proposed provision thus needs to be clarified.*

Provisions concerning juveniles

185. Although the proposed Article 97.1 allows for minors who have committed misdemeanors to be discharged from criminal liability, the provision being replaced provided for such discharge from unintentional crimes of moderate severity. The latter include crimes which are technically grave but the participation of the minor in them is a *conduct* of moderate severity. It would be preferable for the "moderate severity" threshold to be preserved and liability for misdemeanors to be abolished. Certainly courts should have the discretion to assess the individual dangerousness of the conduct and not only its formal category, especially when the offender is so young.

186. *This proposed provision should thus be revised accordingly.*

187. Moreover, a number of the penalties imposable on children are highly inappropriate as measures for correcting their criminal behavior.

188. First, since juveniles do not generally have income/property of their own and do not work, they should not be fined. It should be noted that CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures requires that sanctions and measures in respect of juveniles should be based on the principles of social integration and education[41] and priority should be given to measures which have an educational impact as well as constituting

[41] Article 2.

a restorative response to the offences committed by juveniles[42]. Furthermore, "the rights of juveniles to benefits in respect of education, vocational training, physical and mental health care, safety and social security shall not be limited by the imposition or implementation of community sanctions or measures"[43].

189. Even if a juvenile has financial resources, these will not equate to those of an adult for obvious reasons. A juvenile is never financially or economically equal to an adult in case of reduction of property but far more vulnerable as financial losses are harder to be recovered and may jeopardise his/her development.

190. In addition CM/Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice suggests sanctions should better reflect the age and maturity of the offender, and be more in step with the offender's stage of development, with criminal measures *being progressively applied as individual responsibility increases*. According to that Recommendation courts must have sufficient degree of discretion to consider best interests of the juvenile, the gravity of the offences committed, age, physical and mental well-being, development, capacities and personal circumstances. These conclusions and observation do not depend on legislative efforts to introduce special regime for fines payable by juveniles.

191. The problems created by the applicability of fines to juveniles is exacerbated by the proposed Article 99.2, which provides for the penalty rate to be lower for juvenile offenders with no independent income or receivers of social benefits. The provision is very unreasonable, even if not considered also cruel, and directly contradicts the international standards discussed in the previous paragraph. Thus, it affects alimony income necessary for the survival of a child who is below the age of labour capacity and cannot have labour income of his or her own. The affected funds by all means do not belong the convicted child but to private property of a third party or to public funds. It is not reasonable to believe that a fine collected in such a way may have any positive impact of the child's morality or behaviour at all. Indeed, the imposition of a fine is more likely to create circumstances for the juvenile to continue his or her criminal behaviour in order to survive.

192. The provision in the proposed Article 99.3 and 99.4 for the transformation of pecuniary penalties into other penalties is also problematic. This entails transforming a lighter penalty ("fine") into a graver one ("correctional labour"). This is likely to cause negative correctional effect on children below and even closely above the age of labour capacity and with no legal labour experience.

193. *The provisions allowing fines to be imposed upon juveniles should thus be deleted, as should ones allowing for their transformation into other penalties.*

[42] Article 3(2).
[43] Article 28

194. Secondly, although the proposed Article 57.2 prohibits the imposition of correctional labour as a penalty for perpetrators below the age of 16, its imposition on persons below (or above) the age of 18 is in its present formulation – as already noted[44] – contrary to European and international standards.

195. *This penalty thus should not be retained either for juveniles or adults without addressing the requirements of the prohibition on forced labour.*

196. Thirdly, there appears to be a contradiction between the stipulation in the proposed Article 60 that "arrest shall not be imposed on persons below 16 years of age" and the unqualified authorisation in Article 98 for this penalty to be imposed on minors. However, this contradiction may be resolved by the way in which arrest is defined in Article 101 as implying "detention of a minor, who attained the age of 16 by the time of sentencing".

197. *It would, therefore, be appropriate for the age limitation to be made explicit in Article 98.*

198. Fourthly, the last sentences of paragraphs 1 and 2 of the proposed Article 98 provides for the possibility of juvenile perpetrators of either type of criminal offences being "subject to such additional punishments as a fine and deprivation of the right to hold certain offices or engage in certain activities". However, it seems unreasonable to have this rule regardless of the type of offence committed and, in particular, to allow additional punishments to be imposed on juvenile perpetrators of misdemeanors

199. *The respective sentences should thus be deleted.*

D. Comments to Criminal Code: Special Part

200. There are a number of proposed new or modified offences for which some comments are warranted.

Articles 126, 127, 365 and 365-1. Torture and Abuse of Power

201. The prescribed elements for the existing offence in Article 127 and the proposed amendments to Articles 126 and 365 lack the specificity necessary to comply with Article 4.1 read with Article 1.1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[45], as well as the case law of the European Court[46], which require all the elements of torture and inhuman and degrading treatment or punishment to be criminalised.

[44] See paras. 144-146 above.

[45] See item III.8 of the General Comment No. 2 (Implementation of article 2 by States parties) to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "States parties must make the offence of torture punishable as an offence under its criminal law, *in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4*", (emphasis added).

[46] See, e.g., *Myumyun v. Bulgaria*, no. 67258/13, 3 November 2015.

202. Furthermore, the existence of three different sets of provisions dealing with the obligations undertaken by Ukraine is likely to lead to inconsistent approaches to the prosecution of similar instances of ill-treatment.

203. *These elements thus need to be transcribed into a single comprehensive provision*.

204. Furthermore, the prescribed penalties in the proposed Articles 126 and 365 seem unduly mild[47]. Moreover, there are no qualifying provisions proposed as aggravating features - such as commission by public officials or some grave bodily harm or death ensuing – that would require even graver penalties[48].

205. In addition, there is no provision making it an offence and prescribing penalties where public officials do not allow the Ombudsperson and Members of the Verkhovna Rada or the National Preventive Mechanism to inspect places of deprivation liberty in accordance with obligations under the Optional Protocol to the Convention against Torture.

206. *There is thus a need to ensure that the revision to these provisions address these concerns*.

Article 128-1. Violations of the regulations governing animal care

207. The new Article 128 seems to be between the common criminal offence and new misdemeanor type of offences. However, paragraph 2 is somewhat unclear as to what is entailed by the reference in its qualifying provision to the offence being "committed against a minor or a pregnant woman".

208. *There is thus a need for this qualification to be clarified*.

Article 142. Illegal human experimentation

209. The particular elements constituting this proposed crime are not clearly stated as there is just a statement that the performance of the three types of experimentation must be illegal. It would be appropriate some additional elements for this crime, following the "models" for example from the proposed Articles 143.2 and/or Article 145.1.

210. In addition, the penalties prescribed in paragraphs 1 and 2 seem to be disproportionately mild.

211. *There is thus a need to elaborate the elements of the proposed crime and to review the adequacy of the proposed penalties for its commission.*

Article 154. Sexual coercion

212. The reference to "natural or unnatural sex act" in Article 154.1 could just as well be to "any sexual act" in order to avoid unnecessary debates as to whether a particular act is "natural" or "unnatural", particularly as the distinction is not material to the penalty that might be imposed.

[47] See, e.g., *Valeriu and Nicolae Roşca v. Moldova*, no. 41704/02, 20 October 2009, at para. 72.

[48] *Cf.* the specification in Article 126.2 that the commission of the proscribed acts when committed "in relation to the discharge of official, professional or public duties" is an aggravating factor.

213. Furthermore, the penalties prescribed in both paragraphs of the provision seem unduly mild and could be inconsistent with Article 3 of the European Convention[49].

214. *There is a need, therefore, to amend this provision to address these concerns.*

Article 161. Violation of racial, ethnic or religious equality

215. The title for this provision is narrower than all the encroachments upon equality covered by it.

216. There is a lack of precision as to what is intended by the "grave consequences referred to in paragraph 3.

217. *There is a need, therefore, to revise this provision in order to address these concerns.*

Article 173. Gross violation of an employment contract

218. There is a lack of clarity as what might be regarded as a "gross violation of an employment contract" in addition to "unlawful dismissal". These concepts may be ones that are already defined in the civil law but it is not clear whether the approach followed in the latter would automatically determine how the present provision is to be applied.

219. *There is thus a need to ensure that the meaning of the two concepts are in practice clear or to provide more elaboration of them in this provision.*

Article 175. Failure to pay salary, scholarship, pension or any other statutory payments

220. The element "unreasonable delays in paying salaries" lacks precision and seems to be more like a concept of civil law (and might remain such, if no detailed clarification of elements of this criminal offence is feasible).

221. *There is thus a need to ensure that the meaning of "unreasonable delays" is in practice clear or to provide more elaboration of the concept in this provision.*

Article 182. Invasion of privacy

222. The existing provision appears to provide for a general protection of privacy (both data privacy and confidential/privileged information). However, the proposed replacement for it would only provide protection in respect of physical following (monitoring/surveillance). Moreover, the term "ongoing" with respect to monitoring is unclear.

223. *It would be more appropriate to retain the existing Article 182 and introduce an additional Article providing a clear prohibition of both "real" stalking and cyber stalking.*

[49] See, e.g. *Okkali v. Turkey*, no. 52067/99, 17 October 2006, *Gafgen v. Germany* [GC], no. 22978/05, 1 June 2010 and *Austrianu v. Romania*, no. 16117/02, 12 February 2013.

Article 192. Infliction of property damage by deceit or breach of confidence

224. As one basis of the offence being created involves an "absence of elements of fraud", it is not clear what kind of "deceit" is another one that needs to be fulfilled.

225. *There is thus a need to clarify the scope of this offence*.

Articles 245 and 246. Destruction or damaging of vegetation items, Illegal forest felling

226. The formulation of the proposed provisions give the impression of a possible infringement of the prohibition of double jeopardy in that the element of "damaging the woodlands" in paragraph 1 of Article 245 appears also to encompass the one of "illegal logging" in paragraph 1 of Article 246.

227. *There is a need, therefore, to review these two provisions to ensure that their formulation does entail the creation of two distinct offences.*

Article 255-1. Formation of or Membership in an Organized Crime Group

228. *The phrase "under this Code" should be inserted after the word "crimes" in paragraph 1 in order to satisfy the principles of legal clarity and legitimacy*.

Article 258-3. Setting up a terrorist group or terrorist organisation

229. There is no proposal to modify the existing provision in the Criminal Code Article 258-3 and so its formulation does not take account of some important and relevant developments in the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism[50], namely, those concerning foreign terrorist fighters[51].

230. *Consideration should thus be given to expanding the scope of this provision to take account of the contents of the Additional Protocol.*

Article 294. Riots

231. The content of this proposed provision bears some resemblance to those proposed regarding hooliganism in the proposed Articles 296 and 563 so that there is a risk of duplication and thus double jeopardy[52].

232. In addition, the formulation of the first paragraph gives the impression that there will be strict liability in that it appears to cover legal demonstrations that became riotous without any intention or effort to bring about that result

233. *There is a need, therefore, to clarify whether or not such concerns are well-founded and, if so, to address them through a revision of the provision*.

[50] CETS No.217. Signed by Ukraine on 28 October 2015, not ratified yet.
[51] Especially those in Articles 3 (Receiving training for terrorism), 4 (Travelling abroad for the purpose of terrorism) and 6 (Organising or otherwise facilitating travelling abroad for the purpose of terrorism). See also the United Nations Security Council Resolution 2178 (2014) of 24 September 2014.
[52] Discussed below. See paras. 233-239 and 247-252.

Article 296. Hooliganism

234. This proposed offence is problematic in a number of respects.

235. Firstly, there is a lack of clarity in the description of disorderly conduct in paragraph 1 in that it is uncertain whether the reference to the "long and persistent mockery of a person who is in a helpless state, a child, a pregnant woman, or an elderly" concerns mockery about the person's disability some other characteristics.

236. Secondly, the element concerned with "other extremely cynical display of shamelessness in a public place" seems to be a statutory analogy and as such contrary to the principle of legality in criminal matters and the principle of legal clarity[53]. It also does not take account of the exercise of the right to freedom of expression under Article 10 of the European Convention.

237. Thirdly, the element concerned with "long (over an hour) disruption of and comfort of community or disruption of regular operation of an enterprise, institution or organization" also fails to take account of the right to freedom of expression under Article 10 of the European Convention and of the right to freedom of assembly under Article 11[54].

238. Fourthly, the determination and delimitation of punishments under paragraph 1 seem to be too disproportionate; on one side there is prescribed a monetary fine and on the other quite high penalties of imprisonment.

239. Finally, the causal connection in paragraph 2 between proscribed actions and prescribed punishments is unclear and probably disproportionate since there is no requirement of endangerment of safety of traffic of railway, sea, river, air, or public transport so that the principle of *ultima ratio* is not respected.

240. *There is a need, therefore, to revise this provision to take account of these concerns.*

Article 370. Provocation of commercial subornation

241. The proposed part 2 of the Note to the Article that would be introduced into this provision, namely, the "holding of a check of righteousness of the person subject to liability for corruption offenses in compliance with the law", seems to afford too wide a justification for action by officials. Thus, it would allow for systemic entrapment, with practically no limiting rules and no clear relationship with criminal procedural rules. As a result, its compliance with Article 6 of the European Convention cannot be assessed.

242. *It would be advisable not to retain this part of the proposed Note to Article 370.*

[53] On the "quality of law" see also the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia, No. 3-4-1-3-97, 6 October 1997 dealing with elements of administrative offences. See also *Shvydka v. Ukraine*, no. 17888/12, 30 October 2014, paras. 38-42 and 49-55.

[54] On the freedom of expression protections in cases of hooliganism see *Cholakov v. Bulgaria*, no. 20147/06, 1 October 2013, especially paras. 27-36.

Article 375. Delivery of a knowingly unfair or unjust final court ruling by a judge

243. The prosecution of judges for intentional acts connected with the performance of their functions, such as the taking of bribes, is not necessarily inconsistent with the requirement of independence under Article 6 of the European Convention. At the same time, recommendations deriving from the Council of Europe Recommendation on "Judges: independence, efficiency and responsibilities", Recommendation CM/Rec(2010)12 and the *Magna Carta* of the Consultative Council of European Judges of 2010 are to be taken into consideration[55]. However, the Note that explains the substantive offences in paragraphs 1 and 2 of delivery of knowingly unfair or unjust court rulings does nothing to prevent these offences from being inconsistent with the guarantee of independence required by Article 6 as its terms are so broad as to permit liability to be imposed where there is simply disagreement as to what is the correct application of the law. Potentially every judge, whose judgment was quashed or significantly altered by a second instance court could be accused of having committed these offences.

244. However, the primary and Rule of Law compliant remedy concerning any mistakes of law (substantive or procedural) or fact made by judges in their decision-making is the availability and application of prescribed legal remedies[56].

245. Furthermore, the proposed imposition of liability for negligence in respect of duties will equally undermine the independence of the judiciary. Insofar as there are errors in adjudication, a more appropriate remedy than the risk of imprisonment would also be training and disciplinary procedures.

246. In addition, there is sometimes the possibility of prescribing a special criminal offence of abuse of law by a judge. However, its elements need to be narrowly determined and should be based on higher legal values, such as guaranteeing transition from dictatorship to democracy which would also include the guarantee of protection of judicial independence[57]. For example, Article 339 of the Criminal Code of Germany narrowly defines the offence of perverting the course of justice as a type of "an abuse of official duty criminal offence" and its specific provisions are very narrowly stated as: "[…] conducting or deciding a legal matter perverts the course of justice for the benefit or to the detriment of a party […]".

247. However, since the existing similar provision in Article 375 of the Criminal Code is already a traditional criminal offence and is problematic from the viewpoint of respect of judicial independence under Article 6 of the European Convention, such a "transition" argument

[55] See also Annex II to the present Opinion: Overview of relevant European standards and European practice with regard to criminalizing the unlawful rendering of judicial decisions or the abuse of office by judge, prepared under the CoE project "Support to the implementation of the judicial reform in Ukraine".

[56] Including those required pursuant to Article 13 of the European Convention.

[57] See for example: Judgment of the Constitutional Court of the Czech Republic, No. 1993/12/21 - Pl. ÚS 19/93, 21 December 1993 and also the Judgment of the Federal Constitutional Court of the Federal Republic of German, BVerfG, 21 January 1953 - 1 BvR 520/52 and the Judgment of the Federal Constitutional Court of the Federal Republic of Germany BVerfG, 17 December 1953 - 1 BvR 335/51.

would not seem to be applicable. In these circumstances, the deletion rather than the amendment of the existing offence, together with reliance on the general criminal offences on violations of official duties, would establish a clear respect for the concept of judicial independence.

248. In any event, the modification proposed for Article 375 is unlikely to reduce corruption levels or the increase the recognition and prosecution of corruption. It is much more likely to be used against independent judges who struggle with new forms of criminal offences and imperfect legislation than against corrupted persons. The risk of destabilizing the judiciary[58] in the light of the major changes that would be effected by the Draft Law would certainly heighten the risk of this occurring.

249. *The retention of neither the existing provision nor the proposed amendments to it does not seem to be essential given that other offences (notably those involving corruption) could be invoked where there is evidence of genuine judicial misconduct. Nonetheless, if the existing and proposed offences are to be retained in some form, it is vital that they be significantly modified in order to clearly prevent the possible encroachment on the independence of judiciary.*

Article 382. Failure to comply with a judgment

250. The reasons for the proposed changes – namely the deletion of paragraph 1 and the "disappearance" of the concept of "wilful" except with regard to judgments of the European Court – are unclear. It would appear that the new wording of paragraph 2) allows for strict liability (in some cases) for non-enforcement of judgments and court rulings but it is not evident that a difference in the treatment of judgments according to jurisdiction is appropriate or necessary.

251. *There is a need, therefore, to clarify the rationale for the proposed changes.*

Article 462. Domestic violence

252. The punishments that would be prescribed by paragraphs 1 and 2 for domestic violence are disproportionately mild if compared with the prescribed elements (and protected values), as well as the requirements of Article 3 of the European Convention[59] and Articles 45 and 46 of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence[60].

[58] See, e.g., *Kinský v. the Czech Republic*, no. 42856/06, 9 February 2012, paras. 86-99 and 113-115, *Sovtransavto Holding v. Ukraine*, no. 48553/99, 25 July 2002, paras. 80-82 and *Ivanovski v. the Former Yugoslav Republic of Macedonia*, no. 29908/11, 21 January 2016, paras. 136-151.

[59] See, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009

[60] The former requires that "the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness" and the latter requires certain "circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences established in accordance with this Convention".

253. There is also a need to clarify whether the protection being provided against acts against a "family member" is capable of embracing the different forms of conduct when they are committed by an ex-partner, such as following a divorce.

254. In addition, this offence does not provide any protection against stalking, as is required by Article 34 of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence.

255. *There is a need, therefore, to revise this provision to take account of these concerns.*

Article 470. Violation of the Right to Free Healthcare

256. The actual basis for liability in paragraph 2 of this provision, namely, the illegal reduction of the network of state-owned or municipal healthcare facilities, is unclear. Certainly, it could have the effect of catching any reorganisation of such facilities, notwithstanding that this might make them more effective.

257. *There is a need to clarify what is intended to be the scope of this offence.*

Article 561. Violating the procedures for organizing and holding meetings, assemblies, street processions and demonstrations

258. The application of the proposed offences under this provision need to be compatible with the rights to freedom of expression and freedom of assembly under Articles 10 and 11 of the European Convention[61], which does not necessarily require compliance with the formal requirements for meetings, etc.[62].

259. Furthermore, paragraph 1 is problematic in that its elements seem to amount to strict liability and there is no causal link between them and legitimate interests requiring protection so that there is no requirement for a violent meeting to have been properly prohibited or for an individual prosecuted to have contributed to this violence.

260. Moreover, it is unclear whether or not the elements of this offence include protests before the courts[63] or outbursts within the judicial proceeding, which might be better dealt with under the milder contempt of court provisions.

261. In addition, it is unclear whether a second violation – for which a heavier penalty can be imposed pursuant to paragraph 2 - needs to occur at the same (prohibited) event, which could in at least some instances be disproportionate.

262. In the event that repetition at the same meeting, etc. is not covered by paragraph 2, there is also a lack of clarity as to whether or not there is any deadline within which such repetition is

[61] See, *Cholakov v. Bulgaria*, no. 20147/06, 1 October 2013, especially paras. 27-36 and *Shvydka v. Ukraine*, no. 17888/12, 30 October 2014, paras. 36-42

[62] See, e.g., *Éva Molnár v. Hungary*, no. 10346/05, 7 October 2008, paras. 34-46.

[63] See, some small indication in this context: *Kakabadze and Others v. Georgia*, no. 1484/07, 2 October 2012, para. 64.

to occur. In the absence of such a deadline, the enhanced criminalization for repeated acts could last indefinitely, which would be contrary to the principles of legality and proportionality.

263. *There is, therefore, a need to revise this provision to take account of these concerns*.

Article 563. Petty hooliganism

264. This proposed provision appears to coverthe area of classical public law and order concerns - gross violation of public order or peace – and the prescribed elements of this offence mostly accord with the principle of legality.

265. However, sub-paragraph 3 of paragraph 1 is so widely drawn that – in the absence of a requirement of willful disturbance of the cinema show or theatre performance - any loud voice (even laughing, etc.) could be interpreted as petty hooliganism.

266. Moreover, the application of this offence needs to be clearly subjected to the right to freedom of expression under Article 10 of the European Convention. This is especially pertinent to sub-paragraph 4 dealing with insults, etc. but it could be relevant to the application of any of the other elements.

267. Furthermore, there is a lack of clarity as the element on "restricting their will" in sub-paragraph 4 which runs counter to the principles of legal clarity and legality in substantive criminal law.

268. Finally, the relationship of this provision with the major (general) offence of hooliganism in the new Article 296, including the question why the misdemeanor of petty hooliganism is not followed by the major (general) misdemeanor of hooliganism, is unclear.

269. *There is thus a need for this provision to be revised so as to address these concerns*.

Drinking offences

270. The misdemeanors that would be created by Articles 565 and 566 – drinking in public places and at place of production – are not offences in all European jurisdictions. Undoubtedly, the rationale for both offences relates to concerns about possible social dangerousness but the objectionable aspects of such conduct could be equally addressed by the misdemeanour of petty hooliganism in Article 563.

271. *Consideration should thus be given to the need to retain these provisions or to treating the conduct as no more than an administrative offence*.

Article 618. Failure to implement the court decision

272. The formulation of this offence does not make it clear who is supposed to be punished under it, how it is to be decided that a decision has not been implemented and whether it is concerned only with full or partial implementation

273. At the same, while it seems hard to justify the criminalising of non-wilful failure to implement a court decision, it would be more appropriate to treat the wilful failure to execute such decisions by a public official as a crime rather than a misdemeanor.

274. *This provision should thus be revised accordingly*.

Article 623. Failure to perform a restraining injunction (domestic violence injunction) or failure of correctional program

275. Paragraph 1 does not make it clear that the offence concerns the violation of a final (or binding) judicial order (in connection with the proposed new Article 96-2-1).

276. Furthermore, it does make it clear that it is concerned with compliance of all these orders (injunctions) in full.

277. Moreover, there is no provision for a graver type of offence in paragraphs 2 and 3 where the non-compliance harmed a person`s security, dignity, body, health or resulted in a person's life being endangered.

278. *There is a need to revise this provision to take account of these concerns*.

E. Comments to Code of Administrative Offences

279. The proposed changes to this Code will involve a considerable change to its content both in terms of the offences contained in it and of the measures for enforcing them.

Offences

280. Thus, a significant number of the amendments proposed in the Draft Law for this Code affect provisions that will be removed to the Criminal Code, with or without some revision[64]. These have been considered in the preceding section of the comments and will not be discussed further in this one.

281. Moreover, a number of other provisions establishing offences will be deleted from the Code of Administrative Offences without giving rise to any concern as regards compliance with European standards because the offences concerned are already covered by existing provisions in the Criminal Code (or will be by ones that will be modified or introduced pursuant to the proposed amendments).

282. The first part of Article 15.1 – providing for the liability for administrative offences of military and related personnel and officers in the State Criminal Executive Service of Ukraine, internal affairs departments and the State Service for Special Communications and Information Protection of Ukraine to be under disciplinary statutes – will be retained.

[64] The relevant provisions – with their proposed Article numbers in the Criminal Code in brackets – are: Articles 30-1(56), 31 (57), 42-1 (574), 42-2 (577), 42-3 (575), 44 (578), 51-2 (466), 53-4 (533), 85 (517), 85-1 (518), 88 (519), 88-1 (520), 88-2 (522), 90 (523), 91 (524), 106-2 (579), 122-4(455), 122-5 (552), 133 (541), 146 (595), 90 (536).

283. However, the extent of the administrative liability of these persons "in accordance with the usual procedures" for violation of various rules, regulations and standards has been substantially curtailed as a result of the transfer of offences to the Criminal Code[65]. As a result the usual procedures – which is understood to mean those established by the Code of Administrative Offences - will apply only to the liability for road safety, sanitation and hygiene and epidemic prevention.

284. *However, there is a need to clarify the scope of the liability for administrative offence under disciplinary statutes as opposed to that under the "usual procedures" as that is not evident from the proposed amendments.*

Penalties

285. Of particular significance in the changes to be effected by the Draft Law will be the deletion of many of the penalties that can currently be imposed for administrative offences.

286. In particular, there will be the deletion of the provision in Article 32 that allows for administrative arrest for a term of up to 15 days[66], which will eliminate the scope for the deprivation of liberty in circumstances where the guarantees in the Code of Criminal Procedure are not available.

287. In addition, there will be the deletion of the administrative penalties provided for in Article 24, as well as those concerned with primary and additional administrative sanctions, the compensated seizure of an item that became an instrument or an actual object of an administrative offence, confiscation of such an item and deprivation of a special right granted to a citizen[67].

288. Moreover, certain penalties – community service and correctional service[68] – will only be imposable for offences under the Criminal Code.

289. Also noteworthy and welcome will be the deletion of provisions authorising the seizure of items and documents constituting an instrument or an actual object of an offence discovered during detention, body search or inspection of personal belongings and the temporary seizure of a driver's licence[69]. Any seizure connected with offences will henceforth need to be in accordance with the requirements of the Criminal Procedure Code.

[65] Thus, it no longer covers the following: customs rules, making of the offenses connected with corruption, violation of silence in public places, unauthorized use of state-owned property, illegal storage of special means of secret receipt of information, rejection of measures for private determination of court, evasion from accomplishment of legal requirements of the prosecutor, violation of the legislation on the state secret, violation of the accounting treatment, storage and use of documents and other material data carriers containing office information.

[66] A separate basis for administrative arrest for up to 10 days for repeated violation of driving rules will also be removed from Article 121. The penalty of military confinement for up to 10 days under Article 32-1 will also be deleted.

[67] Pursuant to Articles 25, 28, 29 and 30.

[68] Pursuant to Articles 30-1 and 31.

[69] In Articles 265 and 265-1.

290. Similarly, the deletion of Article 266 – which allows for the imposition of bans on driving vehicles, river or small vessels and examination for a state of alcoholic, drug or other intoxication or for influence of pharmaceutical drugs that reduce attention and reaction speed – will also lead to such measures being taken in accordance with the requirements of the Criminal Procedure Code.

291. In some provisions, the only change made is an increase in the level of the fines that can be imposed for the offences concerned but – although the increase amounts to a doubling or even slightly more of the possible fines – the potential liability that will ensue still does not seem excessive[70].

292. Moreover, certain of the changes that will be made to provisions dealing with the responsibility for considering administrative cases just reflect the additions and deletions to provisions creating offences[71]. In addition, some new provisions will be added to give this responsibility to bodies not previously given it under the Code of Administrative Offences[72].

Procedure

293. In addition, a number of the proposed changes relate to the procedural aspects of handling administrative offences.

294. Some of these will just be consequential on other changes[73] and others will be the consequence of the reorganisation of the allocation of responsibility for considering administrative cases proposed in the Draft Law[74]. None of them are therefore problematic.

295. This is generally the case with the revision in Article 262 of the authorities authorised to carry out administrative detention. However, Part 2.2 refers to detention in respect of illegal crossing or an attempt to illegally cross the state borders of Ukraine – which is, in principle, compatible with Article 5(1)(f) of the European Convention - when the administrative offence in respect of that (in Article 204-1) is to be deleted according to the terms of the Draft Law.

296. *There is a need, therefore, to clarify whether this deletion is intended or whether there is some other offence justifying detention as otherwise this power should not be retained in Article 262.*

[70] Namely, those in Articles 46-1, 108, 116, 121 and 122-2. However, the level of the fines prescribed for the offences covered by 164 has been reduced and that in Articles 191 and 193 has not been changed.
[71] Namely, those to Articles 222, 222-1, 223, 228, 229, 230-1, 234-1, 234-2, 234-3, 236, 244, 244-1, 244-4, 244-13, 244-16 and 244-17.
[72] Namely, Articles 244-20 to 244-235.
[73] Namely, the revision of Articles 38.2, 38.3,40.2, 258, 260, 264, 265-2, 267, 276, 277, 283, 285, 287, 288, 295, 296, 299, 301, 303 and 307 and the deletion of Articles 259.7, 268, 290, 294 and 311-328 .
[74] Articles 40-1, 51, 122.4, 122.2, 122.3, 127.4, 130, 139, 140.4, 154.4, 156.1, 156.3, 156.4, 160, 164.3, 164-3, 164-7, 166-21, 171-2, 172-4 to 172-9 (Ch. 13-A), 172-10 to 172-20 (Ch.13-B), 173-1, 173-2, 174, 177-2, 178, 180, 181-1, 182, 185, 185-1, 185-2, 185-3, 185-4, 185-5, 185-6, 185-7, 185-9, 185-10, 185-11, 187, 195-1, 195-2, 195-3, 195-4, 195-5, 195-6, 204-1, 204-2, 206-1, 212-2, 212-6, 212-7 to 212-20 (Ch. 15-A), 214, 218, 219, 221, 221-1, 246-2, 250 and 255.

297. *The latter recommendation is equally applicable to the provision in Article 263 that authorises administrative detention in respect of illegal crossing or an attempt to illegally cross the state borders of Ukraine and related matters.*

298. There will, however, be a reduction in the period of administrative detention authorised for the purpose of establishing identity, namely, from 3 days to 48 hours. This is welcome since it reduces the risk of such detention being continued for longer than is actually necessary but it remains the case that that standard means that the new limit must still not be automatically applied[75].

299. The proposed deletion of Article 294 will result in the removal of the possibility of a second-tier judicial appeal in respect of an administrative case but leaves intact the existence the possibility of appealing to a court of first instance.

300. The retention of the latter possibility is important since the European Convention requires that the imposition of criminal liability should either be by a court in the first instance or there should be a possibility of taking any decision made in this regard by an administrative authority before a tribunal that offers the guarantees of Article 6[76].

301. However, the removal of a further right of appeal is not necessarily problematic since the right of appeal under Article 2 of Protocol No. 7 – which Ukraine must observe[77]– does not apply to offences of minor character and an important consideration in determining whether or not offences have this character is the absence of imprisonment as a punishment[78]. The deletion of the possibility of imposing administrative arrest for a term of up to 15 days in respect of offences under the Code will thus be a significant consideration in favour of the compatibility of the deletion of Article 294 with the requirements of Article 2 of Protocol No. 7.

302. The Draft Law also will lead to the deletion of the Articles in Chapter 24-1 which is concerned with the reconsideration of a case on administrative offense in cases when an international judicial institution, whose jurisdiction is recognised by Ukraine, established that Ukraine violated its international obligations during trial.

303. *Although the provisions in this Chapter appear to duplicate those in Law of Ukraine "On the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights"*[79]*, there is a need to clarify that the arrangements that law makes does apply still to convictions for administrative offences. This is important as it cannot be excluded that*

[75] See, e.g., *Vasileva v. Denmark*, no. 52792/99, 25 September 2003.
[76] *Öztürk v. Germany*, no. 8544/79, 21 February 1984.
[77] After ratification on 11 September 1997, the Protocol entered into force for Ukraine on 1 December 1997.
[78] See, e.g., *Zaicevs v. Latvia*, no. 65022/01, 31 July 2007, paras. 24 and 25 and *Luchaninova v. Ukraine*, no. 16347/02, 9 June 2011, para. 72.
[79] Adopted on 23 February 2006.

a conviction pursuant to Code of Administrative Offences as amended by the Draft Law will not give rise to a finding of a violation of the European Convention by the European Court.

F. Comments to Criminal Procedure Code

304. There are eleven sets of amendments proposed in the Draft Law relating to provisions in the Criminal Procedure Code.

305. These are generally directed to ensuring that there continues to be consistency between the formulation of these provisions and the changes to the concepts and terminology found in the Criminal Code - as well as certain additions to and deletions from Criminal Procedure Code[80] - that would be effected in the event of the Draft Law being adopted. Such changes are not in themselves problematic.

306. However, there are two sets of proposed amendments which require attention.

Articles 183.2.1, 194.7 and 208.2

307. These provisions are concerned with the level of the fine for an offence which (a) allows for custody to be imposed as a measure of restraint, (b) limits the only measures of restraint that can be applied to bail or custody to be and (c) allows for a suspect to be apprehended by a competent official without a warrant from an investigating judge or court in certain limited circumstances[81]. This would be changed by the Draft Law from the existing fine "of over 3,000 tax-exempt minimum incomes of citizens" for the offences concerned to "a fine exceeding 51 penalty rates".

308. This appears to extend quite substantially the circumstances in which custody or warrantless apprehension might be used with respect to suspects since there would be a considerable lowering of the threshold for such action given that one tax-exempt minimum income for the purpose of counting fines is 17 Ukrainian hryvnias.[82]

309. This is because – taking into account other changes proposed in the Draft Law[83] - the relevant fine would become any fine in excess of 3000 Ukrainian hryvnias which is clearly a lower sum than the existing 51,000 Ukrainian hryvnias (17 x 3,000 tax-exempt minimum incomes of citizens).

[80] Namely, the inclusion or exclusion of offences specified in Article 216 for the purpose of determining their allocation to particular categories of investigators to undertake the pre-trial investigation. These changes are not problematic.
[81] Namely, "only if the suspect has defaulted on the duties imposed upon him when a measure of restraint was decided or failed to comply as prescribed with the requirements concerning deposition of bail and submission of documentary proof of such deposition".
[82] P.5, Sub-chapter 1, Chapter XX (Transitional provisions), Tax Code of Ukraine,
[83] According to the terms of Article 53.2-1 that is proposed in the Draft Law, "the penalty rate shall equal two units of account as established by this Code" and, according to paragraph 10 of the note that it would add to Chapter III of the Criminal Code - Criminal Offence, its Types and Phases, "one *unit of account* shall equal 30 Ukrainian hryvnias".

310. The lowering of the threshold for a warrantless apprehension might be seen as creating a serious risk that the resulting interference with the liberty of the person will not be one that is genuinely necessary for the purpose of enforcing the criminal law but arbitrary and thus contrary to Article 5(1) of the European Convention[84]. However, this risk should not generally arise if there is proper regard to the requirement that the person concerned must also have either defaulted on the duties imposed upon him when a measure of restraint was decided upon or failed to comply as prescribed with the requirements concerning deposition of bail and submission of documentary proof of such deposition.

311. *Nonetheless, it would be appropriate to ensure that the officials charged with apprehending such persons are alerted to the risk of such an apprehension being unnecessary and carry out thorough checks with the person concerned about the relevant default or failure having occurred*[85].

312. These changes would not affect the general rules governing measures of restraint and apprehension of a person in Chapter 18 of the Criminal Procedure Code and, in particular, the purpose and grounds for enforcement of measures of restraint in Article 177.

313. Nonetheless, there is certainly a risk that the proposed restriction of the measures of restraint that can be imposed for the relevant offences to bail or custody will result in an interference with the liberty of the person that is not necessarily required for the purpose of enforcing the criminal law. Certainly, the European Court is likely to reach that conclusion in cases where custody has been imposed as a measure of restraint in circumstances where bail cannot be provided but some other measure of restraint – such as personal commitment or personal warranty – would have been sufficient to ensure any legitimate concerns regarding the possible conduct of the suspect (such as flight or interference with witnesses) are adequately safeguarded.

314. Such a risk of unjustified restriction of liberty may already exist with the unamended version of Article 194.7 in that it excludes some available measures of restraint that could be suitable in certain cases. However, this risk will clearly be exacerbated by the extension of the range of offences covered as a result of the change proposed for the level of fines at which the restriction of measures of restraint to bail or custody becomes applicable.

315. There is, of course, no objection to the introduction of a provision that merely allows for the possibility of custody being imposed as a measure of restraint in respect of persons suspected of having committed the relevant offences.

316. Nonetheless, there does not seem to be any compelling need to restrict the measures of restraint to bail or custody for offences that attract the relatively modest fines concerned. Indeed, such a restriction necessarily precludes the court concerned from determining whether

[84] *Cf. Witold Litwa v. Poland*, no. 26629/95, 4 April 2000.
[85] *Cf. Stepuleac v. Moldova*, no. 8207/06, 6 November 2007.

there are relevant and sufficient reasons for an interference with liberty and it is thus, in principle, incompatible with Article 5(3)[86].

317. *In these circumstances, it would be inappropriate to proceed with the proposed amendment to Article 194.7 and indeed consideration should be given as to the need for retaining this provision in any form.*

Article 477

318. The proposed changes to the three paragraphs of this provision involve additions and deletions to the lists of offences for which an investigator or public prosecutor may initiate proceedings only on the victim's application.

319. The deletions and additions follow the proposed amendments to provisions in the Criminal Code and, on the whole, do not seem problematic since the resulting lists of offences do not generally concern ones that would merit being pursued without the need for a specific request from a victim. This is because the majority of them do not have the potential to interfere significantly with certain human rights.

320. However, that does not seem to be the case with four existing offences – namely, those in Articles 459 (forcing sexual intercourse), 467 (obstructing religious ceremonies), 468 (violating personal privacy) and 489 (threatening to destroy or damage property)[87] - as well the entirely new offence that would be introduced in Article 126.2 (battery and other violent acts under certain aggravating circumstances), notwithstanding the exception made in the last offence for the cases when such actions are committed by a group of people.

321. The commission of these offences inevitably involves conduct that has the potential to interfere with the prohibition on torture and inhuman or degrading treatment or punishment, the right to respect for private life, the right to freedom of thought, conscience and religion and the right to the protection of property under Articles 3, 8 and 9 and Article 1 of Protocol No. 1.

322. These provisions all entail certain positive obligations, including one to ensure that in appropriate cases criminal sanctions exist and are applied in respect of interferences with the rights concerned[88].

323. Moreover, the European Court has recognised that in some cases the interference with human rights may warrant the pursuit of a criminal investigation and of a prosecution even though

[86] See *Buzadji v. Republic of Moldova* {GC], no. 23755/07, 5 July 2016.
[87] Albeit these would replace the existing Articles 154, 180, 182 and 194.1 of the Criminal Code.
[88] See, e.g., *Abdülsamet Yaman v. Turkey*, 32446/96, 2 November 2004,*97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, no. 71156/01, 3 May 2007, *Hristovi v. Bulgaria*, no. 42697/05, 11 October 2011, and *Söderman v. Sweden* [GC], no. 5786/08, 12 November 2013.

there is no complaint. This will be especially so where the interference with the right is serious and the threat to the right concerned is a continuing one[89].

324. *In these circumstances, it seems inappropriate to include these offences in the list of those which an investigator or public prosecutor may initiate proceedings only on the victim's application and the proposed list should be revised accordingly*.

G. Comments to Criminal Executive Code

325. There are eight sets of amendments proposed in the Draft Law relating to provisions in the Criminal Executive Code. These are also generally directed to ensuring that there continues to be consistency between the formulation of these provisions and the changes that would be made to concepts and terminology used in the Criminal Code - as well as deletions from it - that would be effected in the event of the Draft Law being adopted.

326. The only other change relates to Chapter 10, which deals with the execution of sentence in form of service restriction for servicemen who have been convicted of an offence. The propose amendment is substantially a re-enactment of the existing provision with the only modification being that the role of implementing the service restriction is given to the chief of the military unit rather than the commander of the military base, institution or organisation where the convicted serviceman is serving. Such a modification – which does not affect the obligations regarding implementation – is not one that gives rise to any concerns regarding compliance with European standards.

H. Conclusion

327. The foregoing comments have necessarily concentrated on problematic issues and specific suggestions and recommendations have been formulated and highlighted in italics in the text of the Opinion above. However, the existence of these does not diminish the significance of the reform that is being proposed by the Draft Law and the very welcome nature of the changes that this will effect. In particular, the consolidation of much that was formerly covered by the Code of Administrative Offences into the category of misdemeanors within the Criminal Code should ensure that proceedings in respect of them will be handled in a manner consistent with the requirements of the Criminal Procedure Code and, thereby, those of the European Convention. Moreover, the reform being proposed for what is left of the Code of Administrative Offences will eliminate many objectionable features. However, careful consideration should be given as to whether all the administrative offences that would be transferred to the Criminal Code need to be reflected in the Criminal Code and governed by all the requirements of the Criminal Procedure Code. Of particular relevance in this regard will be the resulting increase in workload for judges, prosecutors and investigators. Such

[89] See, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009 (as regards domestic violence).

consideration should also be given to the reclassification of some existing criminal offences as misdemeanors.

328. The complexity of the exercise that such a substantial reform entails inevitably gives rise to problems in its execution and it is on these that the comments have focused. Some observations concern legislative technique and certain aspects of them relate to the general approach to legislation and it cannot be expected that this will change. However, they have been highlighted as some reflection on the utility of this approach might be worth undertaking. Most of the comments about technique are more specific and relate to the clarity, consistency and internal coherence of the changes that will be effected to the provisions in the Codes by the proposed amendments. Such shortcomings in formulation are crucial for the effectiveness of the reform and for ensuring that the rule of law is respected.

329. Additionally there are various instances where offences being transferred into the Criminal Code do not satisfy aspects of principles fundamental for the criminal justice system, notably those relating to individuation of responsibility and respect for proportionality. There are also some provisions where the formulation and/or the penalties being proscribed do not satisfy requirements of European and international standards, especially those relating to domestic violence and torture. On the other hand the use of certain penalties – namely, correctional labour and community service – is not consistent with European standards. Furthermore, there are some proposed provisions where there is a need for greater precision in their formulation so as to ensure that there is no scope for arbitrariness in their application. Moreover, there are certain proposed amendments for which the provision of some clarification might remove the appearance of there being a problem.

330. Finally, it would be highly desirable – before adopting the Draft Law – to carefully consider whether the aim of the humanisation on the one hand and the need to ensure effective administration of justice on the other hand will be fully achieved, as well as to ensure that there is a thorough review and full discussion with all concerned as to whether the legal, administrative, organisational and financial implications of the proposed reform have been sufficiently considered and satisfactorily addressed. Addressing these implications would also require an interval of at least a year between the adoption of the provisions in the Draft Law and their entry into force.

331. None of the problematic issues are ones that cannot be readily surmounted and it would be churlish to suggest that their existence negates the value of the reform being proposed. Nevertheless, addressing these issues in an effective manner will enhance that reform and ensure that the goal of giving effect to European standards is more satisfactorily achieved.

ANNEX I.

Executive Summary of Recommendations

A. General Recommendations:

a) Systemic rules to be observed

- describe the elements of misdemeanours in a precise manner, in accordance with the standards stemming from the concept of criminal charge.
- avoid duplication between misdemeanours and other criminal offences on account of the prohibition of double jeopardy in Article 4(1) of Protocol No. 7 to the European Convention and the principle of legality of substantive criminal law.

b) Transfer of certain offences from the Code of Ukraine of Administrative Offences to the Criminal Code of Ukraine

- clarify the basis on which the administrative offences would either be transformed into misdemeanors or left in the Code of Administrative Offences.
- assess against the principles of proportionality, humanity and *ultima ratio* some of the offences suggested to be transferred.

c) Reclassifying offences from crimes to misdemeanours

- review the appropriateness of changing the status of some offences, in particular those directed against the prohibition of ill-treatment, the freedom of media, proper administration of justice, the fight against corruption and so on.

d) Legislative drafting technique

- delete or reformulate the provisions, which do not add any legal meaning but simply direct to other provisions, repeat the content of other provisions or contain obvious statements that have no practical value, including observations of a theoretical nature.
- amend the ordering of provisions in order to ensure their overall coherence.
- transfer the provisions whose subject-matter is not concerned with substantive criminal law, to more appropriate laws.
- clarify and to simplify as much as possible the language used in the Draft Law, as the complexity of the formulations used sometimes makes it impossible to determine what is intended by certain provisions.

e) Practical arrangements

- review whether all implications of the proposed reform have been sufficiently considered, as this transfer means that the procedures set forth in the Criminal Procedure Code become fully applicable. While broadening of the guarantees is commendable, there is a need to take account of resources needed to ensure the observance of these higher standards in practice, including the workload of the investigative authorities, public prosecution and judges, as well as the operation of the legal aid system.
- establish a sufficiently simplified framework for the investigation of possible misdemeanors which still respects the rights of the defence.

- specify that the Draft Law's provisions are to come into effect a year after their adoption.

B. Specific Recommendations pertaining to concrete provisions of the Draft Law:

C. Criminal Code of Ukraine: General Part	
Article	**Recommendation**
2. Basis for criminal liability	develop the concept of guilt in a more detailed manner, to be consistent with the classical concept of guilt being the mental subjective attitude of the offender towards the *act* itself and not the *harmfulness* of the act and its consequences, reflected also in Article 24 of the Code, thus also eliminating internal incoherence. define more clearly and motivate the legislative choice between culpability and social dangerousness, applying this universally in the Code. determine the definition of criminal offences (and not the concept of criminal liability). proscribe the application of the concepts of legal analogy and statutory analogy, including reviewing whether the position on the analogy within the scope of the Code should also be stated in this provision.
2-1. Principle of legality and principle of legal certainty	do not define both principles in a single provision. define the principle of legality as the legality of crime and punishment and to formulate it with a clearer wording by, e.g., drawing on that in Article 7 of the European Convention. give the priority to the principle of legal certainty, as it requires by necessity crime and punishment being set out in the law – the core of the legality principle - but it also requires stable and consistent legislation. amend the stipulation that "*The law provisions on criminal liability shall define the criminally punishable act in explicit and clear wordings and shall not be subject to an expansive interpretation*", as the necessity for clear wording is not a principle but a recommendation to the legislature, what is more, in view of the proportionality and legality principles, and human rights standards, it would be reasonable to allow expansive interpretation in some cases, if it leads to expansion of provisions which introduce grounds for de-criminalisation/de-penalisation/ milder punishment/etc.
2-3. Principle of guilt	remove this provision, as it does not deal with the guilt principle, but with the presumption of innocence, which is not a part of the substantive criminal law and is usually a part of criminal procedural law.

2-4. Principle of justice	change the title of this Article to reflect its content - its first part describes the "principle of proportionality", and the second one deals with the concept of "double jeopardy". transfer the text relating to double jeopardy to the Criminal Procedure Code.
2-6. Principle of personal nature of criminal responsibility	reconsider the need to retain this provision, as the text is unclear (punishment is made a part of the criminal liability; the provision points who is liable and not for what he or she cannot be held liable) and duplicate other Articles (notably Article 2.1). if retained, modify the provision to state that a natural person may only be held criminally liable for criminal offences he or she has intentionally or negligently committed. Or, if the intention was to re-state Article 61.2 of the Constitution of Ukraine[90], to transcribe that formulation into the Draft Law and possibly add explicit prohibitions on strict liability, collective liability and the liability of parents for the acts of their children.
2-7. Principle of humanity	change the title of the provision into "Aims of Punishments" or something similar, as the formulation mixes goals of the punishment with a criminal law principle. delete the first part of the provision (*"The Criminal Code of Ukraine shall provide the protection of a human being, his health and life, honour and dignity, inviolability and security as the highest social value"*) as it is a mere guidance for the legislature and has no relevance to substantive criminal law issues. re-think the hierarchy of values prescribed and to amend the second part of the provision accordingly. revise the provisions of the Code in order to deal with all basic issues of penalties together, probably removing the goals of the punishment from general principles.
2-8. Principle of inevitability of criminal liability	delete this provision, as it does not contain a separate principle but sets out an operational consequence of the principle of legality, which may entails risks of confusion and diverse case law.
4. Operation of the law on criminal liability in time	extend the proposed revised paragraph 3 so that it specifies when a more complicated form of criminal offence is considered to have been committed (e.g., when the result of the act as stipulated by the respective provision in the Special Part occurs, when a continuing criminal deed is terminated, etc.)
Note to Chapter III	

[90] "Legal responsibility of person has individual character".

Paragraph 1. **Significant damage**	make a clearer distinction between crimes and misdemeanors in the definitions provided for them. eliminate the incoherence between the notion of "*damage*" related to the consequences of the offence and the circumstances listed in the same provision that describe deeds which might cause damage and not damages as results. include in connection with "*significant damage*" those human rights and freedoms referred to in the treaties that have been ratified by Ukraine, in addition to those having a constitutional status. eliminate the circularity in the phrase "*significant financial/property damage*", which it repeats both the words "*significant*" and "*damage*". reconsider the need to retain the notion of "*two persons*" in the expression "one, two or more persons" in subparagraph 1.
Paragraph 2. **Grave consequences**	eliminate the incoherence with regard to the results / deeds (see comments to paragraph 1 of the Note) with regard to the "*consequences*" in the definition of "*grave consequences*" in this paragraph. eliminate the circularity in the reference to large-scale and grand-scale material damages.
Paragraph 3. **Extremely grave consequences**	eliminate the incoherence with regard to the results / deeds (see comments to paragraphs 1-2 of the Note) with regard to the "*consequences*" in the definition of "*extremely grave consequences*" in this paragraph. reconsider the need for two separate formulas for "*grave consequences*" and "*extremely grave consequences*". clarify the concept of "*failure of a military mission*" (not all failures of all missions might be assessed similarly). introduce a clear distinction between the infliction of an infectious disease that is considered incurable and of one causing death (the former being a grave consequence and the latter being an extremely grave consequence).
Paragraph 4. **Significant financial/property damage** **Paragraph 5.** **Significant size.**	eliminate the repetition in the definitions.
Paragraph 6. Large-scale financial/property damage **Paragraph 7. Large-scale size.**	eliminate the repetition in the definitions.

Paragraph 10. One unit of account shall equal 30 Ukrainian hryvnias.	remove this provision, as various provisions stipulate specific units of account, and this may create unnecessary complication; furthermore, the value of the hryvnia can change.
11. Notion of criminal offence and its types	revise the order of the provisions: paragraph numbered 2 should precede the one immediately preceding it – paragraph 1-1 - as a provision dealing with the notion of criminal offence should precede one concerned with the matters of types of offences clarify the last paragraph of this Article, as the language used is too complex.
11-1.1 Definition of a criminal misdemeanor	transfer the notions "*illegal*" and "*harmful*" to the general definition of criminal offences from Article 11-1.1, while leaving in more specific definitions of crimes and misdemeanor only the features distinguishing them as types of offences. delete the notion of both types of offences being committed 'by an offender.' clarify the concept of harm: to stipulate when exactly it is significant, instead of referring to what it does not encompass; to fuse paragraphs 1 and 2 to provide a single definition; to clarify the issue of harm to the "State" referred to in paragraph 1. de-penalise - in the sense of removing the provision for their punishment by "arrest" - the new misdemeanors that are not covering situations of significant harm as this would be proportionate and humane[91].
12-1. Determination of criminal offences and its principles	remove the theoretical definitions (paragraph 1). ensure that there is no repetition between paragraphs 2, 5-7. ensure that the provisions are consistent with other parts of the Draft Law (in particular, paragraph 5 bullet 1 refers unnecessarily to aspects of the principle of legality and principle of personal nature of responsibility, while paragraph 6 contradicts both individual responsibility and proportionality principles,). remove the provisions of paragraph 5 concerning the prohibition of double jeopardy, as it is a criminal-procedure principle, and not a principle of determination of criminal offences, what is more, its formulation contradicts the notion of ideal accumulation of offences; to remove paragraph 7 ("*If a regulation of any other area of law expressly allows certain acts then such acts may not be punishable under criminal law*") as an incorrect and potentially

[91] However, even if imprisonment was not prescribed for all or most of the misdemeanors in the Draft Law, they would still come under the concept of criminal charge for the purpose of Article 6(1) of the ECHR; "The relative lack of seriousness of the penalty at stake […] cannot divest an offence of its inherently criminal character", *Öztürk v. Germany*, no. 8544/79, 21 February 1984, para. 54.

	dangerous legal statement.
12-2. The rules of determination of criminal offences and choice between general and special provisions and between the whole and its individual parts	remove this Article as its provisions either repeat earlier provisions or contain obvious observations of theoretical nature.
12-3. The rules of determination of criminal offences and choice between two conflicting special provisions	remove this Article as relating to an unlikely hypotheses and contradicting the legality-of-crime principle.
12-4. Special rules of determination of a criminal offence	remove this Article as containing the rules of qualification and interpretation of the law not subject to legislative regulative; the relevant legal issues are covered by Article 70.
13. Consummated and unconsummated criminal offences	add a provision that the perpetrator is criminally liable, if the preparation or attempt to commit one misdemeanor qualifies by itself as another, different in type and consummated misdemeanor.
18. Criminal offender	delete the stipulation that "a *specific criminal offender shall mean a criminally sane natural person who, being of the age of criminal responsibility, has committed an offender-specific criminal offence*" as an obvious notion.
25. Negligence and its types	revise the provision on the use of caution in order to stipulate that the need to use it must be required by law. delete the notion of the "*interests of other parties*" in paragraph 4 as entailing a risk that the principles of legality, legal certainty and rule-of-law will be compromised.
27. Types of accomplices	change the definitions of organizer, abettor and accessory under paragraphs 3, 4, and 5 so that these refer only to crimes.
28. Criminal offence committed by a group of persons, or a group of persons upon prior conspiracy, or an organized group, or a criminal organization	delete the term "*direc*t" from the proposed paragraph 4, as organised crimes are not unlikely to be committed "indirectly".

33. Accumulation of criminal offences	reconsider the need to retain the second sentence of paragraph 1 as it follows from the provisions related to criminal records, rehabilitation and discharge from liability.
49. Discharge from criminal liability due to expiry of the statute of limitations	reconsider the need to retain the rule of extension of the limitation period as a consequence of the commission of another crime (proposed paragraph 3).
56. Community service	include in this Article a maximum period within which various sentences of community service should be completed, as leaving the definition of the overall length to courts with no legally established maximum terms is a deviation from the requirement of Article 7 of the European Convention and can also lead to the breach of the 1990 UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)[92] and ensure that it is imposed in a manner consistent with the prohibition on forced labour.
57. Correctional works	ensure that this penalty, if retained, is imposed in a manner consistent with the prohibition on forced labour.
58. Service restrictions for military servants	eliminate the division of the penalty into degrees as this creates needless complications and restricts judicial discretion in the process of individualization of penalties, and also creates risks of unstable and unjust court practice.
59. Forfeiture of property	remove the repetitions between the last sentence of the proposed Article 59.2 and sub-paragraphs 1 to 3 of the same paragraph.
60. Arrest	eliminate the division of the penalty into degrees (see comment to Article 58). amend paragraph 3 taking into account that the expression "*as a rule*" is insufficiently clear and may create confusion and risks for the uniformity of the judicial practice.
63. Imprisonment for a determinate term	include the word "*exceptional*" (cases) referring to the possibility of applying imprisonment on a perpetrator of a minor crime with no previous convictions, if the offence is violent or profit-motivated, or committed under other expressly stipulated in the law circumstances, in order to unify the provision with similar provisions (e. g. Article 60.4) and bring it into line with the Draft Law's goal of encouraging custodial penalties to be imposed only as 'last-resort' measures.
65. General principles of punishment	rename Article to match its content, as it refers to rules of individualization of

[92]Article 2(6):'Non-custodial measures should be used in accordance with the principle of minimum intervention".

imposition	penalties rather than to the principles. remove or amend provisions containing merely redirections to other provisions (paragraphs 3 and 4), being unnecessary (paragraph 1(2) is an aspect of the legality principle and not a rule/principle of individualization) or confusing (paragraph 5 creates uncertainty as to what the penalty should be where there is a conciliation or plea agreement), or both (third sentence of the proposed paragraph 2 contradicts Articles 51 and 98 containing catalogues of punishments and stating that fines are to be the least severe, and is an analytical observation rather than a legal provision).
66. Circumstances mitigating punishment	amend the notions formulated too narrowly: the reparation itself may be formulated a little broader so as to include also cases where the offender has provided sufficient guarantees for future payment. remove the requirement of voluntariness of the reparation under sub-paragraph 1.2 clarify the provisions on the age of the offender (also drawing a line between a mitigating circumstance and a ground for limiting liability) and the commission of the act by a pregnant woman (whether this circumstance is relevant if present when the offence is committed or when the offender concerned is sentenced or in both cases). clarify the basis for characterising certain conduct as "ill-treatment" in paragraph 1.7.
70. Imposition of punishment for cumulative criminal offences	amend Article providing separate regimes respectively for cumulative crimes and for cumulative crimes and misdemeanors. remove the provision of paragraph 2 allowing to impose a final cumulative punishment within the maximum term provided for this kind of punishment in the General Part in cases where at least one of the crimes committed is an intentional grave or extremely grave offence, as these types can be of a different criminal and criminological nature, what is more, this approach might create a motive for the perpetrator to commit other crimes. This provision can be replaced by a possibility to exceed the cumulative punishment but not the sum of the separate punishments for the cumulative offences with the requirement to justify this punishment. Otherwise, the judicial discretion could lead to breaches of the principle of proportionality and of Article 3 of the European Convention.
74. Discharge from punishment and from serving it	remove the limitation of the scope of the proposed Article 74.4 to cases of minor offences as this change towards a harsher situation is not consistent with the aim of humanization of the Code. reconsider exclusion of all corruption-related crimes from the scope of this provision as this is likely to undermine the possibility of concluding plea-agreements and is also potentially incompatible with Protocol No. 12 to the European Convention.
75. Discharge on probation	reconsider the retention of the proposed requirement in Article 75.1 that the offender should have pleaded guilty in order to benefit from the provision for release on probation, as it creates risks of formal guilty pleas, contradicts the

	nature of the judicial assessment that must not depend on formal facts which are not connected to the nature of the offence and the recidivism risk of the offender, and the right of a person to remain silent or to protest his or her innocence and still benefit from the fact that the offence committed does not create a necessity to serve an effective penalty. reconsider the exclusion of all corruption-related crimes from the scope of this provision (see comments to Article 74).
80. Discharge from serving a sentence due to expiry of limitation periods for enforcement of a judgment of conviction	clarify the rationale for the provision in paragraph 4 that the statute of limitations shall be terminated if a convict commits another crime before the expiry of the periods specified in paragraphs 1 and 3. remove the exclusion of all corruption-related crimes from the scope of this provision (see comments to Article 74).
86. Amnesty	consider deleting the provision of paragraph 4 limiting the scope of amnesties in cases of corruption-related crimes as this approach creates risks for legal certainty, legality and equality before law, *i.a.* the safeguards of Protocol No. 12 to the European Convention.
91. Revocation of a conviction	clarify the need to retain the proposed paragraph 1.1 since it seems to cover the point addressed by the existing paragraph 2.
96-2-1 Restraining/protective order against a domestic violence offender	transfer these provisions to more appropriate laws as they deal with procedural issues of an administrative or civil law nature.
96-2-2. Termination of parental rights and removal of a child from parental custody	see comments to Article 96-2-1.
97. Discharge from criminal liability with imposition of compulsory reformation measures	remove the proposed amendments as establishing stricter limitations on discharging minors from criminal liability than the current version. abolish the criminal liability of minors for misdemeanors.
98. Types of punishment	remove the possibility to impose fines on minors as being in breach of CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, and CM/Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice. resolve the contradiction between the stipulation in the proposed Article 60 that "*arrest shall not be imposed on persons below 16 years of age*" and the unqualified authorisation in Article 98 for this penalty to be imposed on minors,

	by making the age limitation explicit in Article 98. remove the possibility to impose such additional punishments as a fine and deprivation of the right to hold certain offices or engage in certain activities (paragraphs 1 and 2) as unreasonable.
99. Fine	eliminate the possibility to impose fine on minors, especially, the provision on the juvenile offenders with no independent income or receivers of social benefits (paragraph 2), as such funds do not belong the convicted child, and the imposition of a fine is more likely to create circumstances for the juvenile to continue his or her criminal behaviour in order to survive. delete the provision in the proposed Article 99.3 and 99.4 for the transformation of pecuniary penalties into other penalties as being likely to cause negative correctional effect on with no legal labour experience.
100-1. Correctional works	remove this type of punishment both for minors and adults as contrary to European and international standards, including Article 4(3) of the European Convention (see comments to Article 57).
D. Criminal Code of Ukraine: Special Part	
Article	**Recommendation**
126. Torment **127. Torture** **365. Abuse of power** **370-1. Use by an official of inhuman, cruel or degrading treatment or punishment**	revise the prescribed elements for the offences to ensure that they envisage specificities necessary to comply with Article 4.1 read with Article 1.1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the case law of the European Court. consider the possibility of transcribing the elements contained in these provisions into a single comprehensive provision. reconsider the penalties in the proposed Articles 126 and 365 as they seem unduly mild; to provide for qualifying provisions proposed as aggravating features that would require even graver penalties. provide for making it an offence and prescribing penalties where public officials do not allow the Ombudsperson, Members of Verkhovna Rada or the National Preventive Mechanism to inspect places of deprivation liberty in accordance with obligations under the Optional Protocol to the Convention against Torture.
128-1. Violations of the regulations governing animal care	clarify what is entailed by the reference to the offence being "*committed against a minor or a pregnant woman*".
142. Illegal human	elaborate the elements of the proposed crime (in lieu of just a statement that the

experimentation	performance of the three types of experimentation must be illegal). To review the adequacy of the proposed penalties for its commission, as they seem to be disproportionately mild.
154. Sexual coercion	make a reference to "*any sexual act*" instead of *"natural or unnatural sex act".* review the penalties prescribed in both paragraphs as they seem to be unduly mild and could be inconsistent with Article 3 of European Convention.
161. Violation of racial, ethnic or religious equality	reformulate the title of this provision to reflect all the encroachments upon equality covered by it. elaborate with more precision the "*grave consequences*" referred to in paragraph 3.
173. Gross violation of an employment contract	ensure that the meaning of the concepts "*gross violation of an employment contract*" and "*unlawful dismissal*" are in practice clear or to provide more elaboration of the concepts in this provision.
175. Failure to pay salary, scholarship, pension or any other statutory payments	ensure that the meaning of "*unreasonable delays*" is in practice clear or to provide more elaboration of the concept in this provision.
182. Invasion of privacy	retain the existing Article 182 and introduce an additional Article providing a clear prohibition of both "real" stalking and cyber stalking.
192. Infliction of property damage by deceit or breach of confidence	clarify the scope of this offence: since one basis of the offence being created involves an "*absence of elements of fraud*", it is not clear what kind of "deceit" is another one that needs to be fulfilled.
245 Destruction or damaging of vegetation items **246. Illegal forest felling**	review these two provisions and to eliminate possible duplication: the formulation of the proposed provisions give the impression of a possible infringement of the prohibition of double jeopardy in that the element of "*damaging the woodlands*" in paragraph 1 of Article 245 appears also to encompass the one of "*illegal logging*" in paragraph 1 of Article 246.
255-1. Formation of or membership in an organized crime group	insert the phrase "*under this Code*" after the word "*crimes*" in paragraph 1 in order to satisfy the principles of legal clarity and legitimacy.
258-3. Setting up a terrorist group or	consider expanding the scope of this provision to take account of the contents of the 2015 Additional Protocol to the Council of Europe Convention on the

terrorist organisation	Prevention of Terrorism, namely, those concerning foreign terrorist fighters.
294. Riots	revise the content of this proposed provision regarding hooliganism to avoid the risk of duplication and thus double jeopardy due to resemblance to those in the proposed Articles 296 and 563. revise paragraph 1, as it gives the impression that there will be strict liability in that it appears to cover legal demonstrations that became riotous without any intention or effort to bring about that result.
296. Hooliganism	revise the proposed wording to provide for a clear definition of concepts *"disorderly conduct"* and "*other extremely cynical display of shamelessness in a public place"*. align the later definition with Article 10 of the European Convention and the definition *"long (over an hour) disruption of and comfort of community or disruption of regular operation of an enterprise, institution or organization"* with Articles 10 and 11 of the European Convention. ensure the proportionality of the determination and delimitation of punishments, i.e. monetary fine on the one hand and quite high penalties of imprisonment on the other hand. eliminate unclearness and possible lack of proportionality in the causal connection between some of the prescribed actions in paragraph 2 and prescribed punishments, with a view of respect to the principle of *ultima ratio*.
375. Delivery of a knowingly unfair or unjust final court ruling by a judge	not to retain of neither the existing provision nor the proposed amendments to it, as it does not seem to be essential given that other offences (notably those involving corruption) could be invoked where there is evidence of genuine judicial misconduct. if the existing and proposed offences are to be retained in some form, it is vital that they be significantly modified in order to clearly prevent the possible encroachment on the independence of judiciary.
370. Provocation of commercial subornation	delete the part of the proposed Note to Article 370 with regard to "*holding of a check of righteousness of the person subject to liability for corruption offences in compliance with the law*", as it seems to afford too wide justification for action by officials. There is a risk to allow for systemic entrapment, with practically no limiting rules and no clear relationship with criminal procedural rules, thus creating risks of compliance with Article 6 of the Convention.
382. Failure to comply with a	clarify the rationale for the proposed changes, in particular the deletion of paragraph 1 and the "disappearance" of the concept of "*willful*" except with

judgment	regard to judgments of the European Court.
384. Knowingly misleading testimony **385. Refusal by a witness to testify or refusal by an expert or interpreter/translator to perform their duties**	reconsider the appropriateness of reclassifying these crimes as misdemeanors, since this risks undermining the effectiveness of the administration of justice.
462. Domestic violence	revise this provision to reconsider disproportionately mild punishments prescribed by paragraphs 1 and 2 if compared with the prescribed elements (and protected values), as well as the requirements of Article 3 of the European Convention and Articles 45 and 46 of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. clarify whether the protection being provided against acts against a "family member" is capable of embracing the different forms of conduct when they are committed by an ex-partner. provide protection against stalking.
464. Obstruction of Lawful Professional Activities of Journalists or Associations of Citizens	reconsider the appropriateness of reclassifying this crime as misdemeanor, with a view of protecting the media freedom.
470. Violation of the Right to Free Healthcare	clarify what is actually the basis for liability in paragraph 2 of this provision, namely, the illegal reduction of the network of state-owned or municipal healthcare facilities.
561. Violating the procedures for organizing and holding meetings, assemblies, street processions and demonstrations	revise this provision as it is problematic due to a number of reasons: Firstly, Articles 10 and 11 of the European Convention do not necessarily require compliance with the formal requirements for meetings, etc. Secondly, paragraph 1 does not indicate to a requirement of a violent meeting to have been properly prohibited or for an individual prosecuted to have contributed to this violence. Thirdly, it is unclear whether or not the elements of this offence include protests before the courts or outbursts within the judicial proceeding, which might be better dealt with under the milder contempt of court provisions. In addition, it is unclear whether a second violation – for which a heavier penalty can be imposed pursuant to paragraph 2 - needs to occur at the same (prohibited) event, which

	could in at least some instances be disproportionate. In the event that repetition at the same meeting, etc. is not covered by paragraph 2, there is also a lack of clarity as to whether or not there is any deadline within which such repetition is to occur. In the absence of such a deadline, the enhanced criminalization for repeated acts could last indefinitely, which would be contrary to the principles of legality and proportionality.
563. Petty hooliganism	revise this provision, as sub-paragraph 3 of paragraph 1 is so widely drawn that any loud voice (even laughing, etc.) could be interpreted as petty hooliganism. To ensure the application of this offence is not in breach of the right to freedom of expression under Article 10 of the European Convention. clarify the element on "restricting their will" in sub-paragraph 4, as it runs counter to the principles of legal clarity and legality in substantive criminal law. clarify the relationship of this provision with the major (general) offence of hooliganism in the new Article 296.
565. Drinking alcoholic beverages in public places and appearing in a public place in an intoxicated state **566. Drinking beer, alcoholic and low alcoholic beverages at the place of production**	reconsider the need to retain these provisions or to treating such conduct as no more than an administrative offence, as the misdemeanors that would be created by these provisions are not offences in all European jurisdictions.
596. Using knowingly false official documents or important personal documents **602. Violating requirements of financial control and unreliable information reporting**	reconsider the appropriateness of reclassifying these crimes as misdemeanors, in view of corruption-related problems in the country especially, intentional conduct under Article 602 (it might be appropriate to treat negligent acts as misdemeanors).
607. Excess of office or power by an official	reconsider the appropriateness of reclassifying this crime as misdemeanor.

618. Failure to implement the court decision	revise this provision in order to make it clear who is supposed to be punished, how it is to be decided that a decision has not been implemented and whether it is concerned with full or partial implementation.
623. Failure to perform a restraining injunction (domestic violence injunction) or failure of correctional program	revise this provision given that paragraph 1 does not make it clear that the offence concerns the violation of a final (or binding) judicial order and that it is concerned with compliance of all these orders (injunctions) in full. set forth a provision for a graver type of offence in paragraphs 2 and 3 where the non-compliance harmed a person`s security, dignity, body, health or resulted in a person's life being endangered.
Appendix 2 to the Criminal Code of Ukraine	delete the definitions repeating the substantive provisions of the Code (e. g., "murder"), as such repetition is likely to create confusion, injuring the legality principle. delete the definitions that follow from the basics of the criminal law and are more appropriate for legislative studies (e. g., "punishability" "negligence"). eliminate circular and incoherent definitions (e. g., "misappropriation)". reconsider the status of the remaining definitions with a view of their possible transfer to the substantive body of the Code.
E. Code of Ukraine of Administrative Offences	
Article	**Recommendation**
15. Responsibility of the military personnel and other persons subject to liability under disciplinary statutes for commission of administrative offences	clarify the scope of the liability for administrative offence under disciplinary statutes as opposed to that under the "usual procedures" as that is not evident from the proposed amendments.
262. Authorities (officials) authorized to carry out administrative detention **263. Period of**	eliminate inconsistency: the administrative offence in respect of illegal crossing or an attempt to illegally cross the state borders of Ukraine (Article 204-1) is being deleted according to the terms of the Draft Law, but the references to this *corpus delicti* stay in Article 262 part 2.2. and Article 263.

administrative detention	
Chapter 24-1 (current version). Reconsideration of a case on administrative offence in cases when an international judicial institution, whose jurisdiction is recognized by Ukraine, established that Ukraine violated its international obligations during trial	clarify that the arrangements that the Law of Ukraine "On the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights" makes (the reconsideration of a case on administrative offence in cases when an international judicial institution established that Ukraine violated its international obligation) does apply to convictions for administrative offences.
F. Criminal Procedure Code of Ukraine	
Article	**Recommendation**
194. Enforcing a measure of restraint	reconsider the need to retain the provision of paragraph 7 limiting the application of measures of restraint; Not to extend (as proposed in the amendments) the range of offences, as the risk of unjustified restriction of liberty already existing with the current version of this Article will clearly be exacerbated.
477. Concept of criminal proceedings by way of private prosecution	remove from the list of the offences, where an investigator or public prosecutor may initiate proceedings only on the victim's application, the following offences in the Criminal Code: forcing sexual intercourse (Article 459), obstructing religious ceremonies (Article 467), violating personal privacy (Article 468), threatening to destroy or damage property (Article 489) [93], battery and other violent acts under certain aggravating circumstances (Article 126.2), as their commission involves conduct that has the potential to interfere with Articles 3, 8 and 9 and Article 1 of Protocol No. 1 of the European Convention. These provisions all entail certain positive obligations. Moreover, the European Court has recognised that in some cases the interference with human rights may warrant the pursuit of a criminal investigation and of a prosecution even though there is no complaint.

[93] Albeit these would replace the existing Articles 154, 180, 182 and 194.1 of the CC.

ANNEX II.

Support to the implementation of the judicial reform in Ukraine

October 2016

OVERVIEW

of relevant European standards and European practice with regard to criminalizing the unlawful rendering of judicial decisions or the abuse of office by judges

I. Introduction

1. The present document will provide for the overview of the relevant European standards with regard to criminalizing the unlawful rendering of judicial decisions or the abuse of office by judges. It will also include references to best European practices with regard to the implementation of the provisions on functional immunity and criminal accountability of judges while exercising the judicial powers.

2. The overview was prepared by Prof. Dr. Dr. h.c. Lorena Bachmaier Winter[94] following the request of the Council of Europe within the framework of activities of the Council of Europe project "Support to the implementation of the judicial reform in Ukraine", implemented by the Justice and Legal Co-operation Department of the Council of Europe.

II. Relevant European Standards and European practice

3. Council of Europe Recommendation on "Judges: independence, efficiency and responsibilities", Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, contains several recommendations regarding the judicial liability of judges. Although the core points are focused on disciplinary liability, it also underlines the functional immunity the judges shall enjoy, and the scope of the criminal liability. In particular, it's paragraphs 65, 67 and 68 under the title "Liability and disciplinary proceedings" state:

   65. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.

   67. Only the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation.

   68. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases ***should not give rise to criminal liability, except in cases of malice.***

4. The recommendations mentioned above are interpreted in the Explanatory Memorandum of the Recommendation (2010)12 in the following sense:

   "66. The recommendation provides that the personal civil liability of a judge may be incurred only as a result of actions brought before a court by the state after having had to award compensation to persons who sustained damages as a result of an action or inaction by the judge, in situations pre- scribed by law only. In certain cases, if an official breaches his or her duties in a judgment, redress is only possible if the breach of duty consists in a criminal offence. Member states may decide to protect themselves through the subscription

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of insurance schemes covering gross negligence. In certain member states, the judicial code stipulates that judges' responsibility can be engaged in cases of denial of justice or, in the broad sense, when they commit fraud at any stage of the proceedings. Such responsibility has to be prescribed by law and judges can be ordered to award compensation. The case can also be assigned to other judges (paragraph 67 of the recommendation)."

5. Prior to this Recommendation, **the Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, of 19 November 2002, in its paragraph 52 to 54 reads:**

   "52. Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long).
   53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.
   54. The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has become common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.

6. As to the regulation in different CoE Member States, it has to be underlined that the majority of European countries do not provide for specific criminal liability for rendering an unlawful judicial decision. Some countries provide for the offence of "abuse of office" in the criminal Code, but the extended practice is to sanction abuses in the exercise of powers through disciplinary proceedings. Disciplinary sanctions would cover intentional as well as negligent conducts in this sense, and can lead to dismissal.

7. Denmark expressly excludes the possibility of prosecuting criminally a judge for his/her judicial decisions, and Finland regulates in its Penal Code the offence of "abuse of public office", although if committed negligently it would only be sanctioned with a fine or a reprimand.

8. Many countries include the judicial functional immunity in their Constitutions, but this

immunity does not cover the actions that constitute a criminal offence. This is the case, for example of the Constitution of Moldova, where Article 19 (1) and (4) state that judges shall not be held liable for opinions expressed while dispensing justice nor for the judgments they pass " unless they are found guilty of a criminal abuse by a final sentence".

9. One of the few exceptions within the European legal systems is found in the Penal Code of Spain, which provides for the criminal offence of rendering knowingly an unlawful judicial decision. The protected legal good is not mainly the individual right of the persons within the proceedings, but the general value of the Rule of Law. The criminal offence is not only provided for judges, but for any civil servant for knowingly taking an unlawful decision. The aim is to protect the compliance with the law, which is a specific and higher duty for every public servant. It is defined as one of the forms of abuse of office, and its gravity and sanctioning will depend on the damages caused.

10. According to Article 447 Spanish Criminal Code, judges shall be held criminal liable for criminal offences committed in the exercise of their functions, in particular, knowingly passing an unjust judgment constitutes a criminal offence. The penalty varies, depending if the judgment has been rendered in a criminal procedure or not, and if the penalty has been executed or not. The penalty ranges from 6 months to 4 years imprisonment or a fine. In all cases, this criminal offence will entail the dismissal of the judge and the prohibition to exercise any public post up to a maximum of 20 years. Pending a criminal procedure for this offence, the disciplinary proceedings may advance, but no decision will be taken until the criminal procedure is concluded. The facts established as proved in the criminal procedure, are binding for the subsequent disciplinary proceedings. Disciplinary liability can be imposed after a criminal sanction only upon another legal ground (Article 415 LJ).

11. As to the proof of the *dolus*, the case law requires that the law that has been infringed in the unlawful decision is clear –not apt to be interpreted in different ways–, and that being clear, the judge should have known that departing from it was contrary to the law. There are no precise statistics on the number of judgments where a judge has been found guilty of this offence, but it is guessed that no more than two or three cases per year could be an approximate figure.

12. The Penal Code of Estonia would represent another exception, as its Article 311 provides that knowingly making an unlawful decision by a judge is punishable with 5 to 10 years imprisonment. This offence requires express and direct intention of the judge to render an unlawful decision, excluding thus the commission of this offence by negligence.

13. Out of Europe, several Latin-American countries also provide for the sanctioning of the offence of "prevaricación" (unlawful rendering of a judicial decision). This is the case of many countries that historically were under the Spanish Crown, and thus their legal systems were very much similar to the Spanish one. At present, similar criminal offences are found in Uruguay, Argentina, Chile, México or República Dominicana, although they require

generally intent to find criminal liability. The sanction usually entails the dismissal of the judge or civil servant.