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Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

The functioning of democratic institutions in Ukraine

Report*

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* This report was approved by the Monitoring Committee at its meeting in Paris on 9 September 2010.

A. Draft resolution

1. The Parliamentary Assembly welcomes the increase in legislative activity in Ukraine in the wake of the 2010 Presidential election and the establishment of a new governing coalition, which could lead to political stability. It considers that political stability is an essential condition for the consolidation of democracy in Ukraine. However, it is concerned that this relative stability is fragile, as the underlying systemic causes of the instability that has plagued the country in recent years have not been addressed.

2. The Assembly reiterates its position that the only manner in which lasting political stability can be ensured is through constitutional changes that establish a clear separation of powers, as well as a proper system of checks and balances, between, and within, the executive, legislative and judicial branches of power.

3. Noting the concerns expressed with regard to the concentration of power by the new authorities in Ukraine, the Assembly considers that the consolidation of power by a newly established administration is understandable, and in many cases even desirable, but warns that such consolidation should not lead to the monopolisation of power by a single political force, as it would undermine the democratic development of the country.

4. The Assembly warmly welcomes the priority given, and political will displayed, by the authorities to honouring the remaining accession commitments of Ukraine to the Council of Europe. The Assembly offers its full support to the authorities in their efforts to implement the ambitious and far-reaching package of reforms that are necessary to honour Ukraine's accession commitments and membership obligations.

5. The Assembly is concerned that the hasty manner in which the authorities are implementing these reforms could negatively affect respect for proper democratic principles and, ultimately, the quality of the reforms themselves. The fulfilment of the remaining accession commitments entails the implementation of a series of far-reaching and complex reforms, which will have a deep impact on the Ukrainian society. The successful implementation of these reforms is therefore only possible if they are based on a wide political consensus and public support. This, in turn, is only possible if respect for parliamentary procedures and democratic principles is strictly observed.

6. Close co-operation with the European Commission for Democracy through Law (Venice Commission) is crucial to ensure that the legislative reform packages that are currently being developed are fully in compliance with European standards and values. The Assembly therefore calls upon the authorities, and leadership of the Verkhovna Rada of Ukraine, to ensure that the Venice Commission is asked for an opinion on the final versions of draft laws before they are adopted in a final reading.

7. The different areas that are covered by the recent reform initiative have already been extensively addressed by in the Assembly in previous resolutions dealing with Ukraine. Reaffirming its position on these reforms the Assembly, in particular, with regard to:

7.1. Electoral reform

7.1.1. reaffirms its recommendation that a Unified Election Code be adopted in Ukraine and welcomes that a draft for such a Unified Code has now been tabled for adoption in the Verkhovna Rada;

7.1.2. considers electoral reform should not only entail the adoption of a new election code but also of a new election system and reaffirms its recommendation that an electoral system be adopted that consists of a proportional system based on open lists and multiple regional constituencies;

7.1.3. reaffirms its position that the imperative mandate that was introduced with the constitutional amendments of 2004 runs counter to European democratic standards;

7.1.4. calls upon all political forces to make good on their promise to reform the legal framework for elections and to demonstrate the commensurate political will to adopt a Unified Election Code and new election system, in line with recommendations of the Venice Commission and the Assembly well before the next parliamentary elections;

7.1.5. urges the authorities to adopt a law on political party financing that is in line with European standards and to consider the possibility of state funding for political parties to decrease their dependence on economic interests.

7.2. Reform of the Procuratura

7.2.1. recalls that Ukraine, upon accession to the Council of Europe, committed itself to: “the role and functions of the Prosecutor’s Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards”, and regrets that this commitment still remains to be implemented;

7.2.2. reaffirms its position that the general oversight function of the prosecutor’s office in Ukraine runs counter to European standards and that, also as a result of that function, it has powers that far exceed those necessary in a democratic state;

7.2.3. calls upon the authorities and Verkhovna Rada to adopt, as soon as possible and in close consultation with the Venice Commission, a law on the public prosecutor’s office that is fully in line with European standards and values;

7.2.4. considers that constitutional amendments are essential to remove the general oversight function from the prosecutor’s office and reform this institution in line with Ukraine’s accession commitments;

7.2.5 recommends that, as an alternative for the oversight function, the role of the ombudsperson is strengthened and a system of free legal aid put in place.

7.3. Reform of the justice system

7.3.1. considers that the reform of the judiciary and justice system is essential for the consolidation of a state of rule of law in Ukraine and welcomes the priority given by the authorities to these reforms;

7.3.2. considers that the Law on the Judicial System and the Status of Judges of Ukraine is a cornerstone of the reform of the justice system and a key to ensuring the independence of the judiciary and therefore deeply regrets that this law was adopted and enacted in great haste in July 2010, without waiting for the opinion of the Venice Commission that was requested by the Minister of Justice of Ukraine;

7.3.3. asks the authorities to ensure that any recommendations in the forthcoming Venice Commission opinions on the “Law on the Judicial System and the Status of Judges and the Law on Amendments to Legislative Acts concerning prevention of abuse of the right to appeal”, are included, and concerns addressed, in these laws by amending them as required;

7.3.4. considers that, without constitutional amendments, it will not be possible to reform the judiciary in line with European standards and values;

7.3.5. urges the authorities to reform the bar and establish a professional bar association in line with the accession commitments of Ukraine to the Council of Europe;

7.3.6. asks the authorities to adopt, as soon as possible, the new Criminal Procedure Code and to request an opinion of the Venice Commission on the draft of this code, and address any possible concerns before it is adopted in final reading;

7.3.7. calls upon the authorities to ensure that the justice system is sufficiently funded from the state budget as the current situation of chronic underfunding increases the potential for corruption and undermines the state of rule of law.

7.4. Fight against corruption

7.4.1. regrets the decision of the Verkhovna Rada to postpone, until 2011, the entry into force of the package of anti-corruption laws that were developed with the assistance of the Council of Europe, as well as the vetoing by the former President of the anti-money laundering law;

7.4.2. welcomes the priority given by the new president to the fight against corruption and urges him to ensure that the aforementioned in 7.4.1 is now enacted without further delay and that all recommendations made by the Group of States against corruption (GRECO) in its joint first and second round evaluation report are now promptly implemented.

7.5. Civil society

7.5.1. highlights the importance of civil society for Ukraine's democratic development and therefore asks the authorities to speed up the adoption of a new law on civic organisations with a view to addressing the deficiencies noted in the current legal framework for non-governmental organisations;

7.5.2. asks the Verkhovna Rada to adopt the Law on Order of Organising and Conducting of Peaceful events on the basis of the comments and recommendations of the Venice Commission.

8. The Assembly notes that the reforms are constrained in many areas by the current constitutional provisions. Therefore, it will not be possible to implement the reforms necessary for Ukraine to meet its commitments to the Council of Europe without reforming the constitution in the first place. It therefore calls upon the authorities and opposition to jointly implement a constitutional reform package that addresses the current shortcomings, as well as the underlying causes of the systemic political instability, in line with its previous recommendations. In this respect, the Assembly reiterates its previous recommendation that the current constitution should be amended instead an entirely new constitution being adopted.

9. An increased respect for democratic freedoms and rights has been one of the main achievements in Ukraine's democratic development in recent years. Any regression in the respect for and protection of these rights would be unacceptable for the Assembly.

10. The Assembly expresses its concern about the increasing number of allegations that democratic freedoms, such as freedom of assembly, freedom of expression and freedom of the media have come under pressure in recent months. It therefore calls upon the authorities to investigate all allegations of infringements of rights and freedoms and remedy any violations found. In addition, it recommends that the authorities review any decision or appointment that could lead to conflict of interest, especially in the field of law enforcement and the judiciary.

11. Media freedom and pluralism are cornerstones of democracy. The Assembly therefore is concerned about recent developments that could undermine these principles. It calls upon the authorities to take all necessary measures to protect media freedom and pluralism in Ukraine and to refrain from any attempts to control, directly or indirectly, the content of the reporting in the national media.

12. The Assembly reaffirms its readiness to assist Ukraine in strengthening its democratic institutions and firmly establishing a society based on the principles of democracy, respect of human rights and the rule of law.

B. Explanatory memorandum, by Mrs Wohlwend and Mrs Reys, co-rapporteurs

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1. Introduction

1. Since the Orange revolution, Ukraine's political climate has been characterised by a systemic political crisis which has undermined the democratic development of the country and hindered the implementation of the reforms needed for the country to fulfil its remaining accession commitments to the Council of Europe. This systemic political crisis, which has been the subject of the Parliamentary Assembly's attention in several resolutions¹, is rooted in the incomplete and controversial constitutional amendments that were adopted to resolve the political standoff during the Presidential elections in 2004, as well as the continuous rivalry and infighting between the main political forces and their leadership.

2. A shift of power took place following the Presidential elections in 2010, when Victor Yanukovich was elected President to replace the Orange revolution leader Victor Yushchenko. The newly elected president launched an ambitious set of reforms, with the declared aim of honouring the remaining accession commitments of Ukraine to the Council of Europe – and moving into a post-monitoring dialogue with the Assembly – before Ukraine takes over the Chairmanship of the Committee of Ministers of the Council of Europe, in May 2011.

3. We visited Ukraine following the Presidential elections in the framework of the monitoring procedure of the Assembly, from 1 to 4 June 2010, in order to familiarise ourselves with the reform agenda as well as the political climate in the country. After our visit, we welcomed and strongly supported the priority given by the new government to fulfilling Ukraine's accession commitments and to implementing the ambitious and far-reaching reform package that is necessary to achieve that aim. However, we also noted that, in their eagerness to meet sometimes overly optimistic deadlines, the authorities were implementing these reforms without sufficient respect for democratic procedures and deliberation and at the cost of dialogue and the creation of the wide political consensus that the successful implementation of these reforms demand. As a regrettable side effect, a number of the reforms, have become the subject of political controversy.

4. In addition, during our visit, we noted numerous and persistent allegations that respect for democratic freedoms, such as, inter alia, the respect for freedom of expression and freedom of assembly, had come under pressure in Ukraine since the 2010 Presidential elections.

5. For these reasons, and in support of the current reform process, the Monitoring Committee, at its meeting in Strasbourg on 22 June 2010, decided to request to include a debate on the functioning of democratic institutions in Ukraine be held during the October 2010 part-session of the Assembly. The intention was to enable the Assembly to formulate its views and recommendations, at an early stage, in the reform process initiated by the President, as well as to address concerns raised in recent months in this context.

2. Recent political developments

6. The last report on "the functioning of democratic institutions in Ukraine"², was debated in the Assembly on 19 April 2007. Regrettably, most of the period since that debate continued to be characterised by the systemic constitutional crisis in the country, rooted in the unclear separation of powers, and the resulting tug of war between the President, the Prime Minister and the Verkhovna Rada (parliament) of Ukraine.

7. On 30 September 2007, early Parliamentary Elections were held in Ukraine that were triggered by a political crisis that ensued after President Yushchenko's decision to dissolve parliament on 2 April 2007. His decision, the constitutionality of which was challenged by the opposition³, came after a number of defections of the pro-presidential opposition to then ruling coalition of the Party of Regions, Communist Party and Socialist party. His decision was reportedly guided by his concern that further defections would have given the ruling majority the two-thirds majority necessary to override any Presidential veto and to introduce amendments to the constitution without the support of the opposition parties. The political crisis subdued when the main political forces reached a political agreement for early parliamentary elections.

8. The early elections led to a new governing coalition, led by Yulia Tymoshenko, which had a small, 2-vote majority in the incoming Verkhovna Rada. While the early elections ended the political crisis at that time, they did not resolve the underlying systemic constitutional crisis and ongoing tug of war between the different branches of power.

¹ Resolution 1466 (2005), Resolution 1549 (2007)

² Doc. 1255 (2007)

³ The decree was challenged before the Constitutional Court. However, the Court did not issue a ruling due to the fact that a widely supported political agreement on early elections was reached.

9. Indeed, a new crisis broke out in September 2008, when President Yushchenko's bloc (Our Ukraine – People's Self Defence Bloc/ OU-PSD) withdrew from the governing coalition after a law was passed, with the support of Yulia Timoshenko's political bloc (BYuT), to limit the powers of the President. Following a period of time in which the country was without a working coalition or Speaker of the parliament, President Yushchenko again called for pre-term elections. However, after a period of a tense political stand-off, the elections were postponed to an unspecified date in order to address the effects of the global financial crisis which was hitting Ukraine harder than most other European countries.

10. Finally, after attempts to form a governing coalition between the Party of Regions and BYuT failed, a coalition was formed between Our Ukraine, BYuT and Bloc Volodymyr Lytvyn that ended the spectre of early parliamentary elections. Mr Lytvyn was elected Speaker of the parliament, a position he holds to date.

11. However, the period of relative political stability and renewed legislative activity was short lived and ended when the Verkhovna Rada passed a resolution, on 1 April 2009, calling for regular Presidential elections on 25 October 2009. President Yushchenko appealed against this decision to the Constitutional Court, which ruled, on 13 May 2009, that the Verkhovna Rada Resolution was unconstitutional and therefore invalidated the decision to hold Presidential elections on 25 October 2009. The Presidential elections were then set, in line with constitutional requirements, for 17 January 2010.

12. All in all, the systemic crisis and political instability have seriously hampered the governance of the country and prevented the adoption of many necessary policies and reforms with, on a number of occasions, the different branches of powers each proposing competing, and often incompatible, drafts for legal reform packages, including for the reform of the constitution.

13. The first round of the Presidential election took place on 17 January 2010 and the second round on 7 February 2010. International observers, including those deployed by the Parliamentary Assembly, concluded that both rounds were in general democratic and conducted in line with international standards. However, the observers also concluded that this had been the case despite a generally inadequate legal framework and last minute changes, or attempts at last minute changes, by all parties involved in these elections.⁴ Previously, we have had occasion to express our concern about the habit of Ukrainian political forces to play with the rules instead of by the rules. We regret that this was again the case in the context of these elections.

14. In a number of previous reports to the Assembly, we have expressed our concerns about the inadequate legal framework for elections in Ukraine. We deeply regret that no steps were taken by the Verkhovna Rada to bring the electoral framework in line with European standards, despite ample warning and ample time to do so. That said, we would like to highlight that the Presidential elections were the fourth election in a row since 2004 that were considered by international observers to be overall democratic and conducted in line with European standards. This demonstrates that the principle of democratic elections as the mechanism for a change of power is consolidating and is increasingly robust in Ukraine. In our opinion, this is an important legacy of the Orange revolution.

15. The political landscape in Ukraine has changed dramatically in Ukraine following these elections. The incumbent President Yushchenko was replaced by his erstwhile rival of 2004, Viktor Yanukovich, who won the second round of the vote with 48.95% of the vote over 45.47% for former Prime Minister, Yulia Timoshenko.

16. Following his election, the new President and his administration moved swiftly to consolidate their power. After the defection of a number of MPs from the former ruling coalition to the Party of Regions, a new governing coalition was formed around Mr Yanukovich's Party of Regions replacing the government coalition led by Ms Timoshenko. The formation of the new governing coalition to replace Ms Timoshenko proved to be controversial and led to questions about to the new administration's commitment to democratic procedures and principles. The original Law on the Rules of Procedure of the Verkhovna Rada⁵, specified that a parliamentary majority was established on the basis of the numerical strength of the factions, not on the number of individual supporting MPs. However, when support for the former government coalition started to crumble in the parliament following the elections, the Law on the Rules of Procedure of the Verkhovna Rada was changed with respect to the provisions for the formation of a ruling coalition. The new provisions now stipulate that a parliamentary majority is established on the basis of the number of individual MPs that

⁴ See also the reports of the ad hoc Committee of the Assembly that observed the first round (Doc. 12132 (2010)) and second round (Doc. 12178 (2010)) of these elections.

⁵ The Rules of procedure of the Verkhovna Rada take the form of a law, purportedly to make their amendment for short-term political gain more difficult.

support such a coalition. These changes to the Rules of Procedure of the Verkhovna Rada allowed a new governing coalition, centred around the Party of Regions, to be established. These changes in the Rules of Procedure were decried by the opposition – as well as by some independent observers – as being in contradiction with the constitution of the country. However, in a ruling on this issue, the Constitutional Court found that the new provisions were in line with constitutional requirements. This ruling seems to mark new case law compared with previous rulings of the Court on similar questions. At the same time, the notion that a parliamentary majority can only be formed by the factions (and by extension their leadership), over the wishes of the majority of individual members, seems to be closely related to the concept of an imperative mandate of the members of parliament, which runs counter to accepted European democratic standards. We hope that this is an indication that the Verkhovna Rada intends to abolish the imperative mandate in the very near future.

17. Questions by the opposition about the democratic credentials of the new administration and government were further fuelled by the manner in which the Black Sea agreement between Russia and Ukraine was signed and ratified. On 21 April 2010, President Yanukovich, signed an agreement with President Medvedev of Russia extending the Russian lease of the navy facilities in Sebastopol for 25 years with an option for an additional 5 years, in return for cheaper gas prices for Ukraine. This agreement, which is controversial in Ukraine, was ratified within a few days with little debate or consultation and in chaotic circumstances which were broadcast live on television. Opposition representatives claimed that the vote on the ratification was botched with votes being cast by persons who were not physically present in Kyiv at that time. It is clear that such an important, and at the same time controversial, issue should have been the subject of proper deliberation and debate.

18. These two issues, as well as a number of decisions by the new administration that gave rise to controversy, such as the appointment of the head of the State Security Services (FSU) –who is a close ally of Mr Yanukovich– as member of the High Council of Justice⁶, have given rise to questions about the democratic credentials of the new administration and have unfortunately contributed to a continuation of the polarised political atmosphere in the country. This has been underscored by a number of allegations that the new administration is tempted to reduce democratic freedoms and liberties. While these allegations should be seen in the context of the polarised political environment, their number and persistent nature are of concern. In our view, overcoming the polarised political climate is one of the main challenges for the authorities, as well as all other political forces in Ukraine.

19. Consolidation of power by a ruling majority is understandable and, in the context of the years of political infighting between the different branches of power in Ukraine, possibly even desirable. However, it will be of concern if such consolidation of power turns into a concentration, or even a monopolisation, of power in the hands of one political group, as that too could undermine the democratic development of the country.

3. Reform process

20. During his address to the Parliamentary Assembly, on 27 April 2010, President Yanukovich announced that his administration, as a matter of priority, would honour the remaining accession commitments of Ukraine to the Council of Europe, with the aim of moving into a post-monitoring dialogue by the time his country would take over the Chairmanship of the Council of Europe in May 2011.

21. Upon his return to Kyiv, President Yanukovich circulated a set of instructions⁷ to the members of his government to develop the reforms and legislative packages necessary to honour the remaining accession commitments. The instruction of the President sets very ambitious deadlines for the completion of these reforms, which vary from June to December 2010. A copy of the unofficial translation of his instructions has been attached to this report in appendix.

22. The priority given, and political will displayed, by the new administration to honouring the remaining accession commitments of Ukraine is both timely and pertinent, and should be welcomed. The fulfilment of these remaining commitments entails the implementation of a series of far-reaching and complex reforms, which will have a deep impact on Ukrainian society. The successful implementation of such reforms is therefore only possible if they are based on a wide political consensus and a democratic process consisting of genuine deliberation and consultation. However, due to the apparent haste to implement these reforms

⁶ A main concern is a possible conflict of interests, as the Security Services are responsible for investigating alleged corruption cases of judges, while the High Council of Justice has the right to start disciplinary cases and recommend the dismissal of judges.

⁷ Ref. No 1-1/806 dated 30 April 2010

before the country takes over the chairmanship of the Committee of Ministers of the Council of Europe, the authorities seem at times to sidestep proper democratic procedures and consultation. This haste is also affecting the consultation with external actors such as the Council of Europe. While the authorities have underscored, in public as well as in private, that all reforms will be implemented fully in line with European standards and in close consultation with the relevant Council of Europe bodies – most importantly the European Commission for Democracy through Law (Venice Commission) – a number of laws have been adopted without the Venice Commission having been asked to give an opinion on the final version of the draft law before its adoption in a final reading. As a result, some of the legislative packages adopted are not fully in line with European standards and now need to be amended in order to ensure that accession commitments are met.

23. While increased reform activity is welcome and indeed necessary, especially after years of inactivity as a result of the political crisis and infighting, the speed of reform should not come at the cost of respect for democratic principles and the quality of the reforms themselves. This would only undermine the goals the administration has set for itself and will not bring the country closer to meeting its accession commitments. We therefore call upon the authorities to respect fully democratic principles and procedures and to seek an as wide as possible consensus for its reform package. In addition, Council of Europe recommendations and concerns should be taken into account and addressed before legislative packages are adopted in a final reading by the Verkhovna Rada. In order to assist this process, we would like to outline, in summary fashion, our recommendations with regard to the main reforms that are currently being considered.

3.1. Constitutional reform

24. The ambiguities and deficiencies contained in the constitutional provisions that regulate the division of powers, as well as the system of checks and balances between them, have been at the root of the systemic political crisis in Ukraine. In order to resolve the political crisis that ensued after the flawed second round of the Presidential election in 2004, a series of constitutional amendments were adopted that, inter alia, introduced a mixed parliamentary presidential system in Ukraine. In its opinion on these amendments, the Venice Commission already underscored the potential for conflict and political deadlock as a result of the ambiguous and inconsistent provisions that govern the relations between the President, government and Verkhovna Rada, such as, inter alia, the mutual right of legislative initiative of both government and president, the dual accountability of the government to both President and Verkhovna Rada, as well as the overlapping competencies between president and government.

25. In its last resolution on the functioning of democratic institutions in Ukraine⁸, adopted on 19 April 2007, the Assembly called upon Ukraine to re-launch its constitutional reform project, in close co-operation with the Venice Commission, with a view to improving the constitution and to bring it in line with European standards. This call was made not only to resolve the underlying causes of the systemic political crisis that is plaguing the country, but also to address other long-standing shortcomings that are of concern to the Assembly - such as, inter alia the imperative mandate and a number of constitutional provisions that regulate the judiciary and the procuratura - and that need to be resolved in order for Ukraine to fulfil its accession commitments.

26. All political forces pledged their support for the constitutional reform project, but regrettably little progress has been made on this front since 2007. In February 2009, the then President Yushchenko issued a decree establishing a National Constitutional Council. This Council, which was composed of members of the Presidential administration and government, as well as representatives of the different political factions in the Verkhovna Rada, judges, civil society and academic experts, was tasked with drafting a new constitution in line with European standards. However, the Constitutional Council was de facto boycotted by the then opposition. On 31 March 2009, a draft constitution, based on the work of the National Constitutional Council was sent to the Verkhovna Rada by President Yushchenko. In its opinion on this draft constitution⁹, the Venice Commission welcomed the many improvements contained in the draft in comparison to the current constitution, but also noted that the draft did not attempt to resolve the roots underlying the constitutional crisis and maintained the mixed presidential-parliamentary system with the double executive, and hence the potential for conflict between the different branches of power.

27. In parallel, the Party of Regions prepared, jointly with the Bloc Yulia Tymoshenko, a competing draft constitution which was introduced in parliament. The Venice Commission, which was also seized for opinion on this draft, found this proposed draft constitution to be problematic and at variance with European standards. As no consensus could be reached on the changes to the constitution, the Verkhovna Rada decided, in 22 October 2009, to remove all proposals for changes to the constitution from its agenda.

⁸ Resolution 1549 (2007)

⁹ CLD(2009)098

28. To our regret, we were informed by the Head of the Presidential administration during our visit to Kyiv in June 2010, that constitutional reform is currently not a priority for the administration, despite it being mentioned in the President's instructions. We firmly believe that constitutional reform should be at the heart of the overall reform processes in Ukraine. The political system provided for in the current constitution can only be stable if the parliament and president share the same political vision, as is currently the case. However, such stability is not based on constitutional checks and balances and is not robust. Conflict and political stalemate could easily re-emerge if the political priorities of the parliament and president begin to diverge, which would be detrimental to the development of the country. The authorities should therefore avail themselves of their current strength and political stability to change the constitution in this respect. In addition, as we will outline in more detail in the sections below, a number of legislative reforms require changes to the constitution for them to be in line with European standards. In our opinion, it will therefore not be possible for Ukraine to meet its commitments to the Council of Europe, and therefore to move to a post-monitoring dialogue, without first satisfactorily implementing the constitutional reforms recommended by the Assembly.

29. A main question with regard to the constitutional reform project has been whether the current constitution should be amended, or whether a completely new constitution should be drawn up. We would like to reiterate our doubts about adopting a completely new constitution, especially in the light of the unclear legal procedure for adopting a totally new constitution (see below) and taking into account that the current constitution, in the opinion of the Venice Commission, is comprehensive in its protection of fundamental rights and freedoms and "shows willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights".¹⁰ In addition, amending the current constitution would also have the advantage of being able to prioritise the most urgent issues, which could facilitate their adoption.

30. As regards the adoption of a new constitution, there are concerns about the manner in which a totally new constitution should be adopted and the possibility that the legitimate role of the parliament in amending the constitution could be circumvented by attempting to adopt a new constitution through a people's initiative. While the process for adopting amendments to the constitution is clear – including adoption of the amendments by a two-thirds majority of the members of the Verkhovna Rada – the process for adopting a completely new constitution is not clearly defined. In the view of the Venice Commission, the adoption of an entirely new constitution would have to be in full compliance with the provisions in the current constitution¹¹ for amending the constitution, including the approval by two-thirds of the members of the Verkhovna Rada. On 18 April 2008, the Constitutional Court of Ukraine, while confirming the right of the people of Ukraine to change their constitution by way of an all-Ukrainian referendum, held that the adoption of a new constitution should fully respect the amendment procedure of the existing constitution.

3.2. Electoral reform

31. Recent elections in Ukraine have been generally conducted in conformity with international standards, which underscores the progress made by the country in this area. However, successive elections have highlighted the inadequate nature of the current electoral legislation as well as the habit of the political forces in Ukraine to attempt to change the legal framework just before the elections to suit their own narrow party interests. Electoral reform is therefore a priority for the country.

32. Ukraine does not have a unified Election Code. Different elections are each governed by a different set of laws, such as, inter alia the Law on Election of the President of Ukraine, Law on Election of People's Deputies, Law on the Election of Local Councils, Law on the All-Ukrainian and Local referenda, as well as the Law on the State Register of Voters and relevant provisions in the constitution and other legal acts. Also as a result of their frequent changes, these laws are excessively complex, lack coherence and clarity and are at times in contradiction with each other. On multiple occasions, the Assembly has called for the adoption of a single unified –and simplified– election code to govern all electoral processes in the country.

33. The Verkhovna Rada has established a working group, composed of members of different political factions as well as outside experts, with the task of drafting such a Unified Election Code (UEC) that would meet the highest international standards. Despite the wide range of political forces participating in the work of this group, its potential was somewhat undermined by the refusal of the Party of Regions to participate in its work, which we regret. Notwithstanding the existence of the working group to draft a new Unified Election Code, several groups of individual MPs from different parties have prepared their own amendments to the Law on Election of People's Deputies. By January 2009, 8 different draft laws to amend this law had been

¹⁰ CDL(2008)072

¹¹ Chapter XIII of the current constitution

prepared by different political groupings. In February 2009, the Venice Commission participated in a round table with the proposers of the different drafts with the aim of finding common ground between these proposals, which then could be introduced in the work of the working group preparing the Unified Election Code.

34. The working group tabled the draft Unified Election Code on 28 April 2010. However, no further action has been taken by the Verkhovna Rada to discuss and adopt this law. This is a point of concern, especially in the light of claims that the leadership of the main political factions in the Verkhovna Rada are lacking the political will to seriously consider changing the legal framework governing elections and adopt the Unified Election Code.

35. It is important to underscore that the aim of electoral reform should not only be to change the inadequate electoral legislation but also to change the inadequate – for Ukraine – election system itself. The current election system for the Verkhovna Rada is a proportional system based on closed party lists in a single national constituency. In the Ukrainian political context, this system is hindering the consolidation of democracy as it de facto concentrates the political power in the country in the hands of a few individuals. This, in turn, undermines party democracy and democratic transparency. This democratic deficiency is further compounded by the 2004 constitutional provisions that introduced an imperative mandate in the country as well as by the absence of requirements for full transparency of political party and campaign financing.

36. Given the shortcomings of the current political system in Ukraine, we would like to reiterate the recommendation made by the Assembly that an electoral system be adopted that consists of a proportional system based on open lists in multiple regional constituencies. The introduction of open lists and multiple regional constituencies would, inter alia, increase party democracy and voter transparency while ensuring regional representation. This model has also been supported by other international organisations and bodies and we are pleased to notice that most of the above-mentioned drafts for changes to the Law on Election of People's Deputies proposed some form of a regional component and open lists.

37. The 2004 amendments to the constitution introduced de facto the principle of an imperative mandate in Ukraine by allowing a mandate of a deputy to be terminated¹² when not joining or leaving the parliamentary faction on whose list the deputy was elected. As mentioned in the Venice Commission opinion on the 2004 amendments to the constitution, this runs counter to the notion of a free and independent mandate of a deputy and therefore European democratic standards.

38. The lack of proper legislation governing party financing and effectively ensuring its transparency is of concern in Ukraine, where political and financial interests are strongly intertwined and their distinction is often blurred. Therefore, we would like to reiterate the recommendation of the Assembly that the authorities adopt a proper law on political party financing that is in line with European standards and consider the possibility of state funding for political parties to make them less dependent on financial interests.

39. We strongly urge the authorities, and indeed all political forces, to demonstrate the commensurate political will to adopt the Unified Election Code and electoral system, in line with the recommendations of the Assembly, well before next parliamentary elections take place. Given the repeated promises by all political forces that they support electoral reform and a more democratic electoral system, it would be unacceptable if the next parliamentary elections were to be organised under the current system and legal framework.

40. On 1 July 2010, the Verkhovna Rada called for local elections to be held on 31 October 2010. On 10 July, the Verkhovna Rada adopted a set of changes to the Law of Ukraine on Elections of Members of the Autonomous Region of Crimea Supreme Council Local Councils and City, Town and Village Heads, which, inter alia, introduced a new election system for the city councils. This law was not sent to the Venice Commission for opinion but reportedly reduces the possibility for new entrants in the election process by, inter alia, limiting election registration to regional and local party branches that exist for more than one year, thereby limiting the choice of voters and, as a result, the democratic nature of the elections. In addition, we question the wisdom of changing the election system so close to elections which have already been called, which runs counter to accepted democratic standards.

¹² Article 81 § 2 (6) and article 81 § 6

3.3. Reform of the procuratura

41. Upon accession to the Council of Europe, Ukraine committed itself to: *“the role and functions of the Prosecutor’s Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards”*.¹³ This commitment still remains to be implemented.

42. A crucial shortcoming in the current system of the procuratura is the general oversight function of the Prosecutor General, which is a remnant of the Soviet concept of the procuratura and is contrary to European standards and values.¹⁴ In the words of the Venice Commission, the current law on the prosecutor’s office establishes *“a very powerful institution whose functions considerably exceed the scope of functions by a prosecutor in a democratic, law abiding state”*¹⁵. In addition, there are concerns about the extensive powers conferred on the Prosecutors office, and the Prosecutor General in particular, which are not controlled or supervised by the court system and which far exceed European norms. Moreover, some of these powers may be at variance with the principle of separation of powers.¹⁶

43. Despite these serious concerns with regard to the general oversight function of the procuratura, this function was added to Article 121 of the constitution – which describes the functions of the procuratura – with the 2004 constitutional amendments. We would like to stress that the procuratura can only be genuinely reformed according to European standards, and therefore this accession commitment can only be considered to be honoured, if constitutional amendments that remove the general oversight function from the procuratura are adopted.

44. The Prosecutor General has argued that the oversight function of his office is needed to ensure that all Ukrainians, independent of their financial status, have full access to the justice system. However, in our opinion, this can be better ensured by strengthening the role of the ombudsperson and by adopting a system of free legal aid for those in need, which we recommend the authorities will implement.

45. After a long period of inactivity on this subject, on 14 March 2009, the Verkhovna Rada passed, in a first reading a draft law (draft no. 2491) on the Public Prosecutor. On 18 May 2009, the then Minister of Justice asked the Venice Commission for an opinion on this draft law. In its opinion¹⁷, the Venice Commission concluded that this draft did not address the main criticisms and shortcomings that were outlined in earlier opinions on the law on the public prosecutor and in essence did not intend to reform the procuratura as in place today, but rather to consolidate, and even strengthen, its already rather far-reaching powers. The Venice Commission therefore recommended that this draft be withdrawn.

46. In his instructions, President Yanukovich made the reform of the Procuratura, in line with Venice Commission and Assembly recommendations, a priority. This welcome intention was echoed during our recent visit to Kyiv, from 1 to 4 June 2010, during which both the Minister of Justice, as well as the Head of the Presidential Administration, indicated that they agreed that “general oversight” should be fully removed from the functions of the Prosecutor General’s office and that the powers of the procuratura should be reduced to meet European standards and values. We therefore strongly recommend that draft law no. 2491 be withdrawn from the agenda of the Verkhovna Rada and that a new draft on the procuratura as well as corresponding constitutional amendments, will be submitted in the very near future.

3.4. Reform of the justice system

47. The reform of the judiciary and justice system is essential for the consolidation of a state of rule of law in Ukraine. In general, the court system is paralysed by the high volume of cases, leading to unreasonable delays in the examination of cases and the issuance of judgments. In addition, judgments are often not enforced. Public trust in the justice system is very low and the judiciary is generally considered corrupt and underfunded.¹⁸ The independence of the judiciary remains a point of concern and the justice system is heavily politicised. In October 2008, the Chairman of the Supreme Court of Ukraine, Mr Onopenko, stated that there are *“unlawful interference in the work of the judiciary, disregard for the legal foundations of the work of the justice system and the courts are being dragged into the political struggle”*.

¹³ Opinion 190 (1995) §11 -vi

¹⁴ See the opinion of the Venice Commission on the draft law of Ukraine on the office of the public prosecutor, CDL-AD(2009)048 for an in-depth discussion on this issue.

¹⁵ CDL-AD(2009)048

¹⁶ CDL(2001)128

¹⁷ CDL-AD(2009)048

¹⁸ Freedom House, Nations in Transit 2010. pp 566 -567

48. Regrettably, only limited progress has been made in the reform of the justice system since the last report to the Assembly in April 2007. While many concept papers have been published and policy reforms initiated, few have been implemented and a number of legal packages are still pending in the Verkhovna Rada. This overall lack of progress is a point of serious concern.

49. The current administration, like the previous one, has stated that it considers the reform of the judiciary and the justice system to be a priority. Central to the reform of the judiciary, and especially necessary to ensure the independence of the judiciary, is the Draft Law on the Judicial System and the Status of Judges of Ukraine. This draft law, which was originally adopted by the Committee on the Judiciary of the Verkhovna Rada in June 2008, is the consolidation of two previous draft laws which were combined into one upon the recommendation of the Venice Commission in order, inter alia, to improve their clarity and internal coherence. After a series of consultations, this draft law was sent to the Venice Commission for opinion in June 2009 by the then Minister of Justice of Ukraine.

50. The joint opinion of the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and legal Affairs of the Council of Europe¹⁹, which was adopted in March 2010, welcomed the many positive features and improvements made in comparison to the previous draft laws but noted that a series of serious shortcomings and hiatus remain that could undermine the independence of the judiciary and the principle of separation of power, and that, in their current form, are at variance with European standards and values.

51. With regard to the organisation of the court system, Article 6 of the European Convention of Human rights provides that courts must be established by law. However, according to the draft law, "courts of general jurisdiction shall be created and abolished by the President of Ukraine on the basis of a motion by the Head of the State Judicial Administration of Ukraine". This wide discretion to the President to establish courts is therefore not compatible. In addition, the court system consist of four levels of jurisdiction and is excessively complex and heavy. This complexity could undermine the obligation under Article 6 of the Convention to hear cases in a reasonable time. However, these provisions can only be changed through constitutional amendments as the establishment and organisation of the courts are set out in the constitution.

52. With regard to the independence of the judiciary, the Venice Commission opinion expresses concern about the role of the Verkhovna Rada in the appointment of, and in the disciplinary and dismissal proceedings with regard to judges This infringes on the independence of judges as well as politicises the appointment or removal process. In addition, the presence of members representing the President, the Verkhovna Rada, as well as Minister of Justice on the High Qualification Commission, casts doubts on the independence of the latter from political influence. Again, the role of the Verkhovna Rada in the appointment and dismissal of judges is provided for in the constitution which would need to be changed for these processes to be in line with European standards.

53. As regards judicial self-administration, which is an essential element to ensure the independence of the judiciary, the opinion notes that the proposed system is too complex and confusing to be truly effective. This could become an obstacle to genuine self-administration of the judiciary. A more simple structure, possibly based on a reformed High Council of Justice in which judges elected by their peers would have a majority should be put in place. Again, constitutional changes would be necessary to achieve this as the composition of the High Council of Justice is enshrined in the constitution.

54. It is clear that the subject-matter of this draft law is constrained by existing constitutional provisions, and its scope for genuine reform of the justice system, as required by Ukraine's accession commitments, is therefore extremely limited in the absence of amendments to the constitution. The Venice Commission therefore *"recommends to confine judicial reform not to the legislative level but to undertake a profound constitutional reform, aiming to lay down a solid foundation for a modern and efficient judiciary in full compliance with European standards"*.²⁰ We fully support this recommendation.

55. The Committee on the Judiciary, tabled rather suddenly, on 14 May, a revised version of the draft law which was adopted in a first reading, reportedly without much deliberation, by the Verkhovna Rada on 2 June 2010. The speed with which this draft law was introduced and processed raises some questions and doubts, especially as no Venice Commission opinion on the revised version was requested before its adoption in a first reading notwithstanding that the draft law contains a number of potentially politically charged provisions. This is an example of the haste with which key pieces of legislation are prepared and

¹⁹ CDL-AD(2010)003

²⁰ CLD-AD(2010)003 § 119

adopted, bypassing proper deliberation and democratic procedures and giving rise to questions regarding the political intentions of the new administration, especially given the fact that the judiciary has been part of the political battlefield in recent years.

56. The Monitoring Committee, at its meeting on 22 June 2010, asked for an opinion of the Venice Commission on the draft law on the judicial system and the status of judges as adopted in a first reading on 2 June 2010. In parallel, a similar request for opinion was made by the Minister of Justice of Ukraine. At the moment of writing of this report the Venice Commission had not yet finalised its opinion. However, from the preliminary comments of members of the Venice Commission that were asked to prepare the draft opinion²¹, it can be concluded that the revised draft as adopted in a first reading has failed to address the main concerns expressed in the original opinion of the Venice Commission and needs to be thoroughly revised before it can be considered to be in compliance with European standards. Again, the preliminary comments note that, without constitutional amendments, it will not be possible to fully reform the judiciary in line with European standards and values.

57. The revised version of the draft law contains new provisions that substantially reduce the size and mandate of the Supreme Court. The latter loses its jurisdiction in civil and penal matters in favour of new specialised high courts. As mentioned above these new provisions are controversial and have led to allegations that they were inspired by political power games and revenge, as the chairman of the Supreme Court is widely considered to be close to former Prime Minister, Yulia Tymoshenko. This could potentially undermine the public trust in these very important reforms. It is worth noting that the preliminary comments of members of the Venice Commission on the revised draft law consider that the shift of jurisdiction, combined with the transfer of supreme court current judges to the specialised high courts, is a point of concern.

58. In our meetings with the chairman of the Verkhovna Rada Committee on the Judiciary, the latter contended that the concerns regarding to the High Council of Justice could be resolved without constitutional amendments. In that respect, he informed us that the revised draft now demanded that the representatives of the President and Verkhovna Rada on this body be judges, which would ensure that a majority of the members of the Council would consist of judges. However, we would like to underscore that, in order to ensure genuine self-administration and independence, the majority of the members should not only be judges, but also be elected by their peers. This would require constitutional amendments.

59. On 13 May 2010, the Verkhovna Rada adopted law no 2181-VI on “Amendments to Legislative Acts concerning prevention of abuse of the right to appeal”. This law was signed into force by President Yanukovich the next day. Again, the contents of this law, as well as the haste with which it was adopted and signed into law gave rise to controversy.

60. This law makes changes to the Administrative Violations Code of Ukraine, the Administrative Adjunction Code of Ukraine and the Law on the High Council of Justice of Ukraine. These amendments give the High Council of Justice the right to demand copies of case files from any court, except those that take place “in camera”. In addition, it creates administrative liability for not complying with these requests for information. Taking into account that the High Council of Justice is also responsible for disciplinary cases, this could have the effect of intimidating judges. Moreover, the amendments give the High Administrative Court the sole jurisdiction over complaints against actions or inactions of the Verkhovna Rada, the President or the High Council of Justice, without a right of appeal, which is questionable. In a positive development, they removed the right of the Verkhovna Rada to initiate the dismissal of judges. However, this positive element is mitigated by the fact that the Verkhovna Rada, as well as the President, remain represented in the High Council of Justice and Qualification Commissions, as well as the fact that judges elected/appointed by their peers remain a minority on the High Council of Justice, despite its enlarged powers.

61. On 7 July 2010, the Law on the Judicial System and the Status of Judges of Ukraine was adopted in a final reading. It was signed by the Speaker of the parliament on 23 July 2010 and sent the President Yanukovich, who signed it into force on 27 July 2010. We deeply regret, and find it incomprehensible, that this law was adopted and enacted without waiting for, and taking into account, the opinion of the Venice Commission on it, despite a call of the Monitoring Committee to do so. This raises serious doubts about the willingness of the Verkhovna Rada and the administration to co-operate with the Council of Europe in establishing a genuinely independent justice system that is fully in line with the highest European standards.

62. We call upon the authorities to swiftly address any concerns and implement any recommendations that may be contained in the opinions of the Venice Commission on the Law on the Judicial System and the Status of Judges and the Law on Amendments to Legislative Acts concerning prevention of abuse of the

²¹ Preliminary comments of Mr James Hamilton (Ireland) and Ms Hanna Suchocka (Poland)

right to appeal. However, we need to underscore that only commensurate constitutional amendments will allow the country to meet its accession commitments and obligations in this respect.

63. The reform of the Bar and the establishment of a professional bar association is one of the original commitments that Ukraine agreed to when acceding to the Council of Europe that still remains to be implemented. Various draft laws have been introduced but none of them has been adopted. We regret that no co-operation from the Council of Europe has been sought in the preparation of these drafts. We therefore hope that the Minister of Justice and the Verkhovna Rada will now prepare and adopt a new draft Law on the Bar, in close consultation with the relevant Council of Europe departments, in order to satisfy this long-standing commitment. In addition, we would like to highlight the importance of an effective system of free legal aid to ensure the right to a fair trial for all citizens. Although former President Yushchenko adopted a concept paper on a Free Legal Aid System in Ukraine, no concrete progress has been made with regard to honouring this commitments until now.

64. In the field of the reform of the criminal justice system, some limited progress has been made since the last report in 2007. On 8 April 2008, President Yushchenko adopted the Concept Paper on the Reform of the Criminal Justice System of Ukraine and, in August 2008, the government approved the action plan to implement this concept paper. On 15 April 2008, the parliament adopted a Law on Amendments to the Criminal Code and Code of Criminal Procedure. However, the adoption of a new Code of Criminal Procedure, as well as further amendments to the Criminal Code are still necessary.

65. The adoption of a new Criminal Procedure Code is one of the outstanding commitments. A draft code was prepared by the previous government, which was positively assessed by Council of Europe experts. However, it was not tabled in the Verkhovna Rada and its current status is unknown. In addition, another draft for a new Criminal Procedure Code, which was negatively assessed by the Venice Commission in 2004, is still formally on the agenda of the Verkhovna Rada. In the light of its negative assessment, we trust that this draft will now be formally withdrawn. We welcome the fact that the adoption of a new Criminal Procedure Code is one of the priorities in the instructions of President Yanukovich, and urge that the draft of this code will be sent to the Venice Commission for opinion, and that any possible concerns will be addressed, and recommendations taken into account, before the law is adopted in a final reading, unlike what happened with the Law on the Judiciary and Status of Judges.

66. The subordination of the State Department for Execution of Criminal Punishments to the Ministry of Justice is one of Ukraine's commitments to the Council of Europe. While the Department was included in the Ministry of Justice in 2006, its status should also be updated in the Law on the Penitentiary Services, which therefore has to be amended.

67. During our visits over the last two years, the lack of sufficient funding for the justice system has been a constantly recurrent theme. In many cases, courts and judges depend on space and material resources donated by the private sector in order to function, which is a situation in which corruption can easily flourish. The provision of sufficient funding for the justice system should be one of the main priorities for the Ukrainian authorities.

3.5. *Fight against corruption*

68. Corruption continues to be of concern in Ukraine and public trust in the efforts of the authorities to curb corruption remain low. In its 2009 compliance report, the Group of States against corruption (GRECO) concluded that Ukraine has only satisfactorily complied with 1/3 of the recommendations contained in the joint first and second round evaluation report. In its 2009 compliance report, GRECO notes that a successful implementation of its recommendations requires extensive legislative, as well as constitutional changes. GRECO especially considers the establishment of a body to coordinate the development and oversee the implementation of the national anti-corruption strategies and action plans as a main priority. In this respect, the GRECO compliance report underlines that an effective fight against corruption in Ukraine requires "*a strong political commitment that goes far beyond the elaboration of draft legislation*".²²

69. A legislative package consisting of three anti-corruption laws that were elaborated with assistance of the Council of Europe were adopted by the Verkhovna Rada in 2009. However, the entry into force of this package, which was foreseen for 1 January 2010, was deferred in December 2009 by the Verkhovna Rada. The original deferral of 4 months was prolonged by the Verkhovna Rada at the beginning of the 2010 until the January 2011. In addition, the then President Yushchenko vetoed, in December 2009, the anti-money laundering law that was drafted with the assistance of the Council of Europe. Reportedly, the Verkhovna

²² GRECO, Joint First and Second Round Evaluation, Compliance Report on Ukraine § 107, adopted May 2009

Rada intends to adopt a series of new amendments to the legislative package of anti-corruption laws in order to establish the majority of votes needed to allow these laws to come into force.

70. The deferral of the anti-corruption package, and vetoing of the anti-money-laundering law undermine the country's efforts to combat corruption and raise questions about the existence of the necessary political will to fight corruption effectively. We therefore urge the authorities to ensure that these laws are enacted without any further delay.

71. President Yanukovich has made the fight against corruption one of the priorities of his administration. For this purpose, he established an anti-corruption Committee in his administration that is chaired by himself. However, in an act that seems to contradict the stated goals of the new administration, one of the first decisions of the Committee was to postpone the appointment of the government agent for the co-ordination of anti-corruption policies.

4. Recent human rights issues

72. For the Assembly, the establishment of respect for, and protection of, democratic freedoms and liberties has been one of the main achievements of Ukraine over the last years and is one of the welcome legacies of the Orange revolution. It should be noted that, in the view of many election observers, it was precisely the entrenchment of the respect for such fundamental freedoms that ensured the democratic nature of the last presidential elections, despite the severely flawed legal framework.

73. The increasing numbers of recent allegations that the authorities are curtailing these freedoms and that democracy is regressing in the country are therefore of considerable concern. These allegations have mostly centred on the freedom of the media, freedom of assembly and increased pressure by the law enforcement agencies for political purpose.

74. The media are considered in general free at the national level, and government censorship does not exist²³. However, an increasing number of journalists and media representatives complain about increased interference of owners on the editorial lines of their news programmes and therefore a rise in self-censorship among journalists. The intertwining of financial and political interests in Ukraine negatively affects media freedom and pluralism in this respect.

75. In May 2010, a number of journalists published a statement alleging that taboo subjects and censorship had returned to two national TV stations, STB and 1+1. In addition, on 23 April 2010, the organisation Reporters Without Borders sent an open letter to the President, expressing their concern about the erosion of the right to information in Ukraine. On 21 May 2010, a number of journalists and civic organisations announced the launch of a new movement "Stop Censorship", in reaction to the deteriorating media environment in Ukraine.

76. The role of the State Security Services, and especially its head, Mr Khoroshkovsky, who is a close ally of Mr Yanukovich, is a point of controversy in Ukraine, where any possible influence of the security services in political life is seen as highly suspicious as a result of its recent history. Mr Khoroshkovsky is also owner of TV Inter and is alleged to have ordered investigations by the Secret Services into a disputed licensing decision, in which his channel is a party. In addition, managers from TV Inter have reportedly been appointed in key managing positions in the main state owned TV channel, which is widely interpreted by the public as an attempt by the new administration to bring the editorial line of that broadcaster under its control.

77. Following an appeal filed by the media holding pertaining to the Head of the Security Services, the Kyiv Circuit Court, on 8 June 2010, annulled the January 2010 decision of the National Broadcasting Council to allocate broadcasting frequencies to two independent TV Channels, TVi and 5 Kanal. Several media watchdogs, including the OSCE representative for the freedom of the media, expressed their concerns about the effects of this decision on the pluralism of the media in Ukraine.

78. In a worrisome development, attacks on journalists have been on the rise in recent months, culminating in the disappearance, on 11 August 2010 of Ukrainian journalist Vasyl Klymentyev, who had been reporting on corruption cases in Kharkiv. On 19 August 2010, Interior Minister Anatoly Mogylyov, admitted that Klymentyev's disappearance could be related to his reporting.

79. At the same time, the authorities have underlined, on several occasions, their attachment to freedom of expression and freedom of media. Following the open letters by the journalists, President Yanukovich has

²³ Freedom House, nations in Transit 2010, p 562

publicly pledged to protect the freedom and pluralism of the media in Ukraine and warned that any infringement by members of his government and state officials would have serious consequences for the perpetrators.

80. The role of the State Security Services, and especially its Head, Mr Khoroshkovsky, is not only controversial in relation to the media but is also of concern in other respects. Recently, a complaint was filed by the rector of the Catholic University in Lviv, stating that a member of the State Security Services had requested him, in a manner reminiscent of the Soviet era, to provide information about any political activities of his students. President Yanukovich expressed his dismay about this incident and announced a full-fledged investigation into it. However, the public unease with what it sees as an increased involvement in public life of the security apparatus has increased following President Yanukovich' appointment of Mr Khoroshkovsky to the High Council of Justice, despite potential conflicts of interest. Indeed, the State Security Services are responsible for investigating any allegations against judges in Ukraine. This is a matter of concern.

81. A number of NGOs have complained that protest actions had been broken up, and their activists harassed, by the police and other state law enforcement agencies. An example that has created some controversy were the events surrounding the felling of trees in a city park in Kharkiv to make space for a highway and commercial construction that started on 19 May 2010. The decision to allow the felling of the trees was reportedly made without respecting the necessary administrative procedures and without environmental impact studies. When environmental organisations and citizens organised a protest against the felling of the trees and tried to hinder further felling private security guards, with the help of the local police, broke up this protest despite the fact that it had been peaceful. Further scuffles between private security personnel and protesters continued during the following days, with the police reportedly standing by or assisting the private security personnel. In addition, a number of protesters were detained and charged for disturbing public order despite the peaceful nature of the protest, which has raised some concerns among human rights organisations, including Amnesty International in Ukraine. While the events in Kharkiv deserve further investigation by the competent authorities and are hardly a showcase for democratic behaviour, in our opinion, it would not be correct to consider this as symptomatic of the national state of democracy generally or make any generalisations from it.

82. Despite the fact that Ukraine has a vibrant civil society, it operates within an outdated and inadequate legal framework which, in the view of the Court in Strasbourg, does not correspond to European standards. NGOs can only operate in regions and cities in which they are registered and must be registered in all regions of Ukraine in order to have a nationwide status. A proposal for a new law on civic organisations was submitted to the Verkhovna Rada in 2008, but got stalled in the responsible committee.²⁴ The elaboration, and adoption of a new law on civil society organisations is not part of the reforms package that was initiated by the President, but we hope nevertheless that such a law will be adopted, in close consultation with the Venice Commission, in the very near future.

83. Reportedly requests for protests and demonstrations in front of the Verkhovna Rada and a number of other government buildings, which used to be abundant, have recently been refused by the authorities and spontaneous protests in these places have been broken up. In this respect, we note that the current legislation with regard to the organisation of peaceful events and manifestations leaves a wide margin of discretion to the authorities which creates potential for abuse. In December 2009, the Venice Commission and the OSCE/ODIHR adopted a joint opinion on the new "Draft Law on Order of Organising and Conducting of Peaceful events", which was adopted in a first reading by the Verkhovna Rada on 3 June 2009. In this opinion, a number of recommendations are given to reduce the possibility for abuse and increase the protection of democratic principles. However, no follow-up has been given to this opinion and the status of the draft law is currently unknown. We urge the authorities to revive this legislative project and to adopt this law, in line with Venice Commission recommendations, in the very near future.

5. Conclusions

84. The presidential elections of Ukraine heralded a stability in the political environment that has been lacking in the country for many years. However, this stability is fragile and the authorities are urged to implement constitutional reforms that would create a robust and stable political framework with a clear separation between the different branches of power and an effective system of checks and balances between them. This is especially essential as the polarisation between political forces has not ceased in society and could easily result in renewed instability and political infighting. In this context, the consolidation of power by the ruling majority is understandable and, in the context of the years of political infighting between the different branches of power in Ukraine, possibly even desirable. However, utmost care should

²⁴ Freedom House, Nations in Transit 2010, pp 560 -561

be taken so that such consolidation of power does not turn into a concentration, or even worse, a monopolisation, of power in the hands of one political group, as it would undermine the democratic development of the country.

85. The ambitious reform programme initiated with a view to fulfilling the remaining accession commitments, as well as ongoing membership obligations, to the Council of Europe should be strongly welcomed and supported. In that spirit, we have outlined our recommendations, and, where necessary, expressed our concerns, for the main components of this reform. However, the haste in which these reforms are being implemented goes at the cost of proper democratic procedures, as well as a proper deliberation and consultation process. This is a point of serious concern that should be addressed by the authorities. We would like to underscore that far-reaching reforms are needed to meet the remaining accession commitments, which by their nature should be based on an as wide as possible political consensus and public support for them, in order for them to be effective. This is only possible if respect for parliamentary procedures and democratic principles is observed. In addition, we call upon the authorities and leadership of the Verkhovna Rada to ensure that the Council of Europe is consulted on the different reforms and, most notably, that the Venice Commission is asked for an opinion on the final versions of the laws before they are adopted in a final reading.

86. It is clear that the scope for reforms in many areas is limited under the current constitutional provisions. It will therefore not be possible to implement the reforms necessary for Ukraine to meet its commitments to the Council of Europe without satisfactorily implementing the constitutional reforms recommended by the Assembly. The main priority for the authorities should therefore be to implement the constitutional reform project, after which more specific legislation can be elaborated and enacted that is fully in line with European standards and values. In this respect, it should be emphasised that the Assembly, on several occasions, has recommended amending the current constitution, instead of adopting an entirely new constitution.

87. A clear and unwavering respect for democratic rights and freedoms has been one of the main achievements in Ukraine's democratic development in recent years. Any regression in the respect for, and protection of, these rights would be unacceptable for the Assembly. The increasing number of allegations that democratic freedoms, such as freedom of assembly, freedom of expression and freedom of the media, have come under pressure in recent months is therefore of concern. However, while some incidents raise concern, and while we feel that any possible violation of democratic norms and human rights are in principle unacceptable and should be fully investigated and remedied, we feel that it is, yet, not possible to discern any systematic trend that would suggest that the authorities are not committed to fully adhering to the principles of human rights and democratic freedoms. However, we would like to call upon the authorities to react more clearly, and more pro-actively, to these allegations than has been the case till now.

APPENDIX

Instructions of the President of Ukraine

(original Ukrainian version ; unofficial translation by the Council of Europe)

For the implementation of agreements concluded during the working visit of the President of Ukraine to France to participate in the second session of the Parliamentary Assembly of the Council of Europe and as a result of meetings with senior Council of Europe officials on 27 April 2010:

Addressed to: **M. Ya. AZAROV**
O. V. LAVRYNOVYCH

1. Taking into account the conclusions of the Venice Commission and the Resolutions of the Parliamentary Assembly of the Council of Europe, prepare and submit for consideration by the Verkhovna Rada of Ukraine a draft Law of Ukraine "On Amendments to the Constitution of Ukraine".

Completion: January 2011

2. With the aim of bringing the electoral law of Ukraine into line with European standards and taking into account the conclusions of the Venice Commission, prepare and submit for consideration by the President of Ukraine proposals concerning the introduction of necessary amendments to the relevant Laws of Ukraine and the expediency of their codification.

Completion: September 2010

Addressed to: **O. V. LAVRYNOVYCH**

3. Ensure that account will be taken of the conclusions of the Venice Commission when preparing draft laws relating to the reform of the judicial system. Present the relevant draft laws to the President of Ukraine for submission, in accordance with established procedures, to the Verkhovna Rada of Ukraine for consideration.

Completion: June 2010

Addressed to: **M. Ya. AZAROV**
O. V. LAVRYNOVYCH
Yu. O. PLAKSIUK

4. Finalise and submit for consideration by the Verkhovna Rada of Ukraine the draft laws "On Reforming State and Local Government Printed Mass Media", "On the Protection of the Professional Activities of Journalists" and "On Amendments to the Law of Ukraine 'On Information'".

Completion: June 2010

Addressed to: **M. Ya. AZAROV**
O. V. LAVRYNOVYCH
O. I. MEDVEDKO

5. Prepare in the light of the conclusions of the Venice Commission and the recommendations of the PACE a new version of the Law of Ukraine "On the Public Prosecutor's Office" and submit it, in accordance with established procedures, to the Verkhovna Rada of Ukraine for consideration.

Completion: June 2010

Addressed to: **M. Ya. AZAROV**
O. V. LAVRYNOVYCH

6. Finalise and present for consideration by the Verkhovna Rada of Ukraine the draft Code of Criminal Procedure of Ukraine.
7. Develop and present for consideration by the Verkhovna Rada of Ukraine a draft Law of Ukraine "On Amendments to Penal Enforcement Legislation of Ukraine" relating to the transfer of the state penal enforcement service to the judiciary, the creation of a probation system and ensuring respect for the rights of convicted prisoners and detainees, in accordance with the European Prison Rules.

Completion: June 2010

Addressed to: **M. Ya. AZAROV**
K. I. HRYSHCHENKO
O. V. LAVRYNOVYCH

8. Finalise and submit to the President of Ukraine, in accordance with established procedures, the draft Laws of Ukraine "On the Ratification of the European Convention on the Compensation of Victims of Violent Crimes of 1983", "On the Compensation of Victims of Violent Crimes" and "On the Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings".

Completion: 1 August 2010

Addressed to: **M. Ya. AZAROV**
O. V. LAVRYNOVYCH
V. H. YATSUBA
T. V. MOTRENKO

9. Prepare and adopt an Action Plan concerning the reform of the system of state administration.

Completion: 1 August 2010

Addressed to: **M. Ya. AZAROV**
Yu. O. PLAKSIUK
O. V. LAVRYNOVYCH

10. Prepare and submit for consideration by the Verkhovna Rada of Ukraine a new version of the Law of Ukraine "On Amendments to the Law of Ukraine 'On the System of Public Television and Radio Broadcasting'".

Completion: September 2010

Addressed to: **M. Ya. AZAROV**
O. V. LAVRYNOVYCH

11. Finalise and submit for consideration by the Verkhovna Rada of Ukraine the draft Laws of Ukraine "On Ministries and other Central Executive Bodies" and "On Amendments to the Code of Ukraine on Administrative Infringements and the Customs Code of Ukraine (relating to appeals against decisions on administrative infringements)".

Completion: September 2010

Addressed to: **O. V. LAVRYNOVYCH**

12. Within the framework of the working group of the Committee for Legal Policy of the Verkhovna Rada of Ukraine, support the further development of the draft Law of Ukraine "On Advocates" (new version) and secure its passage through the Verkhovna Rada of Ukraine.
13. Secure the passage through the Verkhovna Rada of Ukraine of the draft Laws of Ukraine "On Amendments to Certain Laws of Ukraine on Ensuring Transparency of Ownership Relations with Regard to the Mass Media", "On the Security Services of Ukraine" and "On Free Legal Aid".

Completion: date of adoption of the laws

Addressed to: **T. V. MOTRENKO**
O. V. LAVRYNOVYCH

14. Finalise and submit for consideration by the Verkhovna Rada of Ukraine a new version of the Law of Ukraine "On the Civil Service".

Completion: 1 September 2010

Addressed to: **F. O. YAROSHENKO**
A. V. MOHYLIOV
O. V. LAVRYNOVYCH
K. I. HRYSHCHENKO

15. Secure the passage through the Verkhovna Rada of Ukraine of the draft Laws of Ukraine "On Amendments to the Law of Ukraine 'On Preventing and Counteracting the Legalisation (Laundering) of Proceeds of Crime'" and "On the Ratification of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism".

Completion: date of adoption of the laws

Addressed to: **M. Ya. AZAROV**
O. V. LAVRYNOVYCH
T. V. MOTRENKO

16. Submit proposals for the enhancement of state policy and legislation on the adoption of a gender-based approach to the system of state and social administration.

Completion: 1 July 2010

Addressed to: **O. V. LAVRYNOVYCH**
Yu. Ye. ZAITSEV
K. I. HRYSHCHENKO

17. Take measures to ensure the rigorous and expeditious execution of judgments of the European Court of Human Rights finding violations by Ukraine.
Keep the Head of State constantly informed of the outcomes.

Addressed to: **O. V. LAVRYNOVYCH**
A. V. MOHYLIOV
V. I. KHOROSHKOVSKIY
V. P. TSUSHKO
F. O. YAROSHENKO
O. V. LISITSKOV

18. Finalise and submit for consideration by the Verkhovna Rada of Ukraine the draft Law of Ukraine "On the National Committee of Ukraine for the Prevention of Torture".

Completion: 1 September 2010

Addressed to: **V. I. KHOROSHKOVSKIY**
K. O. YEFYMENKO

19. Finalise and submit for consideration by the Verkhovna Rada of Ukraine the draft Law of Ukraine "On the Interception of Telecommunications".

Completion: 1 September 2010

Addressed to: **Yu. Ye. RESHETNIKOV**
O. V. LAVRYNOVYCH

20. Finalise and submit for consideration by the Verkhovna Rada of Ukraine a new version of the Law of Ukraine "On Freedom of Conscience and Religious Organisations" and the draft Law of Ukraine "On the Restitution to Religious Organisations of Property Intended for Worship".

Completion: 1 December 2010

Addressed to: **M. Ya. AZAROV**
O. V. LAVRYNOVYCH
Yu. Ye. RESHETNIKOV
Yu. O. PLAKSIUK

**K. I. HRYSHCHENKO
V. P. TSUSHKO
F. O. YAROSHENKO
V. I. KHOROSHKOVSKYI
O. P. HINZBURH**

21. Finalise, taking into account the recommendations of the Parliamentary Assembly of the Council of Europe, and submit for consideration by the Verkhovna Rada of Ukraine a draft Law of Ukraine "On Access to Information".

Completion: 1 October 2010

Addressed to:

**M. Ya. AZAROV
Yu. Ye. RESHETNIKOV
O. V. LAVRYNOVYCH
M. A. KULYNIK
D. V. TABACHNYK
V. I. KHOROSHKOVSKYI
F. O. YAROSHENKO
V. P. TSUSHKO
A. V. MOHYLIOV
K. I. HRYSHCHENKO**

22. Taking into account the conclusions of the Venice Commission, and in accordance with the Council of Europe Framework Convention for the Protection of National Minorities, prepare and submit for consideration by the Verkhovna Rada of Ukraine a draft Law of Ukraine "On the Concept of a State Ethno-National Policy of Ukraine" and a new version of the Law of Ukraine "On National Minorities in Ukraine".

Completion: 1 December 2010

Ref. № 1-1/806 dated 30.04.10

V. YANUKOVYCH