



Provisional edition

The functioning of democratic institutions in Ukraine

Draft resolution¹

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

Co-rapporteurs: Mrs Mailis REPS, Estonia, Alliance of Liberals and Democrats for Europe, and Mrs Marietta de POURBAIX-LUNDIN, Sweden, Group of the European People's Party

1. The Parliamentary Assembly expresses its concern with regard to the criminal proceedings initiated under Articles 364 (abuse of office) and 365 (exceeding official powers) of the Criminal Code of Ukraine against a number of former government members, including against former Minister of the Interior, Mr Yuriy Lutsenko, former Acting Minister of Defence, Mr Valeriy Ivashchenko, former first Deputy Minister of Justice, Mr Yevhen Korniychuk, as well as former Prime Minister, Ms Yulia Tymoshenko.
2. The Assembly considers that Articles 364 and 365 of the Ukrainian Criminal Code are overly broad in application and effectively allow for post-facto criminalisation of normal political decision-making. This runs counter to the principle of the rule of law and is unacceptable. The Assembly therefore urges the authorities promptly to remove these two articles from the Criminal Code and for the charges against former government officials which are based on these provisions to be dropped. The Assembly wishes to emphasise that the assessment of political decisions and their effects is the prerogative of parliaments, and ultimately of the electorate, and not of the courts. It considers that that strict international standards delimitating political and criminal responsibility need to be developed.
3. The Assembly regrets the numerous shortcomings noted in the trials against former government members and considers that they may have undermined the possibility for the defendants to obtain a fair trial within the meaning of Article 6 of the European Convention of Human Rights.
4. In the view of the Assembly, these shortcomings are the result of systemic deficiencies in the justice system in Ukraine. These deficiencies are not new and have been longstanding concerns of the Assembly, relating, inter alia, to the lack of independence of the judiciary, the excessive recourse to, and length of, detention on remand, the lack of equality of arms between the prosecution and defence, as well as the inadequate legal reasoning by the prosecution and courts in official documents and decisions.
5. With regard to the independence of the judiciary, the Assembly:
 - 5.1. reaffirms its deep concern about the lack of independence of the judiciary and considers this is the principal challenge for the justice system in the country;
 - 5.2. considers that the current judicial appointment procedure undermines the independence of the judiciary. It invites the authorities to abolish or, at least considerably shorten, the 5 year probationary period for judges and to remove the Verkhovna Rada from the appointment process;
 - 5.3. also considers that judges in their probation period should not preside over politically sensitive or complex cases;
 - 5.4. further considers that the composition of the High Council of Justice runs counter to the principle of separation of powers and also undermines the independence of the judiciary. The Assembly therefore asks for amendments to be adopted to the relevant laws that effectively remove the

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representatives of the Verkhovna Rada, the President of Ukraine and the Prokuratura from the membership of the High Council of Justice. Pending the adoption of these amendments, these three institutions should appoint non-political members to the High Council of Justice;

5.5. invites the Verkhovna Rada promptly to adopt the necessary constitutional amendments that would remove the provisions which impede the implementation of the recommendations of the Assembly mentioned in paragraphs 5.2. and 5.4.;

5.6. expresses its concern about the many credible reports that disciplinary actions have been initiated started, and judges removed from office by the High Council of Justice on the basis of complaints of the Prosecutor's office because due to the fact that the judges in question had decided against the prosecution in a given court case. Such practices are incompatible with the principle of the rule of law and should be stopped at once.

6. With regard to detention on remand, the Assembly:

6.1. expresses its concern regarding the excessive recourse to detention on remand, often without justification or valid reasons, in the Ukrainian justice system;

6.2. notes in this regard that unlawful and excessive detention on remand is one of the major issues in judgments handed down against Ukraine by the European Court of Human Rights;

6.3. reaffirms that, in line with the principle of presumption of innocence, detention on remand should only be used as a measure of last resort when there is a clear risk of absconding or subversion of justice;

6.4. calls upon the authorities to ensure that the Criminal Procedure Code provides a clear procedure for the review of the lawfulness and duration of detention on remand. In addition, guidelines should be given that ensure that detention on remand is only applied as a measure of last resort and only on the basis of a well-grounded decision by a court.

7. With regard to equality of arms between the prosecution and defence, the Assembly:

7.1. notes with concern the bias in favour of the prosecution which is endemic in the Ukrainian justice system;

7.2. calls upon the authorities to ensure that, in the Criminal Procedure Code, the equality of arms between prosecution and defence is guaranteed both in law and in practice;

7.3. invites the authorities in particular to ensure that the Criminal Procedure Code explicitly provides for the defence to be provided with a copy of the case file of the prosecution and given a reasonable time, under the control of a judge, for the defence to familiarise itself with the case file.

8. The Assembly notes with concern of reports that the health of former Minister of the Interior, Mr Jurij Lutsenko, and former acting Minister of Defence, Mr Valeriy Ivashchenko, who are in detention on remand, is rapidly deteriorating and that both persons need medical treatment outside the prison system. The Assembly asks that both men be released at once for humanitarian reasons pending the outcome of their trial, also in view of its concerns regarding recourse to detention on remand in Ukraine.

9. The Assembly welcomes the fact that a number of important reforms were implemented, inter alia, in the area of the integration of the Ukrainian economy in the European economic space. This underscores the importance given by the authorities to the closer European integration of the country.

10. The Assembly reaffirms its position that it will not be possible to implement the reforms necessary for Ukraine to meet its commitments to the Council of Europe without first reforming the current Constitution. It therefore calls upon the President and Verkhovna Rada promptly to initiate a comprehensive constitutional reform process and not to delay this until after the next Parliamentary elections have taken place. The Assembly welcomes the positive opinion given by the European Commission for Democracy through Law (Venice Commission) to the proposal for a Constitutional Assembly, which the Assembly expects will be at the basis of the constitutional reform process. In addition, the Assembly urges the authorities to make full use of the recommendations given by the Venice Commission's opinions on previous drafts for constitutional reform.

11. The Assembly welcomes the systematic requests by the authorities for the opinion of the Venice Commission on draft laws prepared by them. However, it notes that, on several occasions, the draft laws on which opinions have been asked are subsequently withdrawn and that recommendations of the Venice Commission are not addressed in those laws adopted ultimately by the Verkhovna Rada. The Assembly therefore urges the authorities to take fully into consideration the opinions of the Venice Commission when preparing new laws, including on previous drafts on the same subject matter. In this context, the Assembly expects that the positive opinions given on the draft laws –prepared by the Presidential Commission for the Strengthening of Democracy– on the bar, on freedom of assembly and on the constitutional assembly will be taken into consideration in the draft laws that are sent to the Verkhovna Rada for adoption.

12. The Assembly takes note of the adoption, on 17 November 2011, of the Law of Ukraine on the Election of Peoples Deputies. While welcoming that a number of its previous concerns were addressed, the Assembly regrets that its main recommendations, namely the adoption of a Unified Election Code, and the adoption of a regional proportional election system, were not implemented. With regard to the new electoral legislation, the Assembly:

12.1. emphasises that the adoption of this parliamentary election law should not be used as a pretext for not adopting a Unified Election Code, which is still needed to ensure a coherent legal framework for all elections in Ukraine which is fully in line with European standards;

12.2. is concerned that the raising of the threshold for the proportional elections to 5%, combined with the prohibition on parties to form electoral blocs to contest the elections, will negatively affect the opportunities for new or smaller parties to enter Parliament. The Assembly is concerned that these provisions may reduce pluralism, and further increase polarisation, in the new Parliament. It recommends that the threshold be lowered and the prohibition on electoral blocs be removed from the electoral legislation, before the next parliamentary elections;

12.3. regrets the continued inclusion in this law of provisions that limit the right to stand for election for anyone convicted of a crime, regardless of the severity of the crime committed, and requests that constitutional amendments be adopted promptly that would allow these provisions to be removed from the electoral legislation;

12.4. calls upon the authorities to fully implement the recommendations of the Council of Europe Group of States against Corruption (GRECO) with regard to political party financing.

13. The Assembly considers that the upcoming parliamentary elections will be a litmus test for Ukraine's commitment to democratic principles. The Assembly is of the view that international observation of these elections will substantially contribute to their democratic conduct. It considers the Assembly should contribute to the international election observation efforts with a large delegation.

14. The Assembly notes that several important accession commitments have still not been fulfilled, despite the fact that Ukraine acceded to the Council of Europe in 1995, nearly 17 years ago. The successive governments of the country, as well as the Verkhovna Rada and its political factions, share responsibility for this failure. In Resolution 1755 (2010) the Assembly welcomed the ambitious reform programme of the authorities to honour the remaining accession commitments. Despite the initial positive results in several areas, the Assembly is concerned about signals that the drive and political will to implement these reforms are diminishing. The Assembly therefore urges the authorities, as well as all political forces in the country, to implement promptly the reforms needed to honour the country's accession commitments and to build a robust democracy in the country.