Legal Monitoring in Ukraine IV

Does Ukraine try to improve the Rule of Law?

Ukrainian reactions to the Council of Europe´s Parliamentary Assembly Resolution 1862

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Summary of conclusions

The Council of Europe´s Parliamentary Assembly (PACE) Resolution 1862 of 26.1.2012 (see Appendix 1) sharpens the wording and conclusions compared to a number of prior resolutions on Ukraine with mainly the same content. The trials against opposition politicians and officials of the former government have been an eye opener in European countries demonstrating that the chaos of the former years has been replaced not only by a more stable but also by a more authoritarian political system in Ukraine. They have also clearly demonstrated the fundamental short comings of the Ukrainian criminal justice system, which have existed for many years and have negatively affected the protection of individual human rights and the rule of law.

The Resolution makes demands and proposals related to the criminal prosecution of former governmental officials (paragraphs 1-3, 16 and 17 of this report), to the reform of the criminal justice system (paragraphs 4-15 and 24 of this report) and to the functioning of democracy in Ukraine (paragraphs 18-23 of this report).

The final clause of the Resolution reads: "The Assembly considers that the implementation of its recommendations, and especially those relating to the criminal prosecution of former government officials, would signal the commitment of the authorities to the norms and values of the Council of Europe. Conversely, failing to do so within a reasonable time frame would raise serious questions regarding the authorities' commitment to the principles of democracy and the rule of law, which should lead to an appropriate response from the Assembly. The Assembly therefore invites the Monitoring Committee to follow the situation closely and to propose any further action to be taken by the Assembly as required by the situation, including with regard to the possible consideration of sanctions if the Assembly's demands are not met."

It is the first time for more than 10 years that Ukraine has been threatened with possible sanctions which would sideline it with Belarus; Hardly a desirable situation for a country with declared European ambitions.

This report concludes that after the first two months following the adoption of the Resolution

- **The Ukrainian authorities have not given in to the demands related to the criminal prosecution of former governmental officials. On the contrary, new criminal cases have been pursued and several opportunities to amend the Criminal Code were not used.**
- **Only intense external pressure has forced the authorities to show a certain flexibility on the question of medical treatment outside the prison system and of international visits to the imprisoned politicians.**
- **The legislation related to the reform of the criminal justice system is being pressed forward by the Presidential administration with impressive intensity and speed, but the**

actual <u>implementation</u> of the reform is much more demanding and will last for years and depends on whether there is a real will to reform and to replace words with actions.

- **The reform of the Constitution is unpredictable due to being still in the very initial phase**
- **There are no actual initiatives to follow the recommendations of GRECO on political party financing**
- **There are no signs of intentions to change the election system.**

The Danish Helsinki Committee for Human Rights the 10th of April 2012.

Background

On the 26th of January 2012 the Council of Europe (CoE)[1] Parliamentary Assembly (PACE) adopted Resolution 1862 on "The Functioning of Democratic Institutions in Ukraine" (See Appendix 1).

This 4th Report on Ukraine from the Danish Helsinki Committee for Human Rights follows up on Resolution 1862 by describing the reactions of the Ukrainian authorities to the demands of the Resolution at the time of writing (Beginning of April 2012).

Resolution 1862 is based on a report dated 9th of January 2012 by the co-rapporteurs on Ukraine Mailis Reps and Marietta Pourbaix-Lundin of the PACE Monitoring Committee ("Committee on the Honouring of the Obligations and Commitments by Member States of the Council of Europe"). The report paints a very sinister picture of the actual rule of law situation primarily as demonstrated by the criminal proceedings against members of the former government and corresponds to the situation described in the Danish Helsinki Committee´s Preliminary Reports I, II and III[2]. For the first time for more than 10 years a resolution on Ukraine mentions the possibility of considering sanctions if the Assembly´s proposals and demands are not met.

Previous reports on Ukraine were presented to the Assembly in October 2005 (Resolution 1466), in April 2007 (Resolution 1549) and in October 2010 (Resolution 1755). The recommendations in Resolution 1862 partly repeat numerous previous recommendations concerning systemic reforms required to honour Ukraine´s commitment and obligations to the Council of Europe in these resolutions. Thus Resolution 1862 does not put an undue pressure on Ukraine to comprehensive reforms in a very short time; Resolution 1862 just reiterated what has been said by the CoE Assembly for many years.

Resolution 1862 was preceded by events during the October 2011 session of the Assembly when the rule of law situation in Ukraine became a subject of debate. A proposal from one of the political groups to hold an urgent debate on the rule of law situation in Ukraine obtained a majority of votes but not the required 2/3 majority. During the session briefings by representatives of the Danish Helsinki Committee for Human Rights and its "Preliminary Report II on Legal Monitoring in Ukraine" contributed to a decision by the PACE Monitoring Committee to request its co-rapporteurs to prepare another report on the situation in Ukraine. The Helsinki Committee´s Preliminary Report II from August 2012 concludes i.a. that the prosecution of a

[1] The Council of Europe is the main guardian of the rule of law for its member states. It is the international organisation responsible for the European Convention on Human Rights, an integrated part of national legislation of member states, including Ukraine. PACE is an assembly of parliamentarians from all 47 member states, appointed by the national parliaments; it meets four times a year. Next meeting will be in April 2012. Ukraine has been a member of the Council of Europe since 1995. When joining the CoE it undertook a number of commitments, including the reform of the Criminal Justice System which has still not been fulfilled. As a member of the Organisation Ukraine is also bound by obligations stemming from the CoE Statute, in particular with regard to upholding the rule of law, human rights and pluralistic democracy.

[2] www.helsinki-komiteen.dk

number of politicians from the former government is criminalizing normal political decisions without a reasonable suspicion of an offence having been committed, that there is a strong suspicion of a political purpose behind the prosecution, that the courts and the prosecution are not independent and impartial and that the selection of judges has probably violated both Ukrainian and international law.

President Yanukovitch public reaction to Resolution 1862 was to describe it as helpful. He created a working group to implement the recommendations of the PACE resolution. According to the Chief of Staff Serhiy Lyovochkin the President required the working group to make sure that at the next Assembly meeting there is a report of the PACE Monitoring Committee in which the maximum number of concerns voiced in the resolution are withdrawn.

In an interview on the 14th of February 2012 the chairman of the Verkhovna Rada Volodymyr Lytvyn stated the necessity to implement the requirements of the PACE Resolution regarding Ukraine: "We need to demonstrate responsible implementation of the Resolution and real actions in fulfilling respective instructions so that it is clear when and what recommendations Ukraine can and shall perform. It is necessary to find acceptable solutions in the legal plane to the implementation of PACE recommendations".

The CoE Human Rights Commissioner Thomas Hammerberg on the 23rd of February 2012 issued a report on Ukraine. Also he underlined the systemic deficiencies in the functioning of the Ukrainian judicial system and its implication for the enjoyment of human rights. He expressed his concern about the Judiciary being vulnerable to external interference, including of a political nature. He called for decisive action to remove the factors which render judges vulnerable and weaken their independence, among them the procedures and criteria for the appointment and dismissal of judges as well as the application of disciplinary measures. He pointed at the composition of the High Council of Justice which presently does not correspond to international standards. He also pointed at the imbalance between the Defence and the Prosecution and expressed the hope that the new Criminal Procedure Code will rebalance the system. He mentioned cases of abusive prosecutions, harassments and other forms of pressure on lawyers, which impair defence rights and prevent lawyers from effectively serving the cause of justice. Mr.Hammerberg pointed at the ongoing reform of the Criminal Justice System as a unique opportunity to address a number of structural problems, including excessive length of judicial proceedings, non-enforcement of domestic judicial rulings and the abusive use of remand in custody.

The PACE Standing Committee meeting in Paris on the 9th of March 2012 adopted a strong statement on the deteriorating situation of imprisoned politicians in Ukraine (See Appendix 2).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the 12th of March 2012 publicized its preliminary observations based on a

visit to Ukraine. The Committee in particular examined the health care provided to Mr. Ivashchenko, Mr. Lutsenko and Mrs. Tymoshenko and underlined that all possible efforts must be made to ensure that a precise diagnosis is established and that adequate treatment required by the state of health of the person concerned is provided to all prisoners. The Commission expressed its concern that in respect of each of the three persons considerable delays occurred in arranging specialized medical examinations outside the SIZO (Detention Center). As regards Mr. Ivashchenko and Mrs. Tymoshenko the delegation noted that symptomatic treatment is being provided to them, but that if the situation does not improve in the very near future, it would be desirable for additional interventions to be explored, if necessary in a specialized hospital setting.

The European Court on Human Rights decided on the 15th of March 2012 under Rule 39.1 of the Rules of Court to indicate to the Ukrainian Government that it is to ensure that Mrs. Tymoshenko receives adequate medical treatment "in an appropriate institution". It is considering a similar action in favour of Mr. Ivashchenko.

On the 21st of March 2012 the Verkhovna Rada of Ukraine adopted in the first reading a joint Action Plan on implementation of the PACE Opinion 190 (1995) on "Application of Ukraine to join the Council of Europe" and the new Resolution 1862 (2012).

Speaking at the end of a visit to Kyiv from 26th to 30th of March 2012 to discuss the follow-up given by the authorities to Resolution 1862 (2012) the co-rapporteurs for Ukraine of the Parliamentary Assembly of the Council of Europe Mailis Reps and Marietta de Pourbaix-Lundin welcomed plans to address structural deficiencies in the Ukrainian justice system such as the draft Code of Criminal Procedure, but stressed that these plans now need to be adopted and most importantly implemented. Referring to the imprisoned former government officials the co-rapporteurs stressed that the authorities should not only address the underlying deficiencies but also the questionable legal processes that are the result of them. "Not doing so would violate the right to a fair trial as spelled out in the European Convention on Human Rights," they said. They visited Mr. Lutsenko in prison and asked the authorities to ensure that he receive all the necessary independent, mutually-trusted medical expertise needed to properly diagnose and treat his illness. The co-rapporteurs will visit Ukraine again in May this year.

Vote on the draft Criminal Procedure Code in the second reading is scheduled for 10th of April 2012. The draft Code has been reviewed favourably by CoE experts, but more than 4000 amendments have been proposed after the first reading of the Code on the 9th of February 2012. The final outcome therefore remains uncertain.

A new Law on Prosecution and Law on the Bar is planned to be submitted and considered next as part of the reform project.

The report is produced for the Danish Helsinki Committee for Human Rights as a part of its Legal Monitoring program by Mikael Lyngbo, who has many years of experience as a public prosecutor, chief of police and deputy chief of the Danish Security Service. He has also worked for the EU and other international organizations as Chief Advisor in Albania, Political Advisor in the Sudan, Rule of Law Expert in Iraq and Head of Evaluation Team in South Africa.

The conclusions and proposals of Resolution 1862

1. **Amend Articles 364 and 365 of the Criminal Code** (Paragraph 2 and 3 of Resolution 1862 (See Appendix 1))
    a. The Resolution describes these provisions of the Criminal Code of Ukraine to be overly broad in application and effectively allow for post facto criminalization of normal political decision-making[3].
    b. What has been critizised both in the Resolution and in Helsinki Committee reports is the very broad and unprecise definition: "exceed the rights and powers vested in him/her, where it caused any substantial damage" which has allowed for criminalization of normal political decisions. It has been argued that Article 365[4] is also used to prosecute law-enforcement officials who use torture and ill-treatment and that decriminalization of the whole Article 365 would therefor be a drawback for the protection of human rights in Ukraine. A criminalization of abuse of public office is indeed a normal element in most criminal codes, but the criminal codes of most other countires define in details by which acts the public authority is to be abused in order to violate the law. The Resolution therefore proposes amendment, not abolition of the articles.
    c. During high-level meetings in September 2011 President Yanukovych left his European partners with the impression that these articles would be amended and consequently the controversial cases against former government members be stopped.
    d. Talking to journalists on the 4 February 2012 in Munich after his meeting with U.S. Secretary of State Hillary Clinton, President Yanukovitch stated that during the improvement of national legislation it was necessary to resolve the problems that had appeared during the Yulia Tymoshenko trial. According to him, in particular these were the Articles 364 and 365 of the Criminal Code of Ukraine.
    e. No initiative to amend Articles 364 and 365 has however been taken in spite of the oral statements and a number of natural opportunities to do so have been missed.

[3] See also Danish Helsinki Committee Preliminary Report II

[4] **Article 365. Excess of authority or official powers**

1. Excess of authority or official powers, that is a willful commission of acts, by an official, which patently exceed the rights and powers vested in him/her, where it caused any substantial damage to the legally protected rights and interest of individual citizens, or state and public interests, or interests of legal entities, shall be punishable by the correctional labor for a term up to two years, or restraint of liberty for a term up to five years, or imprisonment for a term of two to five years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.
2. Excess of authority or official powers accompanied with violence, use of weapons, or actions that caused pain or were derogatory to the victim's personal dignity, shall be punishable by imprisonment for a term of three to eight years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.
3. Any such actions as provided for by paragraph 1 or 2 of this Article, if they caused any grave consequences, shall be punishable by imprisonment for a term of seven to ten years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

f. In September 2011 the President submitted a draft law on "humanization of economic crimes" which decriminalized several economic crimes and was adopted as a law on the 15th of November 2011. It however did not include any changes with regard to Articles 364 and 365.
g. In January 2012 the President submitted a draft new Criminal Procedure Code which in its final provisions proposes to amend several laws, including the Criminal Code; it however did not propose any changes to these articles of the Code.
h. Since September 2011 the opposition has submitted to the Verkhovna Rada five draft laws with various changes to these articles. Neither of them was supported by the governing majority and was thus rejected.

2. **Drop the charges based on Articles 364 and 365 of the Criminal Code** (Paragraph 2 and 3 of the Resolution)
    a. The Articles have been essential to most of the indictments against politicians, including those against Mrs. Tymoshenko, Mr. Lutsenko and Mr. Ivashchenko. The trials bear the marks of politically motivated and selective justice.
    b. This fact of a political background to the charges, the prosecution and the convictions must explain the encouragement of the Resolution to politically interfering in the proceedings in order to have them dropped. Political interference in pending trials is normally not acceptable.
    c. Former Prime Minister Yulia Tymoshenko was sentenced to 7 years imprisonment and ban to hold certain public offices for 3 years for violation of Article 365.3 on the 11th of October 2011. The sentence was confirmed by the Court of Appeal on the 23rd of December 2011. She is now serving the sentence in the Kachanivska penal colony No. 54 in the Kharkiv region. A cassation appeal hearing is expected to take place on the 15th of May 2012 in the Higher Specialized Court for Civil and Criminal Cases.
    d. Former Minister of Interior Yurij Lutsenko was sentenced on the 27th of February 2012 to 4 years imprisonment for violation of Articles 191.5 and 365.3 and confiscation and ban to hold certain public offices for 3 years. The sentence has been appealed and the appeal hearing scheduled for the 15th of May 2012. He is still detained.
    e. The case against former acting Minister of Defence Valeriy Ivashchenko is still pending. A District Court sentence is expected in mid April 2012. He has been detained since August 2010. The entire trial has been influenced by his health problems which have made pain reducing medicine necessary. He has several times had to be carried to the court room and attend the sessions on a stretcher. This raises serious questions as to the fairness of the trial.
    f. The most spectacular cases involving these articles and the ones leading to them being mentioned in the Resolution have thus not been dropped. On the contrary, a new sentence has been added and new criminal cases have been pursued.

g. Georgy Filipchuk, former Environment Minister in Mrs. Tymoshenko's government has very recently been sentenced to three years imprisonment for violation of Article 365, 3. when concluding an agreement with a law firm over a dispute between the Environment Ministry and Vanco International Ltd., a major owner of which is influential oligarch and Party of Regions MP Rinat Akhmetov.
h. New investigations for violation of Articles 364 and 365 are still being opened, for instance in a case against Mr. Arsen Avakov, a former head of the Kharkiv regional state administration during the former government, for allegedly illegal authorization leading to sale of a land plot. Mr. Avakov has been arrested in Italy and his extradition to Ukraine has been requested.

3. **The President to consider all legal means available to him to release the former government members and to allow them to compete in the upcoming parliamentary elections** (Paragraph 3 of the Resolution)
    a. According to the Regulation on the Procedure for Pardoning (Presidential Decree 902 of 16th of September 2010) pardon of a person convicted for grave crimes requires a personal request from the convicted person and may be satisfied only for humanitarian reasons. Parole without personal request of the convicted requires therefore the mentioned Regulation to be amended, which is however within the power of the President.
    b. In a TV interview on the 24th of February 2012 the President stated that the procedure for pardoning former Ukrainian Prime Minister Yulia Tymoshenko could start after the cassation review and if the ex-premier submits a respective application to the Head of State. Mrs. Tymoshenko has publicly refused to file any application for pardon as she "did not commit the crimes she was charged with".
    c. Also Mr. Lutsenko has in an interview to Ukrainska Pravda on 6. March 2012 refused to ask for a parole.
    d. Mr. Korniuchuk was included in the Amnesty Law for 2011 after the indictment had been changed by the Prosecutor General´s Office. This change in the indictment took place after he had resigned as party chairman and after his father-in-law had abstained from running as candidate for reelection to President of the Supreme Court.
    e. In the TV interview the 24th of February 2012 The President also stated that "I believe that we should have all these cases considered again from the point of view of the new Criminal Procedure Code, which will comply with all European standards". It is unclear what he meant as the draft CPC does not hold any transitory provisions which would allow re-trial of the convictions.
    f. Mrs. Tymoshenko and Mr. Lutsenko will therefore be barred from participating in the upcoming parliamentary election in October 2012 unless their judgments are changed, for Mrs. Tymoshenko in the Cassation Court and for Mr. Lutsenko in the Appeal or Cassation Court. Mr. Korniychuk is in principle not barred; whether he wants to pursue

his political career is not known. Mr. Ivashchenko is not a professional politician and will probably not want to stand for election. The deadline for registration of candidates will expire in early August 2012.

g. First Deputy Head of the Batkivschyna Party Oleksandr Turchynov on the 17th of March 2012 stated that Mrs. Tymoshenko would head the joint list from the opposition in the upcoming parliamentary elections. This appears to be a political move as both Mrs. Tymoshenko and Mr. Lutsenko will be crossed out from the party list by the Central Election Commission if their convictions stand valid at the time of submission.

h. Mrs. Tymoshenko can expect in the near future to be indicted in another trial including the so-called UESU case going back to 1996[5]. The time for familiarization ended on the 28th of March 2012 and a judge has been appointed to hear the case in Kharkiv. A separate problem is whether her health situation allows her to participate in the proceedings to a degree which allows the trial to be fair.

i. Mr. Lutsenko is also to be tried under Article 365.3 for another alleged crime on illegal surveillance in the case of poisoning of Mr. Jurchenko; the hearing in the case was scheduled for the 2nd of April but has been postponed till the 23rd of April 2012.

4. **Abolishing or at least considerably shorten the five-year probationary period for judges to strengthen the independence of the Judiciary** (Paragraphs 5 and 6 of the Resolution)
    a. Ukrainian judges are initially appointed for a period of 5 years by the President of Ukraine. Their permanent appointment thereafter is to be approved by the Verkhovna Rada. This procedure has been criticized for making the judges extremely vulnerable to political pressure in that period[6].
    b. The 5 years probation period is prescribed in the Constitution of Ukraine Articles 126 and 128 and in the Law on the Judicial System and Status of Judges.
    c. No separate initiative is known to have been taken to amend the Constitution in order to abolish or shorten the probation period[7].

5. **Removing the Verkhovna Rada from the appointment process to strengthen the independence of the Judiciary** (Paragraphs 5 and 6 of the Resolution).
    a. The procedure for appointment of judges is prescribed in Articles 84 and 128 of the Constitution and the Law on the Judicial System and Status of Judges. The new wording of the latter law adopted in July 2010 significantly limited the role and powers of the Parliament´s Judicial Committee in the election of judges. It did not, however, restrict the powers of the Parliament itself as that would require changes in the Constitution.
    b. No separate initiative is by now known to have been taken to change the Constitution in order to remove the role of the Verkhovna Rada from the appointment process[8].

[5] See The Danish Helsinki Committee Preliminary Report III
[6] See Danish Helsinki Committee Preliminary Report II
[7] See also Paragraph 18 of this Report on constitutional reform.

c. That is probably not to be expected either taking into consideration the answer given by the Minister of Justice Oleksandr Lavrynovych in the Verkhovna Rada on the 10th of February 2012. He found that the new version of the law "On Judicial System and the Status of Judges" with amended procedures of appointment, election, holding responsible and dismissal of judges guaranteed their independence.

6. **Judges in their probation period should not preside over politically sensitive or complex cases** (Paragraphs 5 and 6 of the Resolution)
   a. A majority of the judges in the trials against Mrs. Tymoshenko, Mr. Lutsenko and Mr. Ivashchenko were still in their 5 years probation period.
   b. Also judges against whom a disciplinary case or even a criminal case is pending will be vulnerable to their understanding of political expectations or direct pressure. The Supreme Court of Ukraine on the 1st of March 2012 submitted for repeated consideration a criminal case against Judge Serhiy Vovk of the Kyiv's Pechersky District Court for issuing unlawful rulings. Judge Vovk was the chairman of the court in the Lutsenko case and is still the chairman in the pending Ivashchenko case. He was approved by Parliament as a permanent judge as recently as the 13th of February 2011 and made responsible for these trials although he in that year was twice under investigation by the High Council of Justice, last time conducted by Mr. Andriy Portnov, member of the HCJ and Head of the Judicial Department of the Presidential Administration and responsible for judiciary-related matters, including appointments and dismissal of judges.
   c. It seems evident that these judges can not have been randomly selected but have been specially selected for the trials due to their vulnerability[9]. Media reports recently described how the presidents of the courts could suspend the random selection system and hand pick special judges for special cases without it even being registered in the system and thus not being the subject of later scrutiny.
   d. According to the draft Criminal Procedure Code being considered by the Rada cases against senior public officials will be considered in the first instance by a panel of 3 judges elected on permanent terms, in appeal by a panel of 5 judges and in cassation by a panel of 7 judges each with an experience of more than 10 years.
   e. Since the passing of the Resolution 1862 there have been no new trials of a political sensitive or complex nature allowing to assess whether a change in policy has been implemented by the Presidents of the courts.

7. **Remove the representative of the Verkhovna Rada, the President and the Prokuratura from the membership of the High Council of Justice. Pending the adoption these three institutions**

[8] Idem.
[9] See Danish Helsinki Committee Preliminary Report II

should appoint non-political members to the High Council of Justice (Paragraphs 5 and 6 of the Resolution)

a. PACE Resolution 1862 describes the composition of the High Council of Justice as running counter to the principle of separation of the executive, legislative and judicial powers and thus undermining the independence of the judiciary. The insufficient separation of powers has led to a political dominance of a body which has the responsibility for i.a. recommendations for appointment of judges and for submissions for dismissal of judges.
b. Changing the composition of the HCJ will require an amendment to the Constitution. According to Article 131 of the Constitution the Parliament, the President, the Congress of Judges, the Congress of Attorneys, the Congress of Legal Universities and Academic Institutions each appoint 3 members, the Conference of Prosecutors appoints 2 members and the Minister of Justice and the President of the Supreme Court and the Prosecutor General are ex officio members, totaling 20 members.
c. Until recently one of the appointees of the President was the head of the Security Service, which in PACE document 12357 was criticized: ”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”.
d. A similar conflict of interest exists when the Prosecutor General and his 2 deputies are members of the HJC and at the same time are parties to the criminal trials managed by the judges; there have also been recent examples of disciplinary cases against judges apparently for having argued and decided against the prosecution[10].
e. According to Council of Europe standards at least half of the members of a body like the High Council of Justice should be judges elected by their peers[11]. The judicial reform adopted in July 2010 changed the provisions on the composition of the High Council of Justice. In particular it was provided that 2 out of 3 members of the HCJ appointed by the Parliament and the President should be judges and 1 out of 3 members appointed by the Congress of Attorneys, Congress of Representatives of the Legal Universities and Academic Institutions and by the Conference of Prosecutors should be judges as well. This new arrangement will however be effective only for future appointments of members of the HCJ, which can last up to the 6 years (the term of office for HCJ members); No new members have been appointed by the three mentioned institutions since the the judicial reform. Anyway such a change fails to comply in full with the European standards, which require that judicial members of the Judicial Council is

[10] See paragraph 8 of this Report
[11] Magna Carta of Judges, Article 13 (https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE-MC%282010%293)
CCJE Opinion No. 10, paragarph 18 (https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE%282007%29OP10)
CoE CM Recommendation CM/Rec(2010)12 on judges, paragraph 27 (https://wcd.coe.int/ViewDoc.jsp?id=1707137)

elected by their peers, which are other judges representing various levels of the judicial system. Ukraine is however not the only European country not to comply with that standard.

f. No initiative is known to have been taken to further change the composition of the High Council of Justice, which will require an amendment to the Constitution. However the Minister of Justice O. Lavrynovych on the 10th of December 2012 answered a question in the Verkhovna Rada on whether the current composition of the High Council of Justice and the procedure of its formation correspond to the European standards of independence of the system of justice. He said that the Ministry of Justice is planning to reform the High Council of Justice as the current methods of forming its powers and structure does not correspond to the mission imposed on it by the Constitution. One might therefore expect the problem to be dealt with in the amendment of the Constitution of Ukraine[12].

8. **Stop the use of disciplinary actions against judges on the basis of complaints from the Prosecutor´s Office because the judges in question have decided against the prosecution in a given court case** (Paragraph 6.6 of the Resolution).

   a. An amendment to the Law on the High Council of Justice in May 2010 introduced a broad and imprecise definition of what constitutes a breach of a judge´s oath leading to a disciplinary case and the demand for dismissal of a judge. It includes such acts as "commission of actions that degrade the title of judge" and "violation of the moral and ethical principles of the conduct of the judge". In a country like Ukraine precise definitions is a necessary guarantee against abuse.

   b. Some examples illustrate the problem of the present situation on disciplinary cases against judges:

      - Disciplinary case initiated on the 7th of June 2011 by a Deputy Prosecutor General, who is a member of the HCJ, against 3 judges of the Kyiv Court of Appeal for not extending remand in custody as requested by the prosecutor in the case.
      - The president of the Kyiv Court of Appeal addressed the High Council of Justice demanding the dismissal of 3 judges of the court for "violation of their oath" by against the request of the prosecution having replaced pre-trial detention with undertaking not to abscond for 2 high ranking officials from the former administration.
      - Disciplinary proceedings opened on the 7th of November 2011 against a number of Supreme Court judges for alleged violation of oath by in 2009-10 having changed 15 life-imprisonment sentences to 15 years imprisonment. The

[12] See paragraph 18 of this Report.

background is a legal dispute on the interpretation of the situation in a short period after the death penalty was abolished and life imprisonment did not exist in the law. Never the less a number of death penalties were transformed into life imprisonment. This purely legal question is now to be decided by an administrative body like the High Council of Justice, and the decision to open disciplinary proceedings was announced by a Deputy Prosecutor General, who is a member of the HCJ.

- Disciplinary case against 3 Appeal Court judges, who changed a sentence against a council deputy for shooting an intruder into an area around a pond from 14 years of imprisonment to 2 years of conditional imprisonment and instantly released the deputy. The case is under cassation appeal, but even before it has been decided by the higher court a disciplinary case is opened by the Prosecution for violation of the oath. The High Council of Justice thus de facto acts as another court instance which assesses the decisions of the judges and confuses the functions of prosecution with that of disciplining judges.

c. The judiciary in general feels its independence to be under pressure. According to a recent survey based on anonymous statements from 579 judges from all over the country and from different levels 20% of the judges found they faced pressure from executive bodies, 17% from the Parliament, 18% from prosecutors, 12% from presidents of their courts and 11% from higher courts. 57% of the judges did not consider the High Council of Justice to be independent and 60% found that its work did not promote the independence of the judiciary[13].
d. The lack of independence of judges will not be solved by the new Criminal Procedure Code as disciplinary procedures against judges are regulated in the "Law on the Court System and Status of Judges" and in the "Law on the High Council of Justice".

9. **The Verkhovna Rada promptly to adopt the new draft Criminal Procedure Code fully taking into consideration the recommendations made by the Council of Europe** (Paragraph 8.4 of the Resolution).
    a. A draft Criminal Procedure Code prepared by the Presidential Administration was submitted to the Rada on the 13th of January 2012. The draft has not been reviewed by the Venice Commission, but CoE legal experts have participated in the working group and found the draft presented to the Rada in the first reading to be in accordance with European standards. The comments of the CoE experts have not been publicized by the Administration and there has therefore been little public debate or consultations before the submission.

[13] The survey was made upon request of the Council of Judges and presented on the 11th of November 2011 in the Supreme Court.

b. The draft CPC has had a rather rough ride through the Verkhovna Rada. The opposition members of the Parliamentary Committee on Law Enforcement walked out and left the meeting on the 12th of March 2012 in protest, whereafter the draft Code by the majority parties was voted to be transmitted to the plenary session for the 2nd reading. Overall about 4000 amendments have been submitted to the draft text approved in the first reading.
c. It was expected to be approved before mid-March, but seems to have been delayed due to the many amendments. The vote on the draft law is now scheduled for the 10th of April 2012. It is at the time of writing impossible to predict whether the final law will be in accordance with European standards. It is most regrettable if such a central law will not be approved by a broad majority.

10. **The Criminal Procedure Code to provide a clear procedure for the review of the lawfulness and duration of detention on remand on the basis of a well-grounded decision by a court based on justification of valid reasons (clear risk of absconding or subversion of justice) and avoid excessive recourse to and length of detention on remand** (Paragraph 7 of the Resolution)
    a. The draft Criminal Procedure Code presented in January 2012 has provisions guaranteeing the protection against unjustified detention on remand, including the requirement that detention shall be applied only if the Prosecutor proves that no other less restrictive measure can be used, establishing a maximum duration of 6 months for lesser and medium gravity crimes and 12 months for grave and especially grave crimes and introduction of a "reasonable time" requirement. At the same time the draft CPC will preserve a broad list of grounds for detention, including a vaguely worded ground of "obstruction of criminal proceedings", similar to the one used against former government officials to justify detention when the defendant did not cooperate or excessively used his/her procedural rights.
    b. As mentioned the text of the final CPC was not available at the time of writing of this report. It therefore remains to be seen whether the new CPC and its practical implementation will lead to the courts actually justifying the decision on detention on valid reasons, changing the excessive use of detention of remand and shorten the length of detention.

11. **Bias in the Ukrainian justice system in favour of the prosecution to be removed to ensure equality of arms** (Paragraph 8 of the Resolution)
    a. Historical and political reasons have given the prosecution in Ukraine the upper hand in the power balance with the judiciary[14]. This has been i.a. the result of the prosecution having a number of functions normally not connected to prosecution, the prosecution

[14] See Preliminary Report II

being strongly over-represented in the High Council of Justice[15] and having the power to initiate disciplinary cases against judges[16]. One of the results has been that only 0.2% of the defendants are acquitted by courts.

b. The draft Criminal Procedure Code is supposed to establish a prosecution according to European standards as regards its role in the criminal procedure. Comprehensive reform of the prosecution system also requires amendments in the Constitution and a new Law on the Prosecutor's Office. Structural changes and new articles will however not in itself change a long tradition and the institutional instinct of self-preservation, and no Ukrainian administration has until now willingly given up control over such important power base. It will require intensive political support for the reform from all parts of the Criminal Justice System and from the President and the Government. Whether that exists in deed and not only in words remains to be seen.

c. A planned CoE programme "Support for Reform of the Public Prosecution System as part of the Reform of the Criminal Justice System" could be an important element in the implementation of the reform.

12. **Guarantee equality of arms in the Criminal Procedure Code and in practice between prosecution and defence** (Paragraph 8 of the Resolution).

    a. Little support has until now been demonstrated for the legitimate role of defence in a criminal proceeding. The role of the defence has been limited by the Criminal Procedure Code but in real life even more important has been the lack of appreciation from some judges and prosecutors. This was confirmed by a number of statements and decisions during the recent trials against politicians. The new Criminal Procedure Code intends to significantly shift the balance to ensure equality of arms.

    b. The Parliament is also in the future to consider a new Law on Prosecution and a new Law on the practice of law (Law on the Bar)[17]. President Viktor Yanukovych stated on the 14th of February 2012 at the ceremony of swearing-in of judges: "In order to qualitatively transform such institutions as the prosecution and the Bar, I have created a working group that will soon consider and submit to the Parliament a new bill on the Bar". He expressed the belief that it is lawyers, who should be the main institution for the effective protection of citizens' rights, freedoms, and interests by providing them with a top-quality legal assistance.

13. **The Criminal Procedure Code to provide for the defence to have a copy of the case files to ensure equality of arms** (Paragraph 8 of the Resolution).

    a. The draft CPC presented to the Parliament provides for such a requirement.

[15] Paragraph 7 of this report
[16] Paragraph 8 of this report
[17] The Venice Commission document CDL-AD(2011)039 on Joint Opinion on the draft law on the bar and practice of law of Ukraine, adopted at its 88th Plenary Session (Venice, 14-15 October 2011)

14. **Defence to be given reasonable time, under the control of a judge, to familiarize with the case file** (Paragraph 8 of the Resolution).
    a. Defence attorneys in the pending cases against former government members have criticized the time they were given to familiarize with the case files often consisting of a considerable number of volumes. The difficulties were increased by the fact that the familiarization should take place in the investigator´s office as the defence did not have their own copy. The investigator decided when, where and what to be read by the defence every day, often leading to conflicting interests with other obligations of the defence. Lack of progress in the familiarization process was used as one of the justifications for the detention of Mr. Lutsenko in December 2010.
    b. According to an amendment to the Criminal Procedure Code in April 2011 the decision of the investigator on the conditions for familiarization can now be reviewed by a judge. The amendment clearly targeted the pending proceedings against former government officials and was also used immediately in the cases against Mr. Lutsenko and Mrs. Tymoshenko, in the latter case without consulting the defence.

15. **Reform of the Prosecutor´s Office, an extremely centralized institution with excessive powers, in line with CoE standards and Ukraine´s accession commitments** (Paragraph 9 of the Resolution)
    a. When becoming a member of the Council of Europe in 1995 Ukraine committed itself to reform the Prosecution, changing it from the functions of a Soviet Prokuratura to a European standard prosecution service. This has been done so far neither by the present nor by any of the former governments.
    b. The new CPC will change the provisions regulating the function of the prosecution during investigation, indictment and trial, but not the organization and responsibilities of the Prosecutor General´s Office. That will require a new Law on Prosecution.
    c. The “Commission for Strengthening Democracy and the Rule of Law” (a body under the President) has finalized drafting a new Law on Public Prosecution and sent it for comments to the Venice Commission which is expected to provide its opinion during its next meeting in June 2012. It is uncertain whether there is political support for this draft from the President considering the tasking of the working group mentioned below.
    d. In November 2011 the President tasked a working group of his administration with the preparation of a draft Law on Public Prosecution “…in line with universally recognized international democratic principles”. The working group has however not presented a draft law yet. The time limit set by the President is one year after the adoption of the Criminal Procedure Code which most likely will be as late as spring 2013. Council of Europe experts is expected to participate in the working group.

e. Ukrainian President Viktor Yanukovych on the 6th of April 2012 signed a decree to set up a "Committee for Reform of Law Enforcement Agencies" under the President with the main task to improve and optimize the structure, activity and personnel of the law enforcement system of Ukraine according to international norms and standards. The committee is headed by the President. Whether reform of the prosecution will be part of the mandate is not clear.

16. **Release of Mr. Lutsenko and Mr. Ivashchenko from detention to allow them medical treatment outside the prison system** (Paragraph 10 of the Resolution)
    a. Neither Mr. Lutsenko nor Mr. Ivashchenko has been released from detention, although the prison system evidently has not the expertise and resources to treat them properly.
    b. Mr. Lutsenko underwent on the 6th of April 2012 a medical examination at the Kyiv City Clinic for Emergency Aid. There is no information about the result or any treatment given.
    c. Mr. Ivashchenko has not been treated outside the prison.

17. **Allow medical examination and if necessary treatment by independent doctors outside the prison system of Mrs. Tymoshenko** (Paragraph 10 of the Resolution)
    a. Mrs. Tymoshenko was after lengthy deliberations and negotiations examined by two medical teams from Germany and Canada on the 14th and 15th of February 2012. There have been later discussions between the international teams and the Ukrainian medical team on a number of issues and only the final document of the German team has been publicized. A central part of the German document reads: "The patient (YT) could not have been treated in a German prison institution. It is due to the complex measures needed, the existing complex harm to her health and the required expertise in treating an old chronic disease. German penitentiary is also lacking the necessary equipment and instruments…Currently (at the time of examination) operation is not recommended. However if the pain persists despite the therapy, an operation will need to be carried out, if only to get rid of the pain. There is no expectation of achieving full recovery of the nerve at this stage". It is a safe assumption that the Ukrainian prisons are not better equipped than the German.
    b. The European Court on Human Rights decided on the 15th of March 2012 under Rule 39.1 of the Rules of the Court to indicate to the Ukrainian Government that it is to ensure that Mrs. Tymoshenko receives adequate medical treatment "in an appropriate institution". It referred to Article 3 of the European Convention on Human Rights Article 3 on torture and inhuman treatment.
    c. Ukrainian Justice Minister Oleksandr Lavrynovych said at a press conference the next day that "the European Court of Human Rights cannot adopt such decisions, it does not have competence to decide where to treat, whom to treat and in which way". He added that there however are no legal obstacles to treating Tymoshenko in a hospital

outside the Kachanivska penal colony if this is necessary. Mr. Lavrynovych noted that according to the State Penitentiary Service the Kachanivska penal colony in Kharkiv, where Tymoshenko is contained, "has all the necessary equipment, medicines, and experts from civil hospitals in order to carry out the eight stages of the treatment plan."

d. The Ukrainian authorities have been forced to reconsider that position. Prosecutor General Pshonka has now instructed the State Penitentiary and the Ministry of Health Protection to take the necessary measures to ensure examination and treatment of Mrs. Tymoshenko in a specialized medical institution outside of the Kachnivka prison colony. Subsequently the Ministry of Health has offered Mrs. Tymoshenko to be treated in the hospital of the State Railway in Kharkiv which allegedly has all necessary facilities and equipment as prescribed by the German doctors.
e. Mrs. Tymoshenko has refused to be treated in the Hospital of the State Railway. She has argued that she does not want to receive special treatment at a special hospital which could later make her vulnerable to criticism.
f. The Foreign Ministry of Ukraine has on 4.4.2012 asked Germany to assist in organizing a visit to Kharkiv by the German doctors who were members of the international commission for the examination of Mrs. Tymoshenko to check whether the hospital in which Tymoshenko is planned to be treated meets their requirements. The German doctors are expected to arrive in Ukraine in the week after the 9th of April 2012 to decide on the further treatment of Mrs. Tymoshenko at a Kharkiv hospital.
g. According to media reports on 7.4.2012 Ukraine and Germany are in talks about the possibility of treating former Prime Minister of Ukraine Yulia Tymoshenko in a German clinic. Interesting is that the information was made public by First Deputy Prosecutor General Rinat Kuzmin although he argued against it.

18. **Initiate a comprehensive constitutional reform process to implement the commitments to the CoE as recommended by the Venice Commission[18] through a constitutional assembly (**Paragraph 13 of the Resolution).
    a. On 25 January 2012 the President issued a decree approving a "Concept Paper on the Formation and Organization of the Constitutional Assembly". It suggests a consultative body under the President with 100 members, including representatives of civil society and political parties. Candidates should be proposed by 16th of April 2012. There is no deadline set for the activities of the Assembly or for approval of its composition and beginning of work.
    b. The opposition political parties have refused to participate in the Constitutional Assembly. President Yanukovych has called the opposition's refusal to take part in the Constitutional Assembly a politically motivated trickery.

[18] Document CDL-AD(2011)002 Opinion on the concept paper on the establishment and functioning of a constitutional assembly of Ukraine - Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011)

c. The consensus of two thirds of the Verkhovna Rada deputies is needed to adopt any changes in the Constitution, and changes in chapters I, III and XIII will also require a subsequent national referendum. Much will therefore depend on the results of the parliamentary elections in October 2012.
d. Among the issues to de dealt with in the amendment of the Constitution are those described in paragraphs 5 and 7 of this report.

19. **Not to withdraw draft laws (for instance draft laws on the Bar[19], on Freedom of Assembly[20] and on the Constitutional Assembly[21]) based on recommendations by the Venice Commission from the Verkhovna Rada and instead adopting laws in which the recommendations are not taken into account** (Paragraph 14 of the Resolution).
    a. The problem described in the Resolution is that several working bodies independently and uncoordinated send draft laws to the Venice Commission for comments, even if they have not been discussed in a broader political context and stand little chance of being adopted[22]. The resources of the Venice Commission are being exhausted and it gets drawn into the internal Ukrainian power game.
    b. The draft laws on Freedom of Assembly and on the Constitutional Assembly mentioned in the Resolution have not yet been presented to the public.

20. **Changes to the Law on Election[23]** (Paragraph 15 of the Resolution)
    a. No proposal to amend the legislation on elections in this regard is known to be prepared or is expected. A recent revision of the Election Law obtained broad support both in the majority and the opposition parties.
    b. There are, however, reports that members of the parliament from the majority parties are planning to challenge a number of provisions of the new law in the Constitutional Court. A decision by the Court to find certain provisions unconstitutional may open a way for new amendments, going beyond contested provisions and not necessarily in line with PACE and Venice Commission recommendations.

21. **Remove the provisions of the Constitution and in the Election Law on limitation of the right to stand for election if convicted of a crime, regardless of the severity** (Paragraph 15.4 of the Resolution)

[19] Document CDL-AD(2011)039 Joint Opinion on the draft law on the bar and practice of law of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011)
[20] Document CDL-AD(2011)031 Joint opinion on the draft law on freedom of peaceful assembly of Ukraine by the Venice Commission and the OSCE/ODIHR adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011)
[21] Document CDL-AD(2011)002 Opinion on the concept paper on the establishment and functioning of a constitutional assembly of Ukraine - Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011)
[22] See paragraph 15 of this report
[23] Document CDL-AD(2011)037 Joint Opinion on the Draft Law on Election of People's Deputies of Ukraine adopted by the Council for Democratic Elections at its 38th meeting (Venice, 13 October 2011) and by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011)

a. No proposal to amend the Constitution or the Election Law in this regard is known to be prepared or is expected.

22. **Implement the recommendations of GRECO on political party financing** (Paragraph 15.5 of the Resolution)
    a. No progress is achieved and no measures are planned for the near future. The State Programme on Combating Corruption adopted in November 2011 by the Government provides for elaboration of relevant proposals only in 2013. Similarly the Action Plan on Honoring Ukraine´s Obligations and Commitments to the Council of Europe adopted by the President in January 2011 provides for August 2013 as a deadline for preparation of the relevant draft proposals.

23. **Support international observation of the upcoming parliamentary elections, including a large delegation from PACE** (Paragraph 16 of the Resolution)
    a. Foreign Minister Hryshchenko on the 19th of March 2012 sent an invitation to OSCE/ODIHR to send observers to the October 2012 parliamentary elections.
    b. There is no information about a possible PACE delegation.

24. **Implement the reforms needed to honour Ukraine´s accession commitments as also described in the reform program of the present Government and welcomed in Resolution 1755 (2010)**[24] (Paragraph 17 of the Resolution).
    a. On the 21st of March 2012 the Verkhovna Rada of Ukraine adopted in the first reading a joint Action Plan on implementation of the PACE Opinion 190 (1995) on "Application of Ukraine to join the Council of Europe" and of Resolution 1862 (2012).

[24] See Appendix 3.

Appendix 1
CoE PACE Resolution 1862 (2012) of 26.1.2012
The functioning of democratic institutions in Ukraine

1. The Parliamentary Assembly welcomes the continuing co-operation with the Ukrainian authorities in the framework of the monitoring procedure of the Assembly. It notes with satisfaction that a number of important steps have been taken by the authorities in order to honour outstanding accession commitments, including with regard to the fight against corruption. It welcomes the close co-operation developed between the Council of Europe and the Ukrainian authorities in implementing the necessary reforms. However, the Assembly regrets that the prosecution of former government leaders in Ukraine is negatively affecting the country's closer European integration.

2. The 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 officials, including the former Minister of the Interior, Mr. Juriy Lutsenko, the former acting Minister of Defence, Mr. Valeriy Ivashchenko, and the former first Deputy Minister of Justice, Mr. Yevhen Korniychuk, as well as the former Prime Minister, Ms Yulia Tymoshenko.

3. The Assembly considers that Articles 364 and 365 of the Criminal Code are overly broad in application and effectively allow for *ex post facto* criminalization 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 to promptly amend these two articles of the Criminal Code in line with Council of Europe standards and to drop the charges against former government officials which are based on these provisions. The Assembly wishes to emphasize that the assessment of political decisions and their effects is the prerogative of parliaments and, ultimately, of the electorate, and not of the courts. In this respect, the Assembly asks the President of Ukraine to consider all legal means available to him to release these members of the former government and to allow them to stand for the upcoming parliamentary elections. It considers that strict international standards delimiting political and criminal responsibility need to be developed.

4. The Assembly regrets the numerous shortcomings noted in the trials against former government officials 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 on Human Rights ("the Convention", ETS No. 5). In this respect, the Assembly takes note of the fact that the European Court of Human Rights decided to fast-track an application of Ms Tymoshenko concerning her detention in which she alleges violations of Articles 3, 5 and 18 of the Convention.

5. In the view of the Assembly, these shortcomings are the result of structural deficiencies in the justice system in Ukraine. These deficiencies are not new and have been long-standing 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.

6. With regard to the independence of the judiciary, the Assembly:

6.1. reaffirms its deep concern about the lack of independence of the judiciary and considers that this is the principal challenge for the justice system in Ukraine;

6.2. 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 five-year probationary period for judges and to remove the Verkhovna Rada from the appointment process;
6.3. considers that judges in their probation period should not preside over politically sensitive or complex cases;
6.4. 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 representatives of the Verkhovna Rada, the President of Ukraine and the Prokuratura from membership in 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;
6.5. invites the Verkhovna Rada to promptly adopt the necessary constitutional amendments that would remove the provisions which impede the implementation of the Assembly's recommendations mentioned in paragraphs 6.2. and 6.4;
6.6. expresses its concern about the many credible reports that disciplinary actions have been initiated, and judges removed from office by the High Council of Justice, on the basis of complaints from the prosecutor's office because 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.
7. With regard to detention on remand, the Assembly:
7.1. expresses its concern regarding the excessive recourse to detention on remand, often without justification or valid reasons, in the Ukrainian justice system;
7.2. 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;
7.3. 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;
7.4. calls on 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 to 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.
8. With regard to equality of arms between the prosecution and defence, the Assembly:
8.1. notes with concern the bias in favour of the prosecution which is endemic in the Ukrainian justice system;
8.2. calls on the authorities to ensure that, in the Criminal Procedure Code, equality of arms between the prosecution and defence is guaranteed both in law and in practice;
8.3. invites the authorities to ensure in particular that the Criminal Procedure Code explicitly provides for the defence to be given a copy of the case file of the prosecution and a reasonable amount of time to familiarise itself with the file, under the control of a judge;
8.4. welcomes the fact that the President of Ukraine has submitted a new draft criminal procedure code for consideration by the Verkhovna Rada and calls on the Verkhovna Rada to promptly adopt this law, which fully takes into consideration the recommendations made by the Council of Europe during its analysis of the draft law.
9. With regard to the structural deficiencies in the legal system, the Assembly regrets that the reform to bring the prosecutor's office in line with Council of Europe standards, which is one of

Ukraine's accession commitments, has yet to be carried out. As a result, the Prokuratura remains an excessively centralised institution with excessive powers.

10. The Assembly notes with concern reports that the health of the former Minister of the Interior, Mr Juriy Lutsenko, and of the former acting Minister of Defence, Mr Valeriy Ivashchenko, who are in detention on remand, is rapidly deteriorating and that both of them 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, and in view of its concerns regarding recourse to detention on remand in Ukraine. The Assembly also expresses its concern about the deteriorating health of Ms Tymoshenko and calls on the authorities to allow, without preconditions, medical examinations and, if necessary, treatment by independent doctors outside the prison service.

11. 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 into the European economic space. This underscores the importance given by the authorities to the greater European integration of the country.

12. The Assembly recognises the outcome of the 15th Ukraine-European Union Summit, which took place on 19 December 2011 in Kiev, in relation to the Association Agreement between Ukraine and the European Union. It is particularly important that both sides recognised that the association agreement would constitute a new stage in the development of Ukraine-European Union contractual relations aiming at political association and economic integration.

13. 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 on the President and the Verkhovna Rada to promptly 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 concept paper for a constitutional assembly, which the Assembly expects to be the basis of the constitutional reform process. In addition, the Assembly urges the authorities to make full use of the recommendations given in the Venice Commission's opinions on previous drafts for constitutional reform.

14. The Assembly welcomes the systematic requests by the authorities for the opinion of the Venice Commission on the draft laws they prepare. However, it notes that, on several occasions, the draft laws on which opinions had been asked were subsequently withdrawn and that the recommendations of the Venice Commission were not taken into account in the laws ultimately adopted 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 opinions on previous draft laws on the same subject matter. In this context, the Assembly expects 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 the concept paper on the establishment of a constitutional assembly, to be taken into consideration in the draft laws that are sent to the Verkhovna Rada for adoption.

15. The Assembly takes note of the adoption, on 17 November 2011, of the Law of Ukraine on the Election of People's 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 electoral code, and the adoption of a regional proportional election system, were not implemented. With regard to the new electoral legislation, the Assembly:

15.1. welcomes the adoption, by a broad consensus and with the participation of the opposition, of the parliamentary electoral law as a first step on the way to unified electoral legislation;

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

15.3. 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 run in the elections, might negatively affect the opportunities for new or smaller parties to enter parliament. The Assembly is concerned that these provisions could 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. In order to increase pluralism and encourage participation of national minorities in public life, the Assembly recommends that, when delineating constituencies for the 2012 parliamentary elections, the Central Electoral Commission ensures inclusion in a single constituency national minority groups that live compactly in certain areas;

15.4. regrets the provisions included in this law that limit the right to stand for election for anyone convicted of a crime, regardless of the severity of the crime committed. Recognising that these provisions are based on Article 76 of the Constitution of Ukraine, the Assembly proposes to promptly remove them in the framework of the constitutional reform process that was recommended by the Assembly;

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

16. 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 that it should contribute to the international election observation with a large delegation.

17. 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 seventeen years ago. The successive governments, as well as the Verkhovna Rada and its political factions, share responsibility for this failure. In Resolution 1755 (2010) on the functioning of democratic institutions in Ukraine, 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 Ukraine's accession commitments and to build a robust democracy in the country.

18. The Assembly considers that the implementation of its recommendations, and especially those relating to the criminal prosecution of former government officials, would signal the commitment of the authorities to the norms and values of the Council of Europe. Conversely, failing to do so within a reasonable time frame would raise serious questions regarding the authorities' commitment to the principles of democracy and the rule of law, which should lead to an appropriate response from the Assembly. The Assembly therefore invites the Monitoring Committee to follow the situation closely and to propose any further action to be taken by the

Assembly as required by the situation, including with regard to the possible consideration of sanctions if the Assembly's demands are not met.

Appendix 2

Statement of 9.3.2012 by the PACE Standing Committee meeting in Paris

The Parliamentary Assembly of the Council of Europe notes with concern, some 6 weeks following the Resolution 1862 (2012) on the functioning of democratic institutions in Ukraine, the absence of any tangible signs of its demands being met with regard to the criminal prosecutions initiated under Articles 364 and 365 of the Criminal Code of Ukraine against a number of former Government members, including the former Acting Minister of the Interior, Juriy Lutsenko, the former Acting Minister of Defence, Valeriy Ivaschenko, and the former Deputy Minister of Justice, Yevhen Korniychuk, as well as the former Prime Minister, Yuliya Tymoschenko.

On the contrary, despite calls of the Assembly to amend Articles 364 and 365 of the Criminal Code as they allow for post facto criminalisation of normal political decision-making, the Parliament of Ukraine failed to do so on 8 February 2012 thereby pre-empting the possibility for charges against former government officials based on these provisions to be dropped. Furthermore, on 27 February 2012, former Minister of Interior Lutsenko was convicted to 4 years of imprisonment on the basis of a trial which is alleged to have been unfair and for crimes which do not justify a term of imprisonment.

The fact that former Prime Minister Tymoschenko remains in detention and the recent conviction of Mr Lutsenko - notwithstanding their seriously deteriorating health - both strengthen the impression of selective justice.

The Assembly reiterates in this respect that “the assessment of political decisions and their effects is the prerogative of parliaments and, ultimately, of the electorate and not of the courts” and, once again, calls on the authorities of Ukraine – including the President – urgently to consider all legal means available to them to release these former government members and to allow them to compete in the forthcoming parliamentary elections.

The Assembly, through its Monitoring Committee, will continue to follow the situation closely. It notes that the Committee’s co-rapporteurs will visit Ukraine at the end of March 2012 and expects full cooperation of the authorities with the co-rapporteurs, including the latter’s access to the former government members detained. It recalls in this connection that it has invited the Committee to propose any further action as required by the situation, including with regard to the possible consideration of sanctions if the Assembly’s demands are not met.

Appendix 3

PACE Resolution 1755 (2010)[1]
The functioning of democratic institutions in Ukraine

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 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, when achieved according to democratic principles, 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 this 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 Ukraine's remaining accession commitments 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 commitments and obligations as a member of the Council of Europe.
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 Ukrainian society. The successful implementation of these reforms is therefore only possible if they are based on 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 the Assembly in previous resolutions dealing with Ukraine. Reaffirming its position on these reforms, the Assembly, with regard in particular to:
7.1. electoral reform:
7.1.1. reiterates its recommendation that a Unified Election Code be adopted in Ukraine and welcomes the fact that a draft for such a Unified Code has now been tabled for adoption in the Verkhovna Rada;

7.1.2. considers that electoral reform should not only entail the adoption of a new election code, but also of a new electoral system, and reiterates 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. reiterates 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 a new electoral 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 provisions on party financing in the Law on Political Parties that are fully in line with European standards, especially with regard to transparency of party financing, and to consider additional measures that would reduce the dependence of political parties on economic and commercial interests;
7.2. reform of the Prokuratura:
7.2.1. recalls that Ukraine, upon accession to the Council of Europe, made the following commitment: "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 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 the 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 to 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 the rule of law in Ukraine, and reiterates its position that this reform should be undertaken with a view to, *inter alia*, eliminating all forms of corruption in the judiciary, while ensuring the independence of the courts;
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. It 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 had been requested by the Minister of Justice of Ukraine;
7.3.3. asks the authorities to bring the system of training of judges and the training institutes into compliance with European standards. For this purpose, judicial training must be part of the judicial branch and should be controlled and supervised by an independent body of judicial self-administration, as recommended by the Venice Commission;

7.3.4. asks the authorities to ensure that 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, take into account any recommendations, or concerns addressed, in the forthcoming Venice Commission opinions, by amending the laws as required;
7.3.5. considers that without constitutional amendments it will not be possible to reform the judiciary in line with European standards and values;
7.3.6. urges the authorities to reform the Bar and establish a professional Bar association in line with the commitments Ukraine undertook on accession to the Council of Europe;
7.3.7. asks the authorities to adopt, as soon as possible, the new Criminal Procedure Code, to request Council of Europe expertise on the draft of this code, and address any possible concerns before it is adopted in a final reading;
7.3.8. 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 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. The Assembly welcomes the adoption, by the Verkhovna Rada, of the Law on Preventing and Counteracting the Legalisation (Laundering) of Proceeds from Crime that came into force on 20 August 2010;
7.4.2. welcomes the priority given by the new president to the fight against corruption and urges him to ensure that the aforementioned package of anti-corruption laws is now enacted without further delay and that all the recommendations made by the Group of States against Corruption (GRECO) in its joint first and second round evaluation report are now promptly implemented;
7.4.3. calls upon the Verkhovna Rada to adopt the laws that are pending in parliament on Conflict of Interest and Ethics in Public Service, on Asset Declarations of Public Officials and on Access to Public Information, after having obtained a Venice Commission opinion on these drafts;
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 Peaceful Assemblies, on the basis of the comments and recommendations of the Venice Commission.
8. The Assembly expresses its concern about the increasing number of credible reports of undue involvement by the Security Service of Ukraine (SBU) in domestic political affairs, including pressure put on journalists and party and civil society activists and their relatives. It considers such activities unacceptable in a democratic society and therefore calls upon the authorities to reform the security services and their functions in line with European standards.
9. 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 first reforming the constitution. The Assembly 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 of an entirely new constitution being adopted.

10. The Assembly takes note of the decision of the Constitutional Court of Ukraine of 1 October 2010 that declares as unconstitutional Law No. 2222 amending the constitution in 2004. The Assembly considers that this decision should now prompt the Verkhovna Rada to initiate a comprehensive constitutional reform process with a view to bringing Ukraine's constitution fully in line with European standards.

11. 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.

12. The Assembly expresses its concern about the increasing number of allegations, and credible reports, that democratic freedoms and rights, such as freedom of assembly, freedom of expression and freedom of the media, have come under pressure in recent months. It considers that the interference of state organs, such as the law enforcement and security services, in the work of journalists and media organisations is incompatible with a democratic society. The Assembly calls upon the authorities to fully investigate all reports of infringements of rights and freedoms and to remedy any violations found. In addition, it calls upon the authorities to ensure that legal proceedings do not result in the selective revocation of broadcasting frequencies and to review any decision or appointment that could lead to a conflict of interest, especially in the field of law enforcement and the judiciary.

13. Media freedom and pluralism are cornerstones of democracy. The Assembly is therefore 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.

14. The Assembly is concerned that allegations of possible electoral fraud could indicate a lack of trust of electoral stakeholders in the fairness of the conduct and administration of the forthcoming elections. Considering that trust in the administration of the elections is essential for their democratic nature, it calls upon the authorities to ensure a balanced composition of the election administration at all levels, including leadership positions. It recommends that the authorities consider adopting additional measures to foster the trust of electoral contestants and voters in the electoral process.

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

1. *Assembly debate* on 5 October 2010 (31st Sitting) (see Doc. 12357 and addendum, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), co-rapporteurs: Mrs Reps and Mrs Wohlwend). *Text adopted by the Assembly* on 5 October 2010 (31st Sitting).