

international special edition

The Ukrainian **Week**

JANUARY 2012



Ukraine and the Council of Europe

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help themselves

The
Economist

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LACK OF FREEDOM
IN UKRAINE

17 October 2011

Opinion no.638/2011

JOINT OPINION ON THE
DRAFT LAW ON FREEDOM
OF PEACEFUL ASSEMBLY
OF UKRAINE

17 October 2011

Opinion no. 635/2011

JOINT OPINION
ON THE DRAFT
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30 March 2011

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OPINION ON THE DRAFT
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OPINION ON THE
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ASSEMBLY OF UKRAINE

9 November 1995

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THE 37TH MEMBER
STATE OF THE COUNCIL
OF EUROPE

23-27 January 2012

PACE WINTER SESSION
DRAFT RESOLUTION
ON UKRAINE

19 December 2011

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DRAFT LAW
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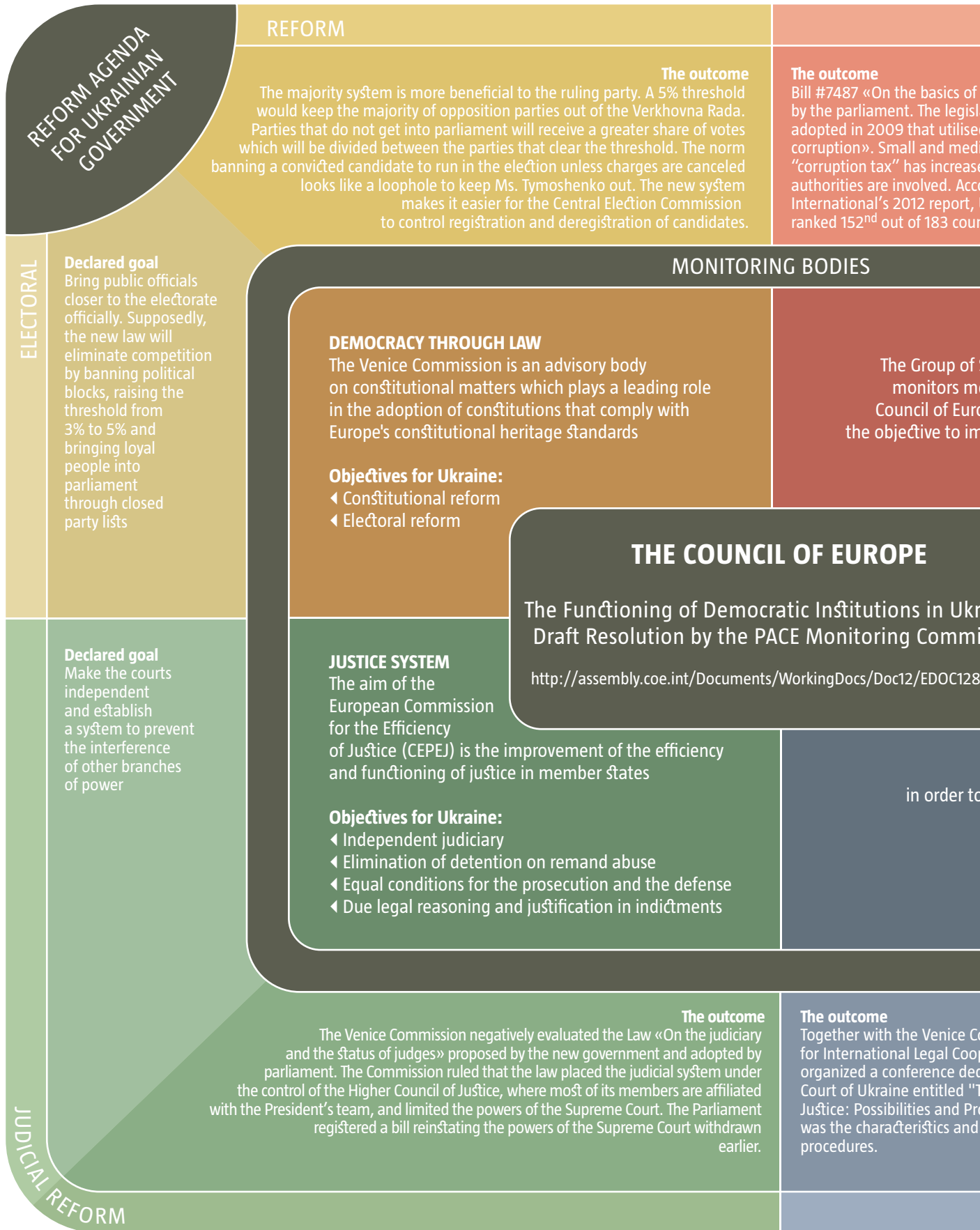


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FIGTING CORRUPTION

preventing and counteracting corruption in Ukraine» was passed
 ure has abolished the series of anti-corruption laws
 d the same procedure as the 1995 basic Law «On fighting
 um business representatives confirm that the
 ed by 2-4 times depending on which
 ording to Transparency
 Ukraine was
 ntries.

Declared goal
 Introduce efficient mechanisms to prevent corruption and eliminate the reasons and circumstances that lead to corruption.

FIGHT AGAINST CORRUPTION

States against Corruption (GRECO)
 member states' compliance with the
 ope anti-corruption standards with
 mprove the capacity of its members
 to fight corruption

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PREVENTION OF TORTURE

The European Committee for the Prevention of Torture visits detention centers to assess the treatment of prisoners

Objective for Ukraine:

◀ Elimination of the persecution of former government officials

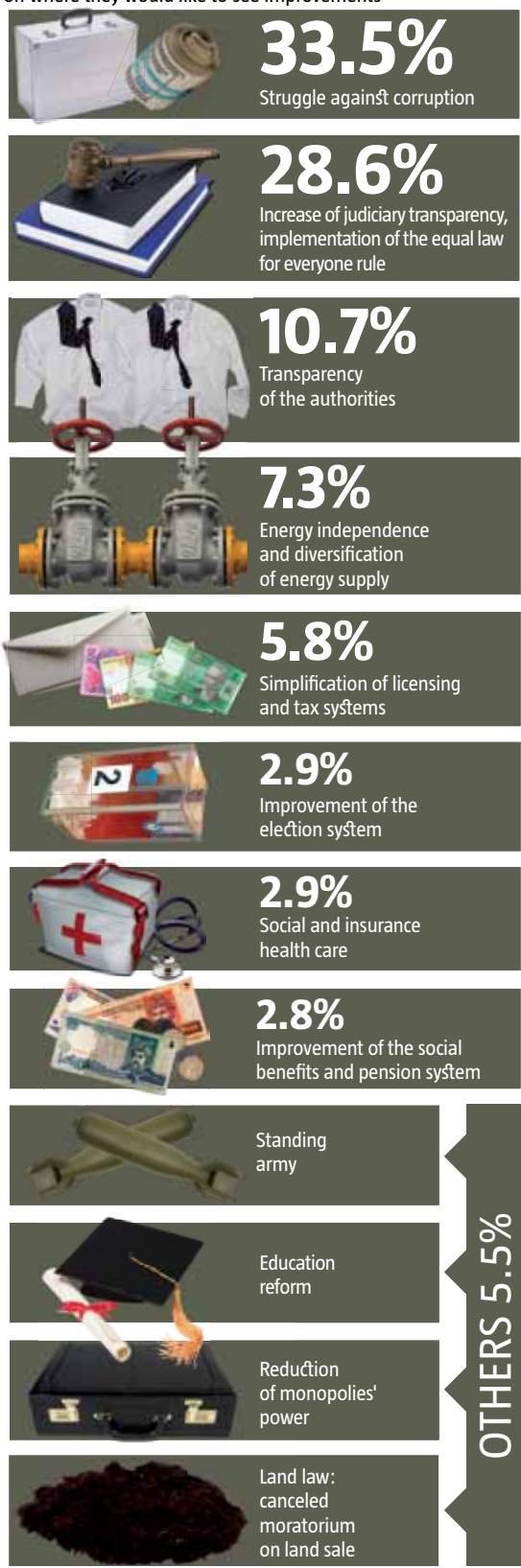
Declared goal
 Review progress made regarding the treatment and conditions of detention and examine the health care provided to Ivashchenko, Lutsenko and Tymoshenko

ommission and the German Foundation
 peration, the Constitutional Court of Ukraine
 icated to the 15th anniversary of the Constitutional
 "The Protection of Human Rights by Bodies of Constitutional
 oblems of Individual Access." The main topic under discussion
 difficulties in the implementation of individual complaint

HUMAN RIGHTS

Which reforms are a priority for Ukraine?

The Ukrainian Week asked its readers to share their opinions on where they would like to see improvements



Total number of the polled: 2,015. The survey was open on tyzhden.ua over 1-21 December 2011. This is not a sociological survey

Going Round in Circles

The Council of Europe reports look discouragingly similar



Author:
Alla Lazareva

If not for the political persecution of the opposition, that has turned into the current government's trademark, the new draft report on Ukraine by Mailis Reps and Marietta de Pourbaix-Lundin, two PACE Rapporteurs, would be barely different from other similar PACE documents. The monitoring continues, Ukraine is not fulfilling its commitments and every new government comes up with new excuses for why Ukraine continuously fails to meet European standards.

WHO IS TO BLAME?

"You can print out all my recommendations from previous years and bring them up for discussion," Hanne Severinsen, ex-Rapporteur on Ukraine, says. "They're not out-

dated. Kyiv has been deaf to all advice from Europe."

Ms. Severinsen's comments mostly focused on the current government, but not that alone. Under Kuchma and Yushchenko, many of the commitments Ukraine undertook when entering the Council of Europe were never intended to be implemented. These included the reform of the Prosecutor's Office, the separation of investigation and oversight, equality of prosecution and defense in trials, the approval of a new Constitution, improvement of criminal legislation and the Uniform Election Code, to name a few. It is enough to simply turn the pages of the reports and resolutions from 2010, 2005, 2001 and 1997.

Why did this happen? Ukraine failed to learn how to be a fully-fledged, self-standing and self-sufficient state over its 20 years of independence. The Ukrainian government feels that it is not responsible for the promises given in the name of the state by its predecessors. When reporting in Strasbourg, Ukrainian officials feel like the speakers of a clan rather than part of the European political class that shares common objectives and values. When addressing foreigners, they often apply to the managers and sponsors of their own political forces rather than their European colleagues who are sitting in the same room. Another option for them is to address their domestic Ukrainian opponents.

Civil society is still being established in Ukraine. For this reason, voters exert actual pressure on the government sporadically rather than systemically, and emotionally rather than methodically. Relations between citizen and state in Ukraine still follow the paternalistic society scheme. When delegated power, the government acts arbitrarily and feels no compunction to report the nation that delegated such power and awaits a response.

Is the situation in Ukraine significantly different from that in Georgia, Moldova or Azerbaijan? Yes and no. Each post-totalitarian country is imperfect in its own way and each conflicts with European standards according to one criteria or another. Is Ukraine moving in the right direction? According to official Kyiv, it is. To prove this, Ukrainian ministers list new documents that have finally been passed by parliament.

Opponents of the Ukrainian government refer to real-life examples. They refer to criminal cases distant from the norms of the European Convention on Human Rights; Independence Day, when people were banned from meet in squares in cities and towns carrying the national flag; they list numerous raider attacks in business, controversial manipulations with historical archives in the humanitarian sphere and ambiguous initiatives in language policy.

The most common question both foreign and Ukrainian experts end up asking, is whether Ukraine is really moving towards a tough authoritarian regime. If so, to what extent can this trend be reversed? Yulia Tymoshenko's imprisonment was a signal to Europe and the whole world that Ukraine is gradually slipping towards dictatorship.

WHAT CAN BE DONE?

The Ukrainian Week polled many politicians, human rights activists, political analysts and lawyers on the Draft Resolution and the report on Ukraine by PACE on the eve of the upcoming Winter session.

Most of them largely support the conclusions of Mailis Reps and Marietta de Pourbaix-Lundin. However, many of those polled say that criticizing and judging the government for moving away from democracy is not enough. If negative trends intensify, tough action should be taken, such as sanctions at different levels.

Calling on Europeans to apply discriminating measures against

one's own country seems strange and regrettable. Yet, most Ukrainians generally differentiate the state from officials. Denouncing a government's destructive practices is not the same thing as betraying national interests. On the contrary, this means the bringing of supporters and sympathizers of a free democratic country to common actions, when the government continues to disregard human values more and more.

In this sense, Ukrainian experts have sported an adequate reaction to the tough tone used in the Draft Resolution and the report on Ukraine. This is the true status: the violation of personal rights and liberties in the country is ever more prevalent; political revenge via the courts is becoming a common practice while the election law that bans political blocks and sets the threshold at 5% has apparently been drafted to suit the interests of the ruling party.

For this reason, the calls of the Ukrainian opposition for Eu-



PACE
Rapporteurs
Mailis Reps
and Marietta
de Pourbaix-
Lundin

ropeans to set clear deadlines for meeting PACE Resolution requirements, in spite of the risk of sanctions, raises few eyebrows. "It should be understood that this is not just about Ukraine's image, which has been seriously damaged under President Yanukovich," Hryhoriy Nemyria, ex-Vice Premier of Ukraine, comments. "It's also about the reputation of the Council of Europe itself, the values of which are currently being neglected with impunity in Ukraine."

The polled experts stress that they expect international institutions to stick to firm principles when dealing with official Kyiv, particularly during the upcoming parliamentary election in October 2012. The Draft PACE Resolution, calls for as many international observers as possible to be sent to this election. These specific future actions are possibly those that have been most welcomed by the polled experts.

What are Ukrainians expecting from the Council of Europe? Apparently, they do not expect that the internal problems of their state will be resolved by foreign political opinions and recommendations alone. However, a specific and effective partnership and practical actions in cooperation with international institutions would be of great help today. These include missions, observers and the joint efforts of lawyers to define clear European standards in separating political and criminal responsibility.

"Some sad trends could have been stopped on time if only the CoE had already held an emergency debate on Ukraine," said some of those polled. Perhaps, they are right. But Ukrainians should not blame their troubles on foreign partners. It looks as if at the present time, official Kyiv is more concerned about avoiding rivalry with Ms. Tymoshenko than about saving Ukraine's good reputation abroad.

Let it be so, but this is only the choice made by one political force. According to the latest sociological surveys, less than 20% of Ukrainians support it. The rest of the voters also have the right to dignity, culture, history and the future. They, not only the official government should become the natural partners of the international institution established to safeguard the world outlook and moral values of Europe. ■

An Opinion Poll

On 15 December 2011, the PACE Monitoring Committee unanimously approved the Draft Resolution titled *The Functioning of Democratic Institutions in Ukraine*. **The Ukrainian Week** has interviewed Ukrainian and European politicians, experts, lawyers and political analysts to learn their opinion on the developments PACE finds disturbing in Ukraine

“The Party of Regions believes that legal provisions cannot be changed to fit a specific individual”

Volodymyr Tolstenko, Secretary of the Verkhovna Rada’s Committee for Legal Policy, the Party of Regions:

I’m in two minds about the Resolution that PACE has approved. It has a somewhat offensive and humiliating tone, particularly in the first items. It contains words like ‘immediately’ or ‘flaws’. Even the most respected organization cannot talk to an independent country involved in European policy-making in such a manner. If it weren’t for this tone, I would readily accept the recommendations and the evaluation of our actions.

As a rule, in our country, people stay at temporary detention facilities during investigations until investigators forward their documents to the court. Sometimes, they take unreasonably long to do so. However, we are drafting a new Criminal Code, which has already been analyzed and discussed by NGOs, and have given a favorable response.

The current practice with temporary detention centers has been in place since soviet times. The new Code will remove it. It entails significant amendments that comply with European standards, such as reasonable case analysis deadlines and emphasis



on the presumption of innocence.

As for the demands to cancel Articles 364 and 365 of the Criminal Code concerning the abuse of office and exceeding of powers, the Party of Regions believes that legal provisions cannot be changed to fit a specific individual, despite the harsh comments from the highly respected PACE. We will reform criminal justice in its entirety. We’ll improve the work of law enforcement agencies and criminal justice. I’m sure political and criminal liabilities will be segregated.

The issue of the Constitution and the proposal to summon the Constitutional Assembly to amend it, is very complex and sensitive. In many countries constitutions have remained unchanged for decades. We’re trying to amend ours. However, it’s better to wait with such issues rather than rush them, as the government did in 2004 under Western pressure. At that time, the Constitution was

amended, fuelling conflicts between the President and the Premier. We will reform the Constitution. That’s clear. But we need time. The new Constitution should not simply reflect the demands of the West. It shouldn’t be amended to suit PACE alone. ■

“Inequality between investigators and lawyers is the biggest problem in the Ukrainian judiciary”

Leonid Tarasenko, President of the Public Defenders Center and Professor at Lviv University, comments on the Draft PACE Resolution

Mr. Tarasenko claims that the way in which Ukrainian lawyers work does not meet the terms envisaged by European standards.

“In many cases, the defense does not have the opportunity to study their clients’ case materials” he explains. “But lawyers have no real leverage to change the basics of criminal proceedings, hence the great importance of cooperation with international organizations, such as the Council of Europe and the Venice Commission.”

Mr. Tarasenko believes that some changes should indeed be introduced to legislation. However, courts could already apply appropriate norms if only they wished to do so.

“One court in the Kharkiv Oblast released a suspect and replaced the arrest with a pledge that he stays in town while his case is being investigated,” says Mr.



Tarasenko. “The General Prosecutor’s Office ruled so out of respect for human right for personal freedom. Therefore, avoiding abuse of preventive detention is possible even in Ukraine, provided that the authorities are willing to do so. The example of the Lutsenko case is something totally different. They put him in jail for the alleged misappropriation of public funds in the amount of UAH 40,000. No one is put behind bars till the trial for this type of violation in Europe, particularly when there are no grounds to assume that the suspect will avoid investigation.”

“Most comments in the Draft PACE Resolution really reflect violations that occur in the Ukrainian judiciary, but not all of them,” Mr. Tarasenko believes.

More specifically, he thinks there is no need “to change the Constitution of Ukraine as proposed in the Draft Resolution, since the current Constitution guarantees a vast array of rights. The fact that the requirements of the Constitution are not complied with in Ukraine, is a different matter. ▣

“People want a change of government, not Constitution”

Volodymyr Horbach, political analyst at the Institute for Euro-Atlantic Cooperation.

The legal approach of the Draft Resolution’s authors is totally relevant, however it did not take into account the socio-political context of the changes and reforms we are being offered. Take the recommendation to cancel some articles of the Criminal Code. It has its purpose, yet misses the initial problem, i.e. the incorrect application of these articles by Ukrainian courts. It’s not the articles that are to blame for our problems; it’s those who apply them. Judiciary reform which would be useful for society cannot be implemented by the very people who openly mock the law. However, there is no mention of this in the PACE Draft Resolution, because such conclusions would be re-



garded as interference in internal affairs. Moreover, the only way to integrate the amendments offered by PACE Draft Resolution to the Constitution is to convene the Constitutional Assembly to approve them. This can only be done by an authority which the public trusts and supports. At this point, there is none in Ukraine. Therefore, this proposal is impossible to implement practically under the current socio-political background, even if reasonable and technologically accurate. The key message of the Draft Resolution is the preparedness of PACE MPs to take part in international observation of the 2012 parliamentary election. Meanwhile, people in Ukraine want a change of government, not Constitution at this point.

The latter could be the next step. ▣

“We undertook these commitments when we joined the CoE and we must comply with them”

Varas Chornovil, First Deputy Head of the VR Committee for Foreign Affairs and member of the Reform for the Future group of MP’s.

The government must have expected this very reaction of European institutions to the arrests of Tymoshenko and Lutsenko. Ukrainian authorities never managed or tried to prove the international community these cases were not politically motivated. That’s why even the first paragraph of the Draft Resolution is the result of the policy that was unfortunately implemented in this direction by Ukrainian government, judiciary and prosecution, all of them. As to the recommendations to remove Art. 364 and 365 from the Criminal Code, I must say similar provisions are in virtually all criminal codes of EU member-states. There-



fore, this proposal is somewhat nonconstructive. The Draft Resolution does not say clearly why these articles in the Criminal Code are inadequate and how they should be changed.

Obviously, we need to fully support the part of the Draft Resolution that criticizes harshly Ukrainian procedure for choosing pretrial arrests as a preventive measure, no question about that. Sadly, pretrial arrests have been abused more and more heavily lately in Ukraine.

Also, I agree that the Uniform Election Code should be passed. But I don’t think it will be there any time before the upcoming parliamentary election. The best option would be for the current parliament to start drafting the Code and transfer it to its successor to pass. ▣

“Any reform in Ukraine is quickly turned into a manipulation”

Viacheslav Kyrylenko, leader of the For Ukraine! political party and Our Ukraine-People's Self-Defense MP, shares his views on the impact of political repression, the dead end for reforms and the possible structure of the next parliament.

U.W.: According to the CoE, the Ukrainian parliament has not followed recommendations of the Venice Commission and passed the controversial election law. Venice Commission experts complain that Ukraine started drafting a Uniform Election Code but never finished it. Do you support PACE's concerns?

– I think the Uniform Election Code is not necessary. However, the country needs transparent election legislation for both parliamentary and local elections. I think it's unrealistic to change anything in the election law, not to mention passing a Uniform Election Code before the next election, since first and foremost, it's politically motivated.

U.W.: The PACE Draft Resolution on Ukraine harshly criticizes the system to appoint judges. More specifically, it insists that the VR should not be involved in the procedure. What's your opinion on this?

– It's impossible to change anything in the procedure for appointing judges by the VR (Parliament), in accordance with PACE recommendations. The current judicial system is being adjusted to the political needs of those in power. Any reform will now turn into manipulation by those who want to pass certain politically motivated decisions. So, we cannot talk about any changes to the Constitution right now. Political problems are extremely acute in Ukraine today. But looking 10, 20 or 30 years ahead and actually ensuring judiciary reform appears unrealistic at this point, against a background of a strong political resistance. Obviously, though, these are valid recommendations and European practice will instill itself in Ukraine sooner or later.

I think the public should control the process of appointing judges. Right now, there is no control whatsoever. We can consider the most radical pro-



posals, such as the public election of some judges, in the future. So far, though, neither the judiciary, nor its experts appear to be ready for this situation. And I don't think the public is either.

U.W.: According to the Monitoring Committee Rapporteurs, in many cases, the Ukrainian judiciary resorts to the detention of people who have not yet been found guilty by the court. In the Draft Resolution, the abuse of arrest is mentioned as the most frequent reason that pushes Ukrainians to appeal to the European Court of Human Rights.

– I think imprisonment for those not yet recognized guilty is only appropriate in extreme cases. In Ukraine, two thirds of all people arrested are put behind bars. Prisons end up being overcrowded. The draconian provisions of the Code of Criminal Procedure allow law enforcers to arrest people as a preventive measure in a large number of cases. But we need to clean up half of the Code of Criminal Procedure to change this. The current parliament is not ready to do this. Our hopes lie with the next parliament. I believe the current opposition will be the majority in the next parliament.

DRACONIAN PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE ALLOW LAW ENFORCEMENT AUTHORITIES TO ARREST PEOPLE AS A PREVENTIVE MEASURE

U.W.: Should articles on the abuse of office and power be removed from the Criminal Code?

– I think Articles 364 and 365 should be removed from the Criminal Code. I co-drafted the draft law to decriminalize these articles. But this position failed to gain a majority vote in the current parliament and I doubt that it will. Moreover, even if these articles are decriminalized, the current regime will find other articles with which to incriminate opposition leaders. The voting to decriminalize these articles in the parliament alone will never stop political repression. And when political repression is no longer a useful tool, which I'm sure will happen at some point in Ukraine, society should take a serious approach to the issue of decriminalizing criminal and criminal procedural legislation and penitentiary reform, since it is only now that these issues draw public attention, as a result of on-going political repressions. ■

“Nothing terrible will happen even if Ukraine does not reform its Constitution”

Oleksiy Plotnikov, Member of the Party of Regions and Ukraine’s Permanent Delegation to PACE, tells *The Ukrainian Week* why he is not too concerned with the conclusions of the Monitoring Committee Rapporteurs.

U.W.: In your view, how justified are the criticisms of the Monitoring Committee Rapporteurs?

– First of all, this is an interim Resolution. The deadline for the final report is April, not January. I don’t think we should expect any specific requirements for Ukraine.

Obviously, the Resolution contains some remarks about Ukraine’s judiciary and legal aspects. But PACE Rapporteurs offer their comments or remarks in a normal procedure. I see nothing unusual in this.

U.W.: Ukraine never did pass a new Criminal Code over the 17 years of its PACE membership, in spite its commitment to do so...

– You see, the problems with the Code of Criminal Procedure of Ukraine that were mentioned in the Resolution did not emerge this year. The Code was inherited from the Soviet Union. We now have an evaluation of the general situation in Ukraine. But this is not a criticism of the current government. We have had no reforms for nearly 20 years now. It’s possible that amendments to the Code of Criminal Procedure will be discussed some time after the New Year.

U.W.: The Monitoring Committee was unanimous in criticizing the



switch from the 3% to the 5% threshold in parliamentary elections.

– The Rapporteurs are entitled to make comments. But I can’t say that this is PACE’s consolidated position.

I would like to remind you that the election law reflects the consolidated position of virtually all Ukrainian MPs. A constitutional majority of the Verkhovna Rada voted in support of the law on parliamentary elections. The Working Group that finalized the document included representatives of both the opposition and the coalition. Therefore, it’s the right of our country to have this very election law, not some other one.

U.W.: Do you think it would be expedient to refuse to approve a Uniform Election Code?

– Obviously, having one document that lists all the rules for local, national and presidential elections is better. But we’ve held all elections without a Uniform Election so far, and nothing terrible has happened. Ukraine can live without this Code. The same thing applies to the constitutional reform that the Resolution deems necessary.

I have to say that nothing bad will happen to us even if we don’t conduct this reform. In all likelihood, there will be no reform until after the upcoming parliamentary election.

Overall, I would like to note that the Monitoring Committee has developed a traditional attitude towards Ukraine. It’s always tough. Therefore, I’m not overly concerned by the Resolution. I will go to Strasburg in January. I already know how the voting on this document will go. ☐

IT’S THE RIGHT OF OUR COUNTRY TO HAVE THIS VERY ELECTION LAW THAT A CONSTITUTIONAL MAJORITY VOTED FOR, NOT SOME OTHER ONE

“The Ukrainian judiciary has turned into a subdivision of the Presidential Administration”

Serhiy Sobolev, leader of the Reforms and Order Party and Deputy Head of the BYuT faction in parliament, speaks about the root of evil in Ukrainian politics and of the time when the reform of the public prosecutor’s office will take place.

U.W.: What’s your overall impression of the draft PACE Resolution which will be up for discussion in Strasbourg in January? How close is it to Ukrainian reality?

– No document can completely mirror the reality. But I was pleasantly surprised how complete and thorough the document offered by the Rapporteurs for consideration of the CoE is. I think they have clearly captured the root of evil in Ukraine. Firstly, the Ukrainian judiciary is totally dependent on the government; it has turned into a subdivision of the Presidential Administration as a result of so-called judiciary reform. Secondly, the Supreme Council of Justice is totally repressive and completely fails to comply with democratic principles for oversight over judges. Thirdly, the document looks into specific cases against Tymoshenko, Lutsenko, Ivashchenko and Korniychuk, rather than simply raising the issue of general political persecution. This is no less important than are the first two items. The Monitoring Committee recognized that the prisoners are essentially being tortured and that the way they are kept, as well the non-provision of medical assistance to them, runs counter to both European and common human standards. Fourthly, there is no doubt that the bodies of the Prosecutor’s Office, which have taken a dominant position in the state, report directly to the President. The commitments undertaken by Ukraine to reform the Prosecutor’s Office and divest its bodies of their responsibilities to perform general oversight and investigation, have not been fulfilled over many years. Ukraine should solve all these issues if it wants to remain a fully-fledged PACE member.

U.W.: The Rapporteurs claim that Ukraine does not provide equal rights to investigators and the defense, prosecutors and lawyers. Is there any possibility of changing the situation via legislation under the current government?

– The state of Ukraine has undertaken these commitments. It does not even have to change the Consti-



THE ROOT OF THE EVIL LIES IN THE DEPENDENCE OF UKRAINIAN JUDICIARY ON THE GOVERNMENT



– I think that neither the President nor his majority have any political will, since they use the Prosecutor’s Office and the courts for a completely different purpose, which is merely to punish the opposition, rather than punishing criminals or discovering the truth.

U.W.: Does the political will exist to resolve the problem?

– I think that neither the President nor his majority have any political will, since they use the Prosecutor’s Office and the courts for a completely different purpose, which is merely to punish the opposition, rather than punishing criminals or discovering the truth.

U.W.: Does it make sense to cancel Art. 364 and 365 of the Criminal Code, as is recommended by PACE Rapporteurs?

– These two articles on abuse of office and power have actually been recognized as politically motivated ones that can be used in different ways to oppress the opposition. We insisted on revising these articles when we submitted amendments which were to have been made in the Code of Criminal Procedure. Unfortunately, though, the bill we submitted to parliament was not approved. In addition, I would like to point out one more thing. You know, there is such a body as the Venice Commission. It directly monitors everything pertaining to legislation. It is the body insisting that recommendations are executed, and is pretty serious about it.

U.W.: So, you think that the issue of these two controversial articles could be addressed again?

– Yes, definitely.

U.W.: But when he spoke at the Monitoring Committee’s session in Paris, Oleksandr Lavrynovych, Ukraine’s Justice Minister, said Articles 364 and 365 appeared in the Criminal Code after Ukraine gained independence, and not under Stalin. Is this true?

– These articles are specifically about the abuse of power by government representatives, such as police officers or employees of the Security Service of Ukraine. Of course, they have to exist, but they should not be applied in the sphere of normal political decisions. Their competence should not expand to other areas. That’s the difference. ■

“Election laws are passed to suit every new president in Ukraine”

Oleh Bilorus, Chair of the VR Foreign Affairs Committee and member of BYuT-Batkivshchyna faction, speaks about what it takes to have fair elections, the causes of corruption in the judiciary and the prospects of removing the articles from the Criminal Code, under which Tymoshenko, Lutsenko and Ivashchenko have been charged.

U.W.: Do you think it makes sense to cancel Articles 364 and 365 of the Criminal Code as recommended in the Draft Resolution on Ukraine by the PACE Monitoring Committee?

We inherited these articles from the soviet era of totalitarianism and repression. They are extremely damaging to Ukraine, particularly in its integration into European systems and structure. Ukraine-EU summit in Kyiv has proven that Ukraine is not moving any closer to the EU without removing these two articles from its legislation. This is where two opposite civilization approaches clash; the European and totalitarian soviet. Under the former, a political figure, a president or premier is exclusively assessed by the electorate, which votes for or against politicians. Ms. Tymoshenko scored well with the electorate with almost 12mn voting for her. If the faked and added figures are excluded, she has the same number of supporters in Ukraine as the current president does.

Thus, these articles should indeed be removed and that's what I think the government will obviously do in the early 2012, not later. Otherwise, there will be no reason to talk of signing the Association Agreement, let alone its ratification. The process could halt after the initialing. At the Kyiv summit, Ukraine undertook a commitment to bring its legislation into order and guarantee democratic elections.

U.W.: The Draft Resolution strongly criticizes the procedure to appoint judges and the overall work of the judiciary...

I think PACE's recommendations on the procedure to appoint judges are completely valid. Indeed, it's absolutely chaotic in Ukraine. The president appoints some judges for five years and the Verkhovna Rada elects them for life. This leads to political, social and economic corruption, no rule of law in courts and citizens deprived of any rights. Ukraine should return to electing judges by popular vote for a limited term. People will continue to vote for the judges who work fairly. I'm sure this is perfectly realistic; it requires a relevant amendment of the Constitution.

I would like to stress once more that judges should be elected, not appointed! Thus, any appointment of a



judge, no matter who does it, is political motivated, if only politically. Among other things, it results in political corruption. Judges become the subjects of those who appoint them. Sooner or later, the Constitution will be amended accordingly.

U.W.: The Draft Resolution quotes certain cases of pressure on the Supreme Council of Justice from executive authorities...

I think there are too many overlapping entities including the Supreme Council of Justice, the Council of Judges, Court Administration as well as numerous courts, such as the Administrative and Commercial Court, etc. Average people are unable to find their way through this judiciary jungle. Thus, the whole system needs to be structured first. The Prosecutor's Office should be the first to be structured. It should drop the soviet oversight function and the right to interfere with courts whereby the Prosecutor can dictate a verdict to a judge. A lot has to be done under the VR's (Parliament's) control. If judges themselves, with their corrupt interests, undertake this work, Ukraine will sink deeper into anarchy and injustice.

U.W.: The Council of Europe insists that Ukraine abuses preventive detention.

I support this concern of the Monitoring Committee.

Since soviet times, millions of Ukrainians have been put in jails to give the state a free workforce. Such arrests are extreme options when an individual is a danger to society. Unless someone has committed a murder or any other extreme crime, they can stay under home arrest or a pledge not to leave the country. This is common practice in Europe and the whole civilized world. I'm sure the process will be launched next year in Ukraine. Currently, we have 250,000 people in jails. Prisons are overcrowded. They turn into hotbeds for tuberculosis, hepatitis and HIV infections.

UKRAINE SHOULD RETURN TO ELECTING JUDGES BY POPULAR VOTE FOR A LIMITED TERM. PEOPLE WILL CONTINUE TO VOTE FOR THOSE WHO WORK FAIRLY



U.W.: Does Ukraine need a Uniform Election Code?

This is an important issue now. Over the past 20 years, election laws have been passed to suit certain people, every new president or specific political forces. Ukraine needs to pass a Uniform Code once and for all. Later, it can be amended accurately and reasonably to improve election technologies rather than their political aspects. This could guarantee free, fair and non-violent elections. But I think Ukraine could get such a Code in three years, no sooner. The upcoming parliamentary election will occur under the law recently passed by the VR. I don't think there will be any more amendments to it anytime soon. ■

PACE is Concerned. What's Next ?

The Draft PACE Resolution outlines the problems with democracy in Ukraine, but does not provide for any sanctions



Interviewer:
Alla Lazareva

On 15 December, the PACE Monitoring Committee unanimously approved a Draft Resolution entitled “The Functioning of Democratic Institutions in Ukraine” available at <http://ukrainianweek.com/Politics/38273> or http://assembly.coe.int/Communication/16122011_UkraineInstitutions_E.pdf. On 26 January, the Draft Resolution will be presented for approval at the Palace of Europe. In his interview for *The Ukrainian Week*, Hryhoriy Nemyria, ex-Vice Premier of Ukraine for European Integration, talks about PACE’s priorities.

UW: Do you find the Draft Resolution well-balanced? Does it reflect all the important aspects of our political life?

– The PACE Resolution on the situation as pertains democracy in Ukraine is long overdue, in light of the catastrophic situation with respect to democratic values, human rights and rule of law principles, which were established in Ukraine after President Yanukovych came to power. In my opinion, PACE should have conducted an urgent debate on these matters a long time ago. Such a discussion in the Assembly last year or early this year, could have significantly influenced the situation and stopped clearly negative tendencies. Therefore, the consideration of this topic during the January session is obviously welcome. However, in my opinion, it should have been a comprehensive report on Ukraine honoring its obligations

PHOTO: UNIAN

and commitments to the Council of Europe.

The Draft Resolution covers many extremely important issues of a political and legal nature. Its main flaw is the lack of effective instruments to force the current administration to implement this resolution after its adoption. In other words, there is no threat of sanctions, without which this resolution will remain another list of recommendations on reforms. Such recommendations were mentioned many times in previous PACE resolutions on Ukraine, which covered all the systemic problems which Ukraine is once more reminded of in the new document. Only the threat of sanctions and strict time limits for implementation can force the current Ukrainian authorities to make tangible changes. Otherwise the response will again be some other action plan, and that will be that. In October last year, the Assembly already passed a resolution with the same title – almost all of its provisions remained unheeded and the Assembly should strongly react to this.

UW: Several paragraphs of the recommendations are dedicated to the prosecution of former government officials in Ukraine...

– As to the prosecution of former government officials, in my opinion, the Draft Resolution misses the fact that systemic legislative and practical shortcomings, which are indeed present in the Ukrainian legal system, are not the main reason for all the flagrant violations of the right to a fair trial and other human rights, which are evident in relevant cases. Legal shortcomings do not explain the lack of legal grounds for prosecuting Tymoshenko, Lutsenko, Ivashchenko, Korniychuk and others; do not explain the use of absolutely unjustified restrictive measures, including the repeated detention of a person who had already been imprisoned; do not explain the denial of proper medical assistance and treatment; do not explain the blatant violation of privacy in the form of the unauthorized publication of photos and videos

of the person who has been detained; do not explain the violation of the presumption of innocence in statements made by the President and leaders of the Prosecutor's Office; and many other things. If the current, albeit imperfect Constitution and laws of Ukraine had been observed, this would not have happened. But all this is a result of the targeted terrorization of the opposition and its leaders. And this should be mentioned in the resolution. The opposition is an important institution in a democratic society and facts of its severe oppression should be debated in the Parliamentary Assembly.

UW: The Draft Resolution suggests that the mechanisms and terms of detention are defined in laws, Ukraine resorts to the excessive use of detention on remand. Can relevant legislative changes be expected from the current parliament? What real mechanisms exist to change this practice, which runs counter to European standards?

– The Draft Resolution mentions a number of flaws in the pre-trial detention system. The resolution of this systemic prob-

lem requires both legislative changes (in particular, a new Criminal Code) and the due enforcement of existing laws, as well as of the case-law of the European Court of Human Rights, the judgments of which, including in cases against Ukraine, set clear requirements regarding the use of detention on remand. A lot can be done by training and raising awareness among judges and prosecutors. As to prosecutors, should the current leadership of the State and of the General Prosecutor's Office make use of at least a fraction of the efforts they direct towards suppressing the opposition to convey to prosecutors the need to use alternative restrictive measures or, let's say, to prosecute cases of torture or ill-treatment in police custody, these problems would have been partly solved without any legislative amendments. But they are simply not a priority for the political leadership and heads of law enforcement agencies – their main task is to retain the monopoly of the current regime's power by all possible means.

UW: The Draft Resolution states that there is a lack of equality between the prosecution and defence in Ukrainian courts. What should be done to bring to life a genuine adversarial trial between the defence and the prosecution?

– Changes must be made to procedural codes, but it is also necessary to ensure genuine guarantees of the independence of judges from prosecutors. What independence can there be if the three chief prosecutors from the General Prosecutor's Office sit on the High Council of Justice and can at any time initiate disciplinary proceedings against judges who deliver independent decisions and do not follow directions from prosecutors? When a Deputy Prosecutor General announces at a press-conference that the whole chamber of the Supreme Court may be prosecuted for their illegal decisions? No matter how perfect the new Code of Criminal Procedure will be, there can be no adversarial trial in a system, where courts are dependent on prosecutors through disciplinary liability and from executive authorities – through lack of sufficient funding. ■



PACE PASSED A RESOLUTION IN OCTOBER 2010. IT WAS NEVER FULFILLED

BIO

Dr. Hryhoriy Nemyria (born April 5, 1960) is an ex-Vice Premier of Ukraine for European Integration, Director, Centre for European and International Studies (CEIS), Institute of International Relations, Kyiv Taras Shevchenko National University, Adjunct Fellow, Center for Strategic and International Studies (CSIS), Washington D.C. (since 1994) Member, Central and East European Advisory Committee, Freedom House (since 1998) Academic Advisor, "Nations in Transit", Freedom House, 2000, 2001 Visiting Lecturer, NATO – Ukraine Relationships, NATO Defense College, Rome, 1999, 2000, 2001 Chair, Executive Board, IRF, Kyiv, (since 1996) Coordinator, Kyiv Political-Economic and Security Task Force, American-Ukrainian Advisory Committee (AUAC), 1998

The Importance of Values

Andres Herkel: 'The problem of Ukrainian politics lies in the perception that deputies' money is more important than their personal traits'



Andres Herkel, the head of the Estonian delegation to PACE since 2007, Vice-President of PACE (2009-2011) and a member of the Pro Patria Union visited Ukraine as part of the “European experience” joint project between The Ukrainian Week and the YE bookstore chain.

In an interview with *The Ukrainian Week* in December 2011 – before PACE Monitoring Committee Report on Ukraine – Mr. Herkel shares his views on the building of democracy in post-Soviet countries

U.W.: You are actively engaged in the Council of Europe in solving the issue of political prisoners. How do you think the nature of relations between the authorities and society has changed in former Soviet republics since the collapse of the USSR 20 years ago? In your opinion, what allowed

authoritarianism to make a comeback in so many of them?

I entered politics after my student years in 1988. One of my first activities was to create network of information between different pro-independence groups. We also started to demand the release of Estonian political prisoners and a few years after that I found myself working together with them in Estonian politics.

The problems with many post-Soviet countries is not only about corruption, or the deformation of the principles of a free market economy, the rule of law and human rights. There are two very simple pre-conditions to development: communist crimes should be condemned and ethnic identity must be strong. Therefore the truth about the Holodomor and the use of the Ukrainian language in education are of extreme importance. Unfortunately, in many of the countries, communist leaders continued to hold the power using old methods. They did not allow an adequate assessment of Soviet legacy and instinctively opposed the development of democracy. The strange concept of a "sovereign" or "controlled" democracy was invented. In many of these countries, ethnic identity is very weak or vulnerable.

But from the other side, if the society as a whole is not ready to formulate national interests then the post-communist leaders have a good chance to manipulate society and to defend their own rather narrow-minded interests with the help of oligarchs.

U.W.: As PACE Rapporteur on the situation in Belarus during the last session, you suggested that your colleagues visit political prisoners in Minsk, including former presidential candidates and human rights activist Ales Bialecki. Did your initiative receive any support? What was Minsk's official reaction to the idea?

I got support from my colleagues but there has still been no reaction from Minsk. After the events in December 2010 PACE decided to not have high-level contact with authorities in Belarus. But currently I am not a member of the Bureau of the Assembly and therefore as a humble member of the Assembly I do have permission to meet with authorities and personally persuade them to release political prisoners. I am also very concerned about their health and the desperate conditions in which they are being held.

U.W.: What is your opinion about the cancellation of the political reform of 2004 in Ukraine and the return to the Constitution of 1996? Should the Council of Europe have made tougher decisions regarding the extension of presidential power a year ago? And could such assessments have prevented the current sliding of Ukraine towards totalitarianism?

Without any doubt Ukraine needs decisive and well-targeted reforms in the field of the Constitution, the criminal justice system etc. The return to the 1996 constitution was a setback. I also wondered how the entire political system in Ukraine is shadowed by the hypothesis that positions on a party list are much more dependent on money than on the political skill or personal qualities of the candidate.

As a Council of Europe member-state, Ukraine always has the ability to consult on Constitutional and other reforms with ex-

BIO

Andres Herkel (born 1962) is an Estonian politician. In 1999 he was for the first time elected to Riigikogu (The Parliament of Estonia, ed.)

Since 2003 he has been member of the Parliamentary Assembly of the Council of Europe (PACE), where he has held significant positions: Head of the Estonian delegation since 2007, Vice-President of the PACE (2009-2011), rapporteur on the honouring of obligations and commitments by Azerbaijan (2004-2010) and the situation in Belarus (since 2011).

perts from the Venice Commission. We should react if certain regulations in legislation do not meet our standards. At the same time, there are choices which are up to the political will in the country. For example, it is strictly a country's own choice on whether to have a presidential or parliamentary democracy or a first-past-the-post or proportional electoral system. Different democratic countries use different systems. In other words, nobody has the right to say in the name of the Council of Europe that a parliamentary democracy is better than a presidential democracy or that you should implement a proportional electoral system with different constituencies and personal votes for specific candidates on a party list. But as a friend of Ukraine, I can tell you that that is what my opinion is.

As far as the choices made in Ukraine are concerned, the weakest point is not the shift towards presidential power as such, but the fact that a political decision was made by the Constitutional Court and not by your parliament.

U.W.: Do you think that the criminal cases against Yulia Tymoshenko, Yuriy Lutsenko, Valeriy Ivashchenko and other members of the previous Ukrainian government are political persecution? How can we distinguish between political repression and fighting corruption? Would it be realistic for PACE members to visit the detainees in their cells?

Yes, I think there is strong political motivation and the analysis made by the Danish Helsinki Committee on those cases is convincing. Unfortunately, Ukraine is not the first country where we can see the very selective use of the criminal justice system with regard to corruption.

I think that PACE monitoring rapporteurs Marietta de Pour-

baix-Lundin and my compatriot Mailis Reps should have the possibility to visit any prisoner they want. I was monitoring rapporteur of Azerbaijan from 2004 until 2010 and despite having different opinions with Azeri authorities even about the existence of political prisoners in the country, I always had opportunity to visit them. Ukraine is still a Council of Europe member-state, like Azerbaijan or the Russian Federation; it is not an outsider like Belarus.

U.W.: In one of your speeches in Strasbourg you mentioned "the responsibility of the international community for cases in which a state openly despises its own citizens". Does the international community feel its responsibility for Ukraine today?

I spoke about the "responsibility to protect" which is the principle more and more underlined in international organizations, including UN. However, this principle was not followed for example during the war in Chechnya. Court-cases against Tymoshenko and others are different than war against peaceful citizens.

At the same time we should act stronger than we did, and a critical look at the functioning of the criminal justice system in Ukraine is probably necessary.

U.W.: What is preventing Europe from having a deep understanding of processes in Ukraine? How can we make people understand it is important not to lose Ukraine? How can the West effectively support pro-European circles in Ukraine today?

Europe is a much better choice for Ukraine than the so-called Eurasian Union led by old-fashioned Russian imperialism. Unfortunately, we are weak at the moment because of the debt crises. The President of France, Nicolas Sarkozy named his daughter Yulia, but it is obvious that Europe is too busy with its own problems. The debt crises has a very clear origin: the basic values of transparency and financial responsibility were not followed in many of countries which belong to the EU and the euro-zone. There is only one way to protect Europe and to protect Ukraine: to simply be consistent with values. ■



Read full interview at <http://ukrainianweek.com/Persona/34117>

Hurdles for NGOs

Ukraine's public organizations are hampered by outdated legislation and red tape

Authors:
Yulia Mykhailiuk
Alina Paštukhova

In Ukraine, 17% of the population belong to various associations, but a mere 2% are really active – but their activity produces results. For example, campaigns and hearings initiated by citizen associations made it possible to save Starokyivska Hora from builders. Moreover, in the place of a foundation pit which the builders had already dug in the Peizazhna Aleia landscape park, a public garden was made thanks to the efforts and money of the Kyiv Landscape Initiative. It has already become a favorite recreation destination for both children and adults.

Unfortunately, stories of this kind do not always have a happy ending. For example, the residents of the Berezhniaky district in Kyiv decided to join forces in 2000 to defend the public garden and the shores of Lake Telbin from builders, but they got tangled up in red

tape: the Justice Ministry rejected their application to set up an NGO because its statute defined its goal to be the representation and defense of the interests of community members. The effective legislation limits the functions of NGOs to the defense of ideas of their members. The disgruntled citizens were forced to take the issue to court but lost there as well. They appealed to the European Court of Human Rights which upheld their case on April 3, 2008. Even though they failed to save the shores of Lake Telbin from construction (three huge houses were built there), the case known as Koretsky et al. vs. Ukraine provided an impetus to revise outdated legislation on NGOs.

BUSINESS IS EASIER

It is much more complicated in Ukraine to set up an NGO than a

business venture. Tetiana Yatskiv, deputy head of the Civic Advocacy Center, says that NGO registration is overregulated by current laws which fail to reflect modern realities. Different governments have submitted bills “On Non-Government Organizations” to parliament but they have been withdrawn each time a new prime minister has taken office.

One of the key problems is the complicated and time-consuming registration procedure: 7-23 documents (depending on the status) are required for the NGO, while a mere four are needed to register a business company. Considering the headaches associated with the process, many law firms do not even take on such cases. The services of the few that do are rather expensive. The joke in the legal circles is “Will trade: one NGO for two limited liability companies

St. Sophia Cathedral belongs to Kyiv, not Moscow



and one privately owned company.” According to the Justice Minister, nearly 60% of those who want to set up an NGO fail to complete the registration procedure. This greatly impedes the progress of civil society and self-organization.

Red tape prevents NGOs from performing one of their key functions – defending the interests of the community. They promote ideas of and provide services only to their members, and the activities of human rights, environmental, and social organizations for the good of social groups is illegal.

Another problem is the unjustified limitations due to territorial status. Other legal entities can freely operate across all of Ukraine, but NGOs may only do so only within the territory defined in their statutes. Thus, an NGO registered in Lviv cannot legally organize an event in, say, Ternopil.

Unlike all European and some CIS countries, in Ukraine only its citizens have the right to create NGOs. Foreign nationals, persons without citizenship and legal persons do not have this right, which greatly limits opportunities for real civilized dialogue between business and authorities.

EUROPEAN PRACTICE

Countries with conducive conditions have many times more NGOs than in Ukraine. For example, in Estonia, an NGO can be registered via a web portal and paid for electronically. Estonia has 201 NGOs per 10,000 people, while Ukraine has just 17.

Poland and many other countries have a simplified form of NGOs – associations. It takes three people to found an association. A newly-created association reports to a local authority, and if it does not receive a denial within 30 days, it is assumed that it is allowed to operate. In Ireland, most citizens choose the form of non-corporate associations that operate on the basis of a written or oral agreement about joint activities, sometimes have statutes and do not require registration. In France, both physical and legal persons (at least two) can found an NGO. In order to register an organization as a legal entity, one has to submit only the statute and an application. No fee is charged. In Hungary, courts register NGOs

but apply a simplified procedure and grant permits within a day.

In Germany, which is considered a country with the most effective system of social security, 60% of the services paid from the budget are provided through NGOs. The government invites bids from government institutions, privately owned companies and NGOs. The latter win owing to higher quality of services and lower cost.

The Ukrainian government also offers financial incentives for NGOs. For example, NGOs received UAH 185 million in grants, but unlike Germany, the procedure was not transparent and no bids were invited.

Curiously, punitive measures for operating NGOs without legal registration have been preserved only in post-Soviet countries, such as Russia, Belarus, Tajikistan and Turkmenistan. In particular, under Uzbek laws, the guilty party may be fined by an amount equal to 50-100 times the average wage.

ALLOW NOW TO BAN LATER

In April 2011, bill No. 7262-1 on NGOs was placed on the agenda of the Verkhovna Rada. It is sponsored by a group of MPs representing the BYuT, NU-NS and the Party of Regions and is seemingly geared toward improving conditions for NGOs. NGO representatives were also involved in drawing it up and are now lobbying for it in parliament. The Council of Europe has been insisting for several years now that a law of this kind should be passed. However, its passage does not necessarily mean an easier life for NGOs.

Not only the opposition is interested in having this law. Chief of the Presidential Administration Serhiy Lovochkin is said to be pushing for it in order to demonstrate the “democratic character” and “quality work” of the government, which can utilize this law to boost its image in the West, while at the same time making it a meaningless paper in reality.

Bill No. 7262-1 contains a number of novelties. First, the registration system will be made easier for NGOs and will take up to three working days regardless of the NGO’s status. Ukrainian citizens, foreign nationals and persons without citizenship can be NGO founders under this bill. Both physical and legal persons, excepting gov-

ernment bodies and government-funded agencies, will have the right to found these organizations and hold membership in them.

Second, NGOs will be permitted to act not only in the interests of its members but also to defend other people who will turn to them for help.

Third, the division of NGOs into local, national and international will be dropped. This will permit them to define the territory covered by their activities and freely operate across the country.

The bill also offers a new conception for legalizing NGOs to help avoid the time-consuming and burdensome procedure of double registration. The Justice Ministry will accredit branches of foreign NGOs registered in compliance with the laws of other countries, will confirm their status as all-Ukrainian NGOs and will keep a unified register.

However, the forms of responsibility have been radicalized. Warnings, fines, suspension of certain types of activities and overall



CURRENT JUSTICE PREVENTS NGOS FROM PERFORMING THEIR KEY FUNCTIONS. THIS GREATLY IMPEDES THE PROGRESS OF CIVIL SOCIETY

suspension envisaged in current legislation will not be applied. Instead, infringements will lead to closure or forced disbandment.

As it shows its readiness to liberalize conditions for NGOs, the Party of Regions seems to have found a way to “minimize the negative consequences” of the new law. The Party of Regions claims it is elaborating a document to control the way NGOs are financed. They promise to regulate the procedure for receiving grants. They are even considering the Russian option of banning foreign grants for NGOs. Public members view this initiative only as a way to cut the financing for the organizations whose activities may damage the government’s image. After the Orange Revolution, the flow of funds on projects to build and defend democracy nearly dried out but can be resumed now. Evidently, the government is acting preemptively to keep this kind of financial assistance from reaching Ukrainian NGOs. ■

Unreal Realpolitik

Cécile Vaissié: “Democratic traditions work only when the government is balanced by an independent judiciary and freedom of speech”

Interviewed by:
Halyna Plachynda

Cécile Vaissié, PhD in political science, is a professor at the University of Rennes 2 and one of the Western authorities on the history of the dissident movement. Her latest book *Les ingénieurs des âmes en chef : Littérature et politique en URSS (1944-1986)* analyzes the mechanisms of political manipulations in the milieu of Soviet writers. Other topics of interest for the French scholar include women in the dissident movement, propagandist influences in cinema art and contemporary protest movements. In her interview for *The Ukrainian Week*, Vaissié discusses the parameters of modern dictatorships, shares her thoughts on Ukraine’s European prospects and identifies resources for resisting authoritarian regimes.

THE EU CAN NO LONGER BE A “RICH CLUB”

U.W.: *On the level of research terminology, to what extent can it be claimed that dictatorships have been established in Belarus and Russia? Can we say that Ukraine is heading for an authoritarian political order?*

– What criteria are used to define a dictatorship? First, power is concentrated in the hands of one person or a small group of people. Second, there is no division of power. Third, individual freedoms are abolished. This is true of Russia and Belarus, even though their systems are different. Starting from 2000, Putin and his clan have been “holding on” to Russia, and they do not expect to let go of it. Opposition parties are not registered, even those led by professional and moderate politicians, such as Boris Yeltsin’s ex-Prime Minister Boris Nemtsov and Putin’s ex-Prime Minister Mikhail Kasyanov. The judiciary and the mass media are dependent on the government; civic freedoms are curtailed; and elections are not free.

In Ukraine, Tymoshenko, Lukashenko and many others are stripped of the right to a fair trial. However, unlike Putin and Alexander Lukashenka, President Viktor Yanukovich keeps speaking about the European course of the country he heads. So if he wants to be consistent, he must secure democratic transformations in Ukraine.

“POWER IS USED WHEN OTHER ARGUMENTS FAIL”

U.W.: *What resources of resistance have allowed dissidents to hold their ground against much more powerful systems?*

– This resource is love for their country. Who wants to live under a totalitarian regime and see how his own children and grandchildren are suffering from dictatorship? The strength of dissidents is a striving for the truth, rejection of lawlessness and an abandonment of violence. These people have managed to overcome fear.

Some of them understood that the Soviet Union was doomed. Remember the book by Andrey Amalrik written in the late 1960s? It was entitled *Will the USSR Exist to 1984?* Solzhenitsyn also kept saying he would return to a liberated Russia.

Many are aware of Russia’s vulnerability today. The country lives by selling raw materials. It sells wood to buy paper. What’s next? Belarus is faring even worse. It has isolated itself from its neighbours and historical progress. Waking up will be brutal in the economic, social and political senses. Ukraine and Belarus will have to carry out reforms, one way or another. Delays will only add to the pain.

Authoritarian regimes seem strong, because they are based on brutality and systematically use power structures against their citizens. But this is essentially proof of their weakness, because force is used when other arguments fail. The USSR, which

appeared to be so powerful, fell apart because its economy could not hold together, and no one ever thought about the reforms which should have happened several decades earlier. I’m afraid that Russia may soon find itself in a similar situation.

U.W.: *In the 1970s, dissidents demanded the Soviet government follow its own declared principles. However, after the fall of the Berlin Wall many of them realized that the very nature of communism contradicts humanistic values and that communist crimes must be condemned on the highest level. Now Eastern European countries are sharply criticizing the brutal consequences of oligarchic capitalism. Are there good reasons to believe that a new wave of dissidents will soon rise in Ukraine, Russia and Belarus?*

– First of all, not all Soviet dissidents demanded the government follow the ideals of communism. This situation was characteristic of the 1960s, when quite a few dissidents and, in a broad



sense, representatives of the intelligentsia believed that, just like in Czechoslovakia and other European countries, "socialism with a human face" was possible in the countries of the Soviet bloc. Later, up until the 1980s, some dissidents identified themselves as Marxists, but they were not in the majority. Throughout the 1970s, the dissident movement began to gradually distance itself from communist views which were not shared by everyone anyway.

"POWER IS USED WHEN OTHER ARGUMENTS FAIL"

Think about the Ukrainian General Petro Hryhorenko. He was born in 1907 and became a convinced communist at 20. In 1964, he was imprisoned and then thrown into a mental hospital for what he had set up – the Union for the Revival of Leninism! Convinced in the correctness of Lenin's discourse, this man undertook a fight against bureaucracy and the absence of citizens' rights. This honest and courageous man began incredibly complicated moral work on himself which eventually led him to declare at 70: "I stopped being a communist even though I had defended this doctrine almost my entire life." He did not conceal how "painful the separation was", but said that he no longer believed in "any communist theory – neither Marxist, nor Leninist, nor any other." He declared at the time: "There is no communist state that would not have crushed its people, deprived it of every human right and destroyed freedom and democracy."

REALPOLITIK VERY OFTEN TURNS OUT TO BE UNREAL IN PRACTICE

U.W.: Addressing Tunisians, Libyans and Egyptians, Nicholas Sarkozy said he regrets having had good relations with dictators who ruled these

North African states and apologized for having failed to "see the sufferings of Arab nations" in due time. Nevertheless, the good relations between Paris and the Kremlin are improving with each passing day. Does Sarkozy "fail to see" the sufferings of the Russian people, or does he fail to understand the nature of Putin's regime?

– The cynicism of politicians is a bottomless pit. We keep finding ourselves faced with a classical choice between realpolitik and respect for moral values. And everyone has to make their choice themselves. Personally, I believe that realpolitik very often turns out to be unreal in practice, and life sooner or later shatters all its excessively pragmatic constructions.

In June 1977, French President Valéry Giscard d'Estaing welcomed Leonid Brezhnev in the Élysée Palace. That same night, French intellectuals met with dissidents (Vladimir Bukovsky and Leonid Pliushch) in the Récamier theater. In August 1991, precisely on the day when the GKChP staged the coup in Moscow, French President François Mitterrand spoke about "his friend Yanayev" on French television. The president and the public may, of course, have different roles. But wouldn't it have been more "realistic" to side with Soviet dissidents back in 1977 and with Yeltsin in 1991? Rousseau explained the French to us a long time ago: "The strongest is not always strong enough to always rule if he does not convert his power into law and subordination into duty."

Remember the reaction of Rama Yade, a young French Secretary of State for Human Rights, when Muammar Gaddafi was welcomed in Paris with great honors in December 2007? "Colonel Gaddafi should know that our country is not a rag with which a national leader, whether he is a terrorist or not, can wipe his blood-covered boots," she said. This means more than the insincere apologies or faked naivety of Sarkozy and the likes of him – those who are always on the side of the strong.

French leaders are absolutely indifferent to the Russian people. They want gas, oil, access to Russian business and crowds of rich tourists in Cote d'Azur. I'm not sure they truly realize that as long as Russia is not a rule-of-law state, French investors will not be protected and will always depend on the whims of a leader, big or small. It is time to end an intolerable variety of "racism" – the claim that some peoples are "by definition" incapable of freedom, equality and respect for law. This reasoning is used to claim that nations like that "are asking for" an iron hand.

U.W.: Some Russian artists, such as director Nikita Mikhalkov, are actively promoting precisely this view...

– Of course! The reason is that the source of privileges for such people is a theory of incapability. The Arab Spring has proved the opposite: every person wants to be free, dignified and protected by law. Noted dissident Sergey Kovalov does not tire of repeating: "States must serve citizens, not the other way around." In my opinion, at a time when shortsighted politicians are playing with realpolitik illusions, civil societies in various countries of the world must act, tell the inconvenient truth and join forces.

U.W.: In your opinion, what are the possible mechanisms for cooperation among those who try to keep their countries from slipping into dictatorship and like-minded people abroad?

– First of all, they need to communicate and speak about what is going on. We Westerners need to understand a lot more about the processes that are happening in the East. Your reality is a reminder to us that without the free press and independent judiciary, the French, just like Ukrainians, would not be spared authoritarianism. "Democratic traditions" work only when the government is balanced by the independent judiciary and freedom of speech.

I think that those in the West who really care about human rights must support the opposition forces in Eastern Europe which defend very similar principles and feel extremely isolated. Civil societies in the countries of the former USSR must know – it is important! – that the Russian, Ukrainian and Belarusian governments have failed to delude all of the West. Many people understand what is happening despite the obvious information war, particularly on the Internet.

I teach at a university, so I am always happy to welcome students from former Soviet republics. I believe that it is equally useful for our young Bretons to study abroad. It is a treasure trove of new knowledge for my lectures. We have no taboos; we debate about the Holodomor, Stalin's repressions, the conquest of the Baltic states and collaboration – not only in the USSR but also in France. French, Ukrainians, Balts and Russians participate. This exchange of experience is extremely important to all of us. We are all Europeans. We must know our common culture and common history in all possible dimensions in order to write the next pages of it together. ■

FREEDOM HOUSE: We Will Continue To Tell the Truth

Freedom House President David Kramer:
“It looks like Ukrainian leaders are using
the judiciary to prosecute their opponents”

Interviewer:
Zhanna Bezpiatchuk



PHOTO: REUTERS

Ukraine dropping in the Freedom in the World report reached all leading mass media and government centers in Europe and the US on the same day. Over the past few months, the current government has essentially been communicating with Freedom House through Hanna Herman and Inna Bohoslovska. These politicians are the people who have been responding to critical reports and letters from Freedom House’s David Kramer and his colleagues on the state of democracy in Ukraine. The Ukrainian Week spoke with Mr. Kramer to hear his opinion on recent developments in Ukraine and the quality of communication with the Ukrainian government.

U.W.: The case against Yulia Tymoshenko brings to mind two opposite views: either her hypothetically possible sentence to prison will have a catastrophic impact on Ukraine’s democracy and European integration or the life of the country will not depend on this case so critically. What is your opinion on that?

– This is a serious threat to Ukrainian efforts to move in a more democratic direction. It’s more than one case. This prosecution of Yulia Tymoshenko started last year first over ambulances and the Kioto fund, and then over the current case as well as gas dealings when she was in the private sector in the 1990s. It has created the impression that the government is intent on going after her, convicting her, putting her in jail, making her ineligible to run for president again and essentially keeping her away from having any opportunity to return to office. So, this whole situation suggests that the Ukrainian leaders are using the judicial system to go after their main opponents. It’s not just Tymoshenko. It’s also Yuriy Lutsenko and oth-

The interview was taken before the court issued a verdict to sentence Yulia Tymoshenko to 7 years of prison

Ascetics often live in caves to seclude themselves from the world. Unlike caves in religion, in politics caves have hardly anything in common with reverent solitude. They are cold, damp places sheltering hol-

low authoritarian or totalitarian regimes. No matter how much one wants to criticize institutions like Freedom House, turning away from them means running away from the world and into all the related consequences. The news of

ers. The Tymoshenko case is, obviously, the one that has received the most publicity.

U.W.: What criteria are most important in assessing democracy in Ukraine? Is it the procedural aspect of the case against the former prime minister — i.e. not ensuring her right to defense, disproportionate preventive measures and the rejection of defense witnesses, or that it is a trial against the opposition leader despite the other problems?

– To be honest, it is a combination of all of this. I think this has reached the point where there is not much that can be done to fix it. The investigation, the charges and courtroom proceedings, in my view, need to be abandoned. The whole procedure has been compromised. It lacks credibility. When the judicial proceedings lack credibility, then you kind to start from the beginning, you start from scratch. I don't think that there can be fixes made in procedures to make this a better, more credible process. This whole prosecution of Tymoshenko lacks credibility. At the same time, former government officials should not be exempted from responsibility. The way this has been conducted almost from the beginning smacks of politics rather than the true pursuit of justice. There are a number of other issues and cases that if judicial authorities wanted to investigate, I'm sure they could find some interesting information such as in the second round of the presidential election in November 2004, or the gas deal that was signed in January 2006. And Yulia Tymoshenko had nothing to do with that. Or the manner in which the Rada ratified the Kharkiv Treaty last year. It seems that the bulk of attention is being devoted to Yulia Tymoshenko because — in the minds of the current authorities — it seems she poses the greatest threat. So they have dug an enormous hole for themselves. And they have to stop digging.

U.W.: Representatives of the current government claim that foreign governments and organizations should not interfere with cases against former top officials. Still, virtually all Western Foreign Ministries

BIO

David J. Kramer is President of Freedom House, which he joined in October 2010. Prior to joining Freedom House, Kramer was a Senior Transatlantic Fellow at the German Marshall Fund of the United States. Before joining GMF, Kramer served as Assistant Secretary of State for Democracy, Human Rights, and Labor from March 2008 to January 2009. He also was a Deputy Assistant Secretary of State for European and Eurasian Affairs, responsible for Russia, Ukraine, Moldova and Belarus affairs as well as regional non-proliferation issues. Before joining the U.S. Government, Kramer was a Senior Fellow at the Project for the New American Century, Associate Director of the Russian and Eurasian Program at the Carnegie Endowment for International Peace, and Assistant Director of Russian and Eurasian Studies at the Center for Strategic and International Studies, all in Washington. Kramer received his M.A. in Soviet Studies from Harvard University and his B.A. in Soviet Studies and Political Science from Tufts University.

have commented on them. How do you see the situation?

– Ukraine is a member of the Council of Europe and a member of the OSCE. Ukraine is a signatory to the UN Declaration on Human Rights. All these things mean that these kinds of concerns — human rights concerns — do raise the level of attention from other countries. And so other countries have the responsibility to raise the issues and concerns about these kinds of actions. And the Ukrainian authorities need to ask themselves why nobody outside of the country (and even a lot of people inside the country) attaches any credibility to this process. Criticism is coming from everywhere, including from Moscow. And yet the Ukrainian authorities say that everything is in the hands of the judicial bodies. President Yanukovich needs to show some leadership and dismiss the case and order the legal authorities to do this as well, because no one finds it credible.

U.W.: In July 2011 you disclosed an open letter to President Yanukovich where you called on him to stop “digging a hole” for himself. Have you got any reply?

– I did not get one directly, personally. There were comments made by Hanna Herman who dismissed the criticism and denied political persecution. Inna Bohoslovska wrote a response in the KyivPost saying that we are the ones digging the hole for President Yanukovich. There seems to be a lot of press attention to it, but I would say the government did not seem to receive it positively. The response from the government to our report that we released in June in Ukraine was more positive. Anna Herman was there, she stayed through the presentation, though she left after she made her first comment. The president issued a statement that he was taking it seriously. Unfortunately, I would say those comments proved to be rather empty. The test is really in the policies of the government which it still has to pass.

U.W.: Eight months of 2011 have passed. Is it possible to forecast Ukraine's position in the next Freedom in the World ranking by Freedom House?

– We still have four months to go before the book is closed. It

would be premature of me to suggest any change, but the trends so far this year have not been encouraging.

U.W.: Who is the target audience of the democracy and human rights surveys carried out by Freedom House?

– The audiences are all those who are interested in the development of freedom all around the world. That includes the US government, US Congress, European governments, European parliaments, the defenders of civil society and human rights. It's global. It covers the entire world. So we get a lot of attention. We have been doing it since 1972. The report has developed the reputation for being a key standard for how countries are developing.

U.W.: Does the country's ranking in your report affect potential investors?

– When a country is moving in the wrong direction on freedom scores, it generally still does have sufficient rule of law to attract the proper or adequate foreign investment. But I do know that US government agencies attach significance to the scores and rankings we report.

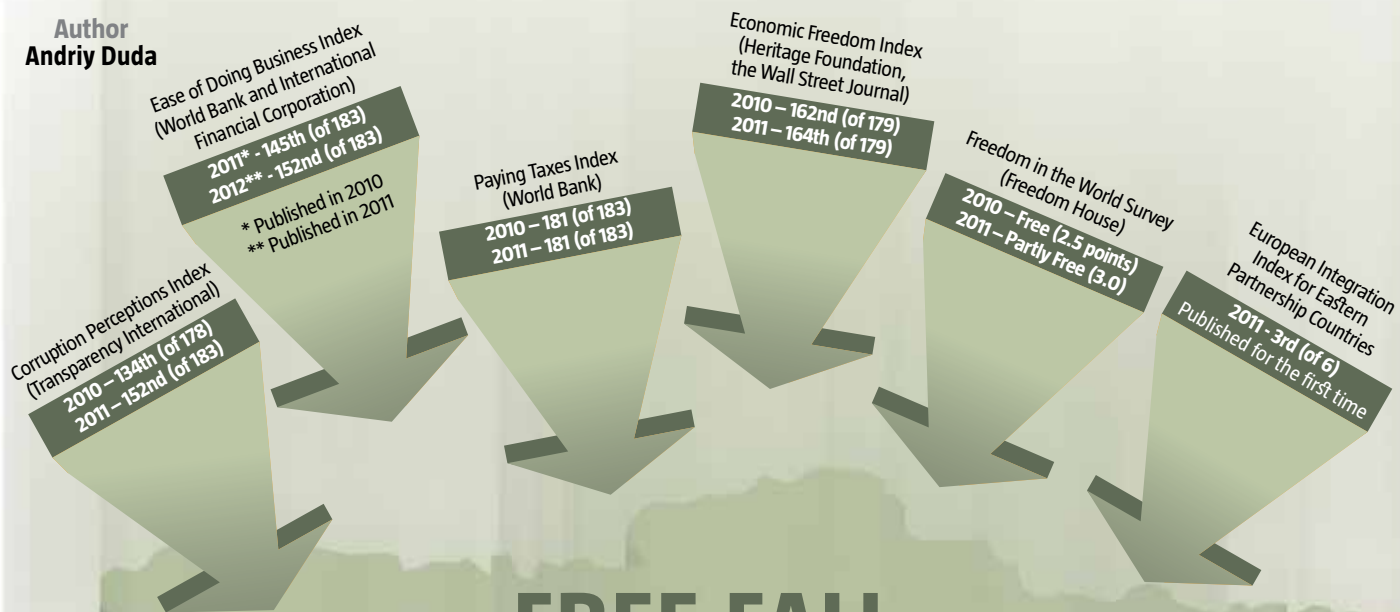
U.W.: There is a caste of politicians in the FSU who say Freedom House promotes the US government's interests. What is your answer to them?

– There is very rigorous methodology for evaluating countries. There are experts who contribute to the process. There is a committee that reviews the analysis and gives scores. It goes through a very rigorous process. That's not to say that we are perfect. We struggle every year to make the analysis and ranking better than the year before. But I think that it is about as good as it could be. It does not surprise me that countries that are authoritarian in nature and that are moving in an anti-democratic direction don't like what we do. They don't like the spotlight being shined on their deficiencies, shortcomings and abuses. I'm not sure what we can do in the minds of such government officials to improve this reputation. We will continue to tell the truth and to do the best job we can. ■

Operation "IMITATION"

The government's "anti-corruption" efforts do not affect the roots of the evil

Author
Andriy Duda



FREE FALL

Ukraine is losing its positions in international ratings

The recently published Transparency International's Corruption Perceptions Index (CPI) showed that corruption levels in Ukraine had increased in 2011: our public officers rank 152nd, together with their counterparts from Tajikistan, while in 2010, Ukraine ranked 134th. However, this deplorable tendency in all annual international ratings has slid down during President Viktor Yanukovich's time in office, and can even be seen in the Eastern Partnership European Integration Rating, which was first published at the EaP Summit in Warsaw in 2011, Ukraine unexpectedly ended up third, behind Moldova and Georgia. Only a short while ago, Kyiv could pride itself on being Eastern Europe's most advanced capital on the route towards European integration.

The largest hole, through which billions of budget funds are lost, is state purchases. Under the new regime, their competitive element is gradually fading, and a corrupt mechanism for purchasing from one player is being used ever more often during the selection of a contractor for the supply of goods and services at public expense

There are miracles out there. 2011 saw Ukrainian legislators passing the Law "On the Principles for Preventing and Counteracting Corruption", which strengthened relevant criminal and administrative accountability. Dmytro Sviatash, a Party of Regions MP, has already published respective data: 3,000 criminal cases were initiated against government officials this year on the grounds of corruption. Some of the persons involved even occupied relatively high posts, such as Vasyl Volha, the Head of the State Commission for the Regulation of the Financial Services Markets, or Volodymyr Halytsky, Head of the State Employment Service. However, in its 2011 report, Transparency International states that rather than decreasing, the corruption level in Ukraine has increased. Apparently, the number of initiated proceedings has no impact on the scope of corruption.

In terms of figures, there is some truth in the words of the Party of Regions' spokesman. The new wording of anti-corruption legislation (of April 7, 2011) expands opportunities for the prosecution of state and municipal officials and other public officers. Therefore 3,000 orders to initiate anti-corruption criminal proceedings is quite a realistic figure. However, it would be good if the authorities also published the number of cases that actually went to trial.

It is clear, though, that Transparency International takes into account qualitative, as opposed to quantitative figures. In other words, it draws a line between the corrupt activities of a public official who has received a present or a bribe in the amount of UAH 1,000, and those that caused losses to the state or society in the amount of millions of dollars or billions of hryvnias.

It is not the only rating that testifies of the professional inadequacy of the anti-corruption "reform team". Thus, Doing Business, a rating reflecting business climates in various countries, based on its assessment of data provided by entrepreneurs, Ukraine ranked 152nd out of 183 countries.

International organizations determine that so far, during 2010-2011, since Yanukovich's team has come in power, corruption levels and the risk of raider attacks have skyrocketed. Almost half of the entrepreneurs interviewed (46%) resort to "informal" methods of solving issues with authorities, an increase from 36% only two years ago. "Corruption" costs have nearly doubled, from 6% to 10% in businesses' expense structures.

Against the background of the incumbent government's "anti-corruption efforts," raiding has experienced a second wind which, as everyone knows, never travels alone, but in tandem with corruption (in Prosecutors' Offices, the Ministry of Internal Affairs and courts). Moreover, the victims of such raids insist that they are not as refined today as they were three or four years ago, with court rulings and the involvement of registrars. Today, there is only a proposal that you sell your business for a sum, which, to put it mildly, is not quite adequate. Of course, you can decline such a modest offer, but they will return tomorrow with an offer that is halved.

By the way, to a large extent, the draft law on humanizing criminal liability, proposed by the President and already approved by parliament, will considerably disarm anti-corruption legislation, particularly that which pertains to raider attacks. More specifically, if the law takes effect, the individuals behind raiding schemes (such as dishonest business owners, notaries, and arbiters) will not go to prison for their actions - the problem can be solved with a token fine.

The largest hole, through which billions of budget funds are lost, is state purchases. Under the new regime, the competitive element is gradually being eliminated, and a corrupt mechanism of purchasing from one player is

ever more prevalent when selecting a contractor for the procurement of goods and services at public expense. The law only allows the application of this procedure in exceptional cases. The last two years show that exceptions outnumber the rules. According to the assessment of Ukraine's Accounting Chamber, in 2010 the value of contracts which did not undergo the competitive procedure accounted for nearly 63% of the total value of the goods and services, purchased by the state. According to the Chamber's data, in 2010, the average costs of purchases made on a competitive basis totaled UAH 1.5mn, while the state spent UAH 51mn on purchases that were not made under the competitive procedure.

There have been no reports from the Accounting Chamber for 2011. However, we have data provided by the State Statistics Service, which shows that over the first three quarters, total expenditure, based on effective purchase contracts, amounted to UAH 72.618bn, of which UAH 25.782bn accounted for purchases from a single supplier.

Instances of abuse in this sector are numerous. More specifi-



SINCE MR. YANUKOVYCH'S TEAM CAME IN POWER IN 2009, CORRUPTION AND THE RISK OF RAIDER ATTACKS HAVE SKYROCKETED

cally, in 2011 alone, Altcom, a company known from numerous publications in the media (associated with Ukraine's Vice Prime Minister, Borys Kolesnikov), secured contracts from public utility companies and state-owned enterprises totaling UAH 6.435bn – as a rule, single-supplier purchases. A few months ago SJS Chornomornaftogaz bought a floating rig in Singapore, costing USD 400mn, whereas according to experts, such rigs can be acquired for USD 250mn. In other words, through the purchase of one such rig, the country lost more than UAH 1bn from the state budget.

However, law enforcement authorities are not interested in these facts at present, and no one has been removed from office. ■

Potemkin and Kafka:

UKRAINE'S 'NEW METHOD' FOR FIGHTING CORRUPTION



Author:
Hanne Severinsen

A Co-Rapporteur of the Parliamentary Assembly of the Council of Europe, from 1995 until 2008. Denmark's Hanne Severinsen effectively participated in Ukrainian politics—13 years that represented more than a half of independent Ukraine's history.

Corruption is a big problem in Ukraine. The country's ranking on Transparency International's list of corrupt nations in 2010 dropped to number 134 in the world.

So, who would not welcome the fact that President Yanukovich, from the beginning of his administration, announced that the fight against corruption would be a top priority?

But very soon it became clear that the “new method” was to “kill two birds with one stone”. Show willingness to fight the corruption and get rid of the most outspoken part of the opposition and scare others from being anything more than a “loyal” opposition.

In one of its very first steps, the new Ukrainian government contacted an American auditing company: Find something to use against them!

Ukraine has before shown the world that its democracy is mature, because its governments have changed peacefully.

Until now! Because it is certainly a new contribution to the modern history of Europe, that you not only blame your predecessor, but hire a foreign firm to find grounds for criminal cases and then put your predecessors in jail.

In June last year the new anti-corruption program began to be implemented, criminal cases were opened and former government officials were investigated and jailed. Today a dozen former ministers are behind bars or are forced to spend most of their time with prosecutors investigating them while being deprived of any possibility of travelling outside of Kyiv. The most prominent of these is the leader of the opposition, Yulia Tymoshenko.

If you take a look at the actual charges against former officials, you would see political rather than criminal responsibility, if any at all. Many examples of the charges are strange — they are not cases of personal enrichment, but rather fall under the more abstract label of “abuse of office.” This is a very broad term which can be used for many things.

I remember very well - from the times of former President Leonid Kuchma – examples I would call “abuse of office.” For instance the tax-administration. The tax-police under the Kuchma regime were used as a censorship-tool against businessmen who advertised in newspapers with critical articles. (So the present government knows what they are talking about!)

Prosecutors describe the accused as guilty, and so do Ukrainian officials around the world. But in a society, governed by the rule of law, one is presumed innocent until proven guilty.

In today's Ukraine less than 0.2% of people charged are found “not guilty”. A charge is similar to guilt, because the judges are dependent on the prosecution, who is dependent on the president who has now got total power over parliament and the government.

This is effective concentration of power! And you are guilty if you are indicted!

THE IVASHCHENKO CASE

Here is one of the stories sent to me about Valery Ivashchenko, who was the Acting Minister of Defense of Ukraine for the last Government from 2009 until 2010.

“We, as close relatives of Valery Ivashchenko, would like to inform the world about the new methods of intimidation being used by the new government to suppress the opposition under the sham label of fighting corruption.

The chief investigator calls in a person as a witness for an interrogation and then announces that this very person is now the main suspect. Without

WITH THIS CONCENTRATION OF POWER, UNJUST COURTS AND VAGUE LAWS ANYONE CAN BE FOUND GUILTY

any evidence the investigator then opens a criminal case, arrests the “victim” and places him behind bars. Thus, the investigator assumes court functions, but without following the laws of the country.

This is a process where the investigator doesn't allow any of the close relatives to take part in the case as defenders, although according to Ukrainian legislation they have the right to assist the defense in protecting a family member in court. Through this false process, close relatives are illegally eliminated from the case.

Under this process, documents from an influential institution (the Special Service of Ukraine) are used to allegedly confirm corrupt contracts and become the basis for detaining a person in jail. The documents allegedly contain information from close relatives (wife, son, daughter and brother) and thus, according to the documents, these close relatives can also be suspected of corruption. Under this logic, every family member involved becomes suspect.

In this particular case the investigator has, without any doubt or shame, falsified documents and has then attached these false documents to the case. Without ever having interrogated Valery Ivashchenko's wife, son, daughter or brother, the investigator has faked their statements. Nobody but the investigator has ever seen these protocols.

Neither the accused nor the defense has received permission to view material that supports the allegation of corruption. The investigator, not wanting to grant any time for a genuine trial, has handed the case to the court and has submitted fake protocols.

Furthermore, the judge has failed to pay any attention to the criminal actions undertaken by the investigator during the pre-trial process. Thus, through his actions, the judge has become an accomplice in crime.

Through the above court example, it can be clearly seen that the struggle against corruption in Ukraine is fiction and that the investigators themselves are corrupt."

On 18 April, the court opened the case and Ivashchenko stated: "In answering the question about my guilt I should understand what I am charged with. But I do not understand."

The lawyer claimed that it was a violation of the law when he had not had the possibility to study all the case materials which include 3,400 pages and material evidence during the preliminary investigation.

THE LUTSENKO AND KORNIYCHUK CASES

The Danish Helsinki Committee of Human Rights has followed two cases of suspected “selective justice” over the past four months and has made its first report of the facts and the legal situation around the investigation and detention of the former Interior Minister Yuriy Lutsenko and former Deputy Minister of Justice Yevhen Korniychuk.

From the findings of the first report, it is seen that pre-trial detention is widely used in Ukraine. In the two cases you can see that it is not because of in-

dividual, specific reasons, but because of a general broad suspicion that the accused could “hamper” the investigation.

Pre-trial detention seems thus to be a tool to promote a defendant to declare “guilty” in order to end the painful detention.

But “guilt” is not easy to declare when you - as in Korniychuk's case - have an indictment on 45 pages that is a broad mixture of what has happened so far and witnesses' testimony, but without a clear definition of the articles that should have been violated. And there is only one copy of the case, with very limited access for the defense to read and to note – and to remember.

Old cases, that have been closed, can be opened again with the same content but a new judge, and thus a Sword of Damocles can hang over the defendant for years.

POTEMKIN REFORMS

The fight against corruption is thus “newspeak” for the fight against the opposition and people standing in the way the ambitions of those in power and any who might hinder them on their road to power and money.

The “reform” of the High Council of Justice last summer means a heavy bias in the composition of the court and the dominance of the president and the prosecutors office.

In January, the president adopted a decree on a new Action Plan Honoring Ukraine's Commitments and Obligations to the Council of Europe. When you have been monitoring Ukraine for so many years, you have seen many such “plans”. Deadlines are sprinkled all over the government – In May do this, in June 2012 do this and that. And don't forget to mention the Venice Commission...

In general all these instructions could have been fulfilled without any new Action Plan merely by fulfilling the decree from 2005 or any of the other numerous “action plans” (EU, NATO) which have been written since then and which duplicate many of these measures.

Ukraine is a specialist in drafting plans, expert groups and first readings! This has been a specialty since Kyiv's membership in the Council of Europe in 1995.

KAFKAESQUE METHODS

Many of us who experienced the Orange Revolution felt that the main result was the feeling of freedom, especially freedom of expression. You dared to criticize (and there was certainly a lot to criticize). But the freedom was fragile, the judiciary unreformed – at that time unpredictable - but today sadly predictable. With power concentrated, biased courts and unclear laws, the government can take to court as many people as it wants. As a defendant, you cannot understand the charges brought against you and your lawyer has very little opportunity to defend you, and your guilt is proven by the fact that you are under investigation.

Thus, methods like those in Kafka's famous book “The Trial” have begun to play a role in Ukraine today. ■■

**OLD CASES, THAT HAVE BEEN
CLOSED, CAN BE OPENED AGAIN
WITH THE SAME CONTENT BUT A
NEW JUDGE**



JUSTICE IN KYIV

The government has failed to convince either Ukrainians or the international community that the Tymoshenko case has nothing to do with politics. *The Ukrainian Week* asks Europeans their opinion on the trial against former Premier Yulia Tymoshenko and the situation in Ukraine

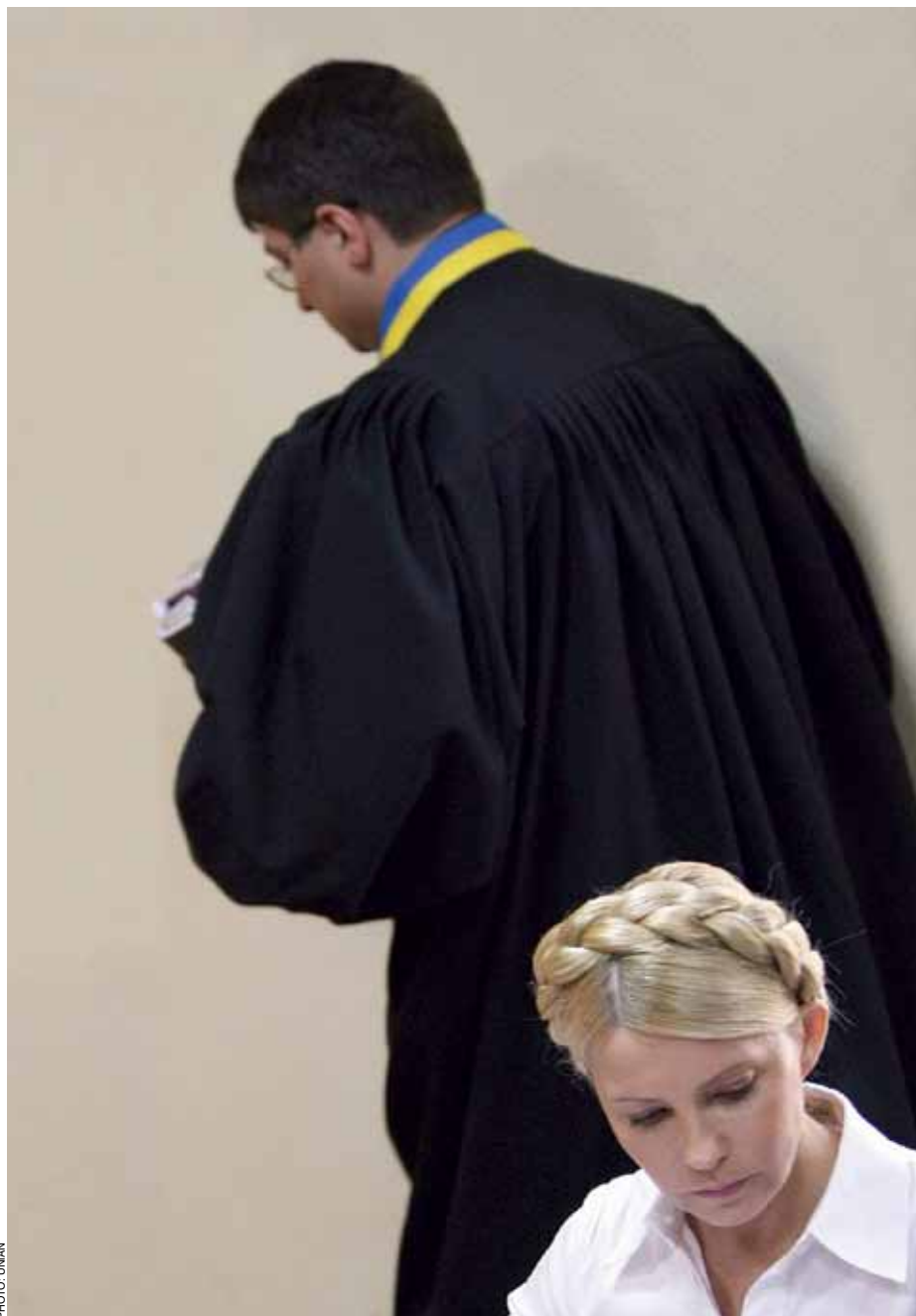


PHOTO: UNIAN

EUROPEAN COMMENTS



LUCA VOLONTE
Chairman of the
European People's
Party Group in the
Council of Europe.

Does the verdict
against Yulia Ty-
moshenko meet Eu-
ropean standards?

No, the decision is markedly political. The whole proceedings entail disputes and the politicization of the final sentence. The principle of collective responsibility for the decisions taken by the government is openly violated in the Tymoshenko case and in many other cases involving the conviction and imprisonment of members of the previous government.

The existing penal code is clearly in contrast with the most basic norms and standard criteria of the Council of Europe and the European Union. It makes no sense for the current Government to hide its responsibility for the failure to reform that penal code. The current Ukrainian penal code is identical to the Soviet one and clearly based on the discretion of political power. Therefore, the proceedings and the sentence against Yulia and many other former ministers do not meet any basic standards of the Council of Europe and the European Union. It is unacceptable political persecution. Obviously, this sentence is a sign of a lack of the fundamental principle of separation of powers (executive and judiciary) and will have serious consequences at the international level.

I strongly support the political position of President Martens. His request to suspend all negotiations between the European Union and Ukraine on free trade is legitimate and fully justified.

How is it possible for the EU to sign an agreement with the current Ukrainian government which violates, directly and indirectly, all European human rights standards, the rule of law and democracy?

It is not possible to continue negotiations between the EU and Ukraine unless the intolerable situation in Ukraine changes. The Ukrainian government is acting against the interests of the Ukrainian people and companies. In order to maintain its "power", it will isolate Ukraine from Europe.

The decision taken in recent days, on the initiative of the Ukrainian Secret Service, is another demonstration of the Government's fierce battle against opposition parties, particularly against Yulia Tymoshenko, with a view to the forthcoming presidential and parliamentary elections. They eliminate political opponents in order to facilitate their electoral victory. This goes against every basic rule of democracy. The EPP-CD Group in the Council of Europe will continue to work hard, unless the basic rules of democracy are re-established in Ukraine.



HANNE SEVERINSEN
President of the European Media Platform NGO and former PACE Monitoring Committee Rapporteur on Ukraine.

Yulia Tymoshenko was tried according to the old Soviet § "Abuse of Power" stemming from the Soviet-era, when it was necessary to have a tool to punish people that had fallen afoul of senior officials. It is scandalous that Ukraine has failed to fulfill its obligation to reform the judiciary. Today's "verdict" is the criminalization of political decisions. It is simple copy-paste: the decision of the prosecutor general - ordered by the president - was executed by a "judge" who is on a probation period - totally dependent and controlled by the prosecution. The EU must demand that Parliament immediately begins the reform of the Criminal Code, which it is obligated to do. This will also mean the decriminalization of the case.



EGIDIJUS VAREIKIS
Chairman of Committee on Rules of Procedure, Immunities and Institutional Affairs in PACE (Lithuania)

I'm not surprised by the 7-year sentence for Ms. Tymoshenko. If the term were shorter, the government would have demonstrated concessions. If it were longer, it would have been considered to be outright repression. This is a politically motivated verdict. Obviously, it will be an impediment to negotiations on free trade and the association agreement. I assume that the Ukrainian government will use Tymoshenko as a bargaining tool with Europeans; to either receive something or improve trade terms with them, for example, in exchange for her release.



ANDRES HERKEL
Member of European People's Party faction in PACE (Estonia)

This verdict has a negative impact on association agreement negotiations between the EU and Ukraine. Even if the association agreement is signed, some questions will remain open: What kind of a country is this with such an inefficient judiciary and why have we signed an Association Agreement with it? Doubts arise as to whether Ukraine really wants to be part of political Europe. EU leaders have already expressed their disappointment. At a meeting of the leaders of EU-members' diplomatic bodies in Luxembourg, Urmas Paet, the Estonian Minister of Foreign Affairs, publicly stated his concern about the situation.



PEDRO ARGAMUNT
Member of European People's Party faction in PACE (Spain)

I read the verdict of the Pechersk Court this morning and I couldn't believe my eyes. I didn't think that this would happen. Seven years in jail followed by a three-year ban on political activities is a 100% politically motivated sentence. In all likelihood, its purpose is to prevent Ms. Tymoshenko from running in the upcoming parliamentary election and subsequently in the presidential election. I guess these are the means by which Mr. Yanukovich decided to simplify his rise to power, by removing a dangerous rival. Such actions damage Ukraine's political image.

I'm sure it won't take long for the Council of Europe and the European Union to give their opinion. This is a huge political scandal. The case is not about corruption or personal enrichment. It's pure politics. Even if the EU does sign an Association Agreement with Ukraine, the European Parliament will not ratify it as long as Tymoshenko is behind bars.



AMANDA PAUL
Analyst, European Policy Centre: "The EU cannot allow its relations with Ukraine to be shaped through the prism of Tymoshenko case"

The ongoing trial against Yulia Tymoshenko is unfortunately being used by a number of players in the EU as a tool to hobble Ukraine's integration into the EU. For those countries that do not support the very idea of Ukraine being granted some sort of membership perspective, it is the perfect excuse. Moreover, the European Peoples Party (EPP) in the European Parliament and its leader, Wilfried Martens, have turned the parliament into a sort of Tribunal for the Yulia Tymoshenko case, with numerous statements coming from Mr. Martens and others who give a far from accurate picture of the political picture in Ukraine. The EU cannot allow its relationship with Ukraine to be shaped through the prism of the court case against Mrs Tymoshenko, this would be extremely short-sighted and detrimental for the EU's goals for this region. By strongly engaging Ukraine, including finalizing and implementing the DCFTA and Association Agreement as well as having an honest approach towards the lifting of visa restrictions, the country will become progressively more modern and democratic. This is even more important at this time, since Russia is increasing pressure on Ukraine to either choose to hand over its gas transit system or face bankruptcy, since as of October, Moscow will be hiking up gas prices to amounts that Kyiv simply cannot afford to pay.



LONIDAS DONSKIS
Member of the European Parliament from Lithuania: "Ms. Tymoshenko and members of the previous government deserve a fair trial"

We signed a resolution regarding this issue during the previous plenary session. Due to the active involvement of the Ukrainian Embassy in Brussels, some MEPs in my group ALDE - Alliance of Liberals and Democrats for Europe were reluctant to comment on this, as they thought that we were interfering with the court decision of a sovereign country. Yet the vast majority stressed the fact that although Ukraine is a democracy and a friend of the EU, the trial was politically motivated; therefore, myself and many colleagues argued that no matter whether we like Tymoshenko or not, she and other former members of government deserved a fair trial, rather than a sheer settling of old political accounts and the fuelling of old animosities between Yanukovich and Tymoshenko. As you know, this majority prevailed, and we have passed a resolution expressing our concern over the shadow cast on this politically motivated case. All in all, it was an encouragement for Ukraine to act as a true democracy and as a genuine member of the symbolic club of democratic states.



ALEXANDRA GOUJON
PhD in Policy Studies, Professor at the University of Burgundy based in Dijon, France; author of the book titled Political Revolutions and the Struggle for Identity in Ukraine and Belarus: "If anyone should be put on trial, it should be all Ukrainian Prime Ministers"

I can't say that French politicians are not interested in the problems faced by the Ukrainian opposition. Quite the contrary, the EU is now discussing the Association Agreement with Ukraine. Political circles are trying to understand what is going on. On the one hand, the 2010 presidential election was recognized as being democratic and power peacefully shifted from one political camp to another. On the other hand, we see opposition protests in full swing and the government's opponents complain about ongoing pressure.

The French press gives well-balanced comments on Ukrainian developments. Newspapers have published critical articles on the Tymoshenko trial while Le Monde published an interview with President Yanukovich where he defends his team. Academics note that Ms. Tymoshenko would hardly make a perfect Premier, yet doubt that her predecessors and successors would act any differently.

We lack information about the essence of the charges. Still, it appears obvious that the first non-transparent thus unfavourable gas supply contract was not signed by Yulia Tymoshenko. Therefore, she alone cannot be held to account for all the troubles of the Ukrainian gas market. If the trial was fair, Ms. Tymoshenko would have all Ukrainian premiers sitting next to her on the defendants' bench, including Mr. Yanukovich.

The impression is that the current Ukrainian government is taking revenge for its defeat during the Orange Revolution. Apparently, it is also intent on weakening the opposition before the upcoming parliamentary election.

Political Retribution

“Tymoshenko case is more political than the Khodorkovsky case”

Interviewer:
The Ukrainian Week

Ever since the Yulia Tymoshenko trial began, the Ukrainian government has insisted that it has been applying the principle that everyone is equal before the law. It is deeply offended, especially after presentations in international institutions, that the world is not applauding its faithfulness to democracy. Halyna Senyk, expert in international and European law, told *The Ukrainian Week* precisely why the Tymoshenko case violates European standards.

U.W.: Ms. Senyk, a new case against Yulia Tymoshenko has been opened in Ukraine in which the investigators are focusing on the 1995-2000 period. Is there any statute of limitations for economic violations in European law?

– Under the European Convention on Human Rights, all issues having to do with statutes of limitations for civil offenses and crimes are regulated exclusively by the national law of each member state. However, in order to secure the right to a fair hearing (Article 6 of the Convention on Human Rights), it is important that courts and prosecutors strictly abide by the norms of national legislation.

U.W.: What does Ukraine’s legislation have in the way of statutes of limitations?

– On October 11, the Pechersk District Court of Kyiv pronounced Tymoshenko guilty of violating Article 365 of the Criminal Code of Ukraine. The next day another case was opened against her: she was charged with violating part 5 of Article 191 of the Criminal Code in a case that goes back to the 1990s. Several days later, a number of old and previously closed cases were re-opened. Questions arise: Why did it happen precisely at this juncture in time? Considering that the incumbent administration is under certain pressure to decriminalize articles on economic offenses, which lie at the foundation of most currently open cases against politicians from the previous government, including Tymoshenko herself; it is an extraordi-

nary thing to open a new case and bring back old cases against an inconvenient opposition politician. The timing of these events, the old age of these cases and their background confirm the existing serious suspicions of political motivation.

U.W.: Does this mean that the old cases which were closed back in 2004-05 were re-opened unlawfully?

– The statute of limitations (10 years) in the United Energy Systems of Ukraine" (former Tymoshenko's company – Ed.) debt case has expired. A statute of limitations cannot be cancelled by saying that an offense was committed at the point when this business stopped paying off its debts in 2000. According to usual legal argumentation, the point of departure would be when it issued guarantees, i.e., in 1996. Likewise, extending the statute of limitations cannot be based on the gas case of 2009. Expired statutes of limitations would also prevent the majority of the eight cases, if not all of them, against Tymoshenko from being re-opened. (They were closed back in 2004 and 2005.) Resuming investigation in cases that were lawfully closed is a violation of Articles 6 and 18 of the European Convention on Human Rights if these decisions are not justified by lawful goals and on lawful grounds. The president made public statements on the Tymoshenko cases in which he confused suspicion and court-established guilt. Statements made by the Prosecutor General's Office on these cases confirm doubts that the criminal justice system is not objective, independent and impartial. The decree to indict Tymoshenko in the debt case employs obscure terminology and confuses fact and suspicion, which makes it very hard or even impossible to determine exactly what she is being charged with. And so it is a violation of her right to defense and a fair trial.

U.W.: The indictment against the former prime minister uses the term “attempted crime.” How common is this concept in Euro-

pean law? Are you familiar with similar trials in Ukraine or abroad? In simple terms, unrealized intentions do not have negative consequences or cause any material or moral damage, do they?

– As with statutes of limitations, formulations of national criminal codes are not subject to consideration by the European Court, except in cases when application of a regulation violates human rights protected by the European Convention on Human Rights.

U.W.: Have there been any such cases in Ukraine or abroad? French law has the concept “trial of intention” with the underlying idea that people cannot be held responsible for what they could hypothetically do.

National systems differ in their approach to “attempted crimes.” Some European countries permit opening criminal cases on charges of an “attempted crime” or incitement to commit a crime. Others, like France, make it unlawful to try people for their intentions. There is no common international criminal law. Therefore, I believe that in this case it is crucial to stick to the position of the European Court of Human Rights which says that a court hearing requires abiding by national laws, the equality of the parties, adversarial procedure and an independent and impartial court. Unfortunately, these foundational principles of a fair hearing have been systemically violated in the Tymoshenko case.

U.W.: A court session which took place in Tymoshenko’s cell produced another arrest order. How much is this in line with European legal standards?

– Regarding Tymoshenko’s repeat arrest in a newly opened criminal case, the European Court clearly regulates the application of Article 5, paragraph 1(c). In this case, detention on remand and during trial requires a ruling by a national court to be lawful (Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998 VIII, § 162, Levedev v. Russia). Moreover, the proceedings



must abide by the principle of adversarial procedure and equality of the parties, both the prosecution and the arrested. This means that a person about to be arrested must have access to the materials produced by the investigation based on which the Prosecutor General's Office demands his or her arrest. This person must also have an opportunity to comment on arguments submitted by the prosecution (see *Niedbala v. Poland*, no. 27915/95, § 67, 4 July 2000). In the case of Tymoshenko's repeat arrest, to my knowledge, the subpoena was delivered to Tymoshenko on December 7, 2011, at 4p.m., requiring her appear before court at 5p.m. the same day. Tymoshenko was being treated for severe back pain in the medical unit of the pre-trial detention center where she was kept and was unable to move around unaided. Instead of giving her the opportunity to improve her health and participate in a court hearing over the grounds for her arrest, the court ruled to have an on-site session, which is something not envisioned by Ukraine's national laws. I will also add that at the time when she was handed the subpoena, neither Tymoshenko, nor her attorneys were given documents produced by the investigation based on which the Prosecutor General's Office demanded to have her arrested. In other words, Tymoshenko did not have the opportunity to familiarize herself with these papers and prepare for the court hearing.

U.W.: Article 5 of the European Convention on Human Rights in-

BIOGRAPHICAL NOTE

Halyna Senyk is an international expert in human rights. She has worked for Human Rights Watch, Amnesty International, the International Center for Migration Policy Development, the International Council on Human Rights Policy, the USAID project to facilitate the organization of elections in Ukraine, and the European Partnership for Democracy. She has experience in democratization, development, elections, human rights, civil society and political parties. She has diplomas from Lviv National University, Central European University (Budapest) and the London School of Economics and Political Science.

cludes certain guarantees for people who are going to be arrested. Have these been kept during Tymoshenko's repeat arrest?

Under Article 5 of the European Convention on Human Rights, a person may only be arrested on a court order. The trial must be an adversarial procedure between the prosecution and the person which it demands to have arrested. The prosecution and the defense must be able to exercise equal rights in the proceedings. The European Court of Human Rights noted in the case *Lebedev v. Russia* (October 25, 2007, § 86) that if a person who is going to be arrested takes part in proceedings while he or she is in poor health, his or her participation cannot be deemed sufficient, because this person is unable to adequately represent his or her interests.

Moreover, as I have said, neither Tymoshenko, nor her attorney received documents from the Prosecutor General's Office that would have provided grounds for her arrest. In light of her poor health and her inability to adequately defend her rights on her own, it was reasonable to assume that attorney Serhiy Vlasenko would be able to help his client. However, on the day when the court hearing on her arrest took place, Tymoshenko was in the medical unit of the pre-trial detention center and her meeting with the attorney was organized in a way that precluded a confidential conversation between them before the court hearing, which is a violation of Article 5, paragraph 4.

U.W.: There must be regulations that guarantee a prisoners' right to medical treatment. What are they?

– The European Court of Human Rights emphasized on numerous occasions that “the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.” (See the ruling of the European Court of Human Rights in *Kalashnikov v. Russia*, No. 47095/99, paragraph 95, ECHR 2002-VI.)

In the case of Tymoshenko, the medical commission approved by the penitentiary system found that she had a series of chronic diseases and a problem with her spine which caused acute chronic pain. According to independent medical specialists who were given the results of Tymoshenko's checkups, she urgently needs surgery. However, she is being given painkillers rather than medical treatment. This cannot be deemed adequate provision of medical aid. Therefore, there are serious grounds to claim that Article 3 of the European Convention on Human Rights was violated. Under this article, no one may be subjected to torture or to inhuman or degrading treatment. When in detention, this places an obligation on the penitentiary system to provide adequate medical treatment or the opportunity to undergo treatment in institutions governed by the Health Ministry.

U.W.: That is to say, politics is more evident in the Tymoshenko case than in the Khodorkovsky case?

– Indeed, the political nature of persecution in the case of Tymoshenko is based on the fact that she was, and remains, one of the likeliest political opponents of Viktor Yanukovich. She won 47% of votes in the last presidential election, which is a very high level of support. So far, she is Yanukovich's only real rival. In this way, by trying to have Tymoshenko convicted at any cost, the Ukrainian government essentially disables her as a political opponent to the incumbent president. ■

“Those in power view us as antibodies that must be isolated and destroyed”

Yuriy Lutsenko told *The Ukrainian Week* about the manner in which Ukrainian courts interpret justice, why Orange politicians lost power and his future plans

Interviewer:
Alla Lazareva

The Prosecutor General sent the criminal case against former Interior Minister Yuriy Lutsenko, with a judgment about his conviction to the Kyiv-based Pechersk District Court for review. Mr. Lutsenko went on hunger strike on 22 April to protest against his illegal detention. *The Ukrainian Week* received Mr. Lutsenko's answers on 13 May. Five days later, on 18 May, the ex-minister was no longer able to read, watch TV or hold a pen... He stopped his strike on 23 May.

Currently, Yuriy Lutsenko is in the Lukianivske detention centre.

UW: How would you explain the factors behind your arrest?

– Charges against myself include a wrongly calculated pension for my driver and the holding of the celebration of the Police Day holiday which the General Prosecutor absurdly claims was illegal. Investigators have not found a single penny that I stole and put into my private pocket.

I was arrested because I refused to plead guilty, give testimony and allegedly read my case file too slowly. The first two aspects are given to me by my constitutional rights. The third is mandatory, not a right, under the Criminal Code. Moreover, I've been under arrest for 20 days after I completed reading the case. So, this is clearly political revenge, not criminal proceedings. Those in power have reasons for launching these charges, including their intention to get pay back for their panic in 2005, to demonstrate new rules of the game and create an aura of fear, and attempt to pull the pre-planned verdict through all necessary controlled courts in order to remove me from politics.

In my opinion, the key reason behind all this is the desire to publicly hang the Orange Revolution. It is important for the current soviet corrupt government to make the nation believe that any struggle is pointless. Hence, the launching of absurd cases against Yulia Tymoshenko and Yuriy Lutsenko.

This is aggression against the opposition who are seen as “antibodies” by those in power who don't play by their criminal rules. We are like “antibodies” for them which they must isolate and destroy.

UW: Do you consider yourself completely innocent? If so, who initiated your arrest?

– I have enough evidence to reject any charges I am facing if they are made in a court where there is the rule of law. I only wonder where I could find such a court in a country where the General Prosecutor's brother is head of the highest criminal court. Add to this the Supreme Council of Justice controlled by the Presidential Administration which blatantly fires inconvenient judges. As a result of this political interference, the Ukrainian judicial system is operated by people who authorise arrests merely on the grounds that they have exercised their constitutional rights. What can be more illegal than that? Therefore, what kind of justice could I find at yet another controlled court?

In this case, I believe my only option is to exercise my right for a jury which is set out in the Constitution. I believe that people who are independent from the government will listen to my arguments and cast aside the politically motivated and absurd accusations of the Prosecutor General.



PHOTO: UNIAN

UW: You claim you are refusing to be force-fed while investigators say they have given you nourishing substances

– As I have already said, after I finished reading all 47 volumes of the Prosecutor General's complete collection of false evidence, the last, third artificial grounds for my arrest fell away. Nevertheless, the judge extended my term of arrest without any reference to the law and without any interest in the correct procedure. So, I decided to protest against this fraudulent judgment and went on hunger strike on 22 April. I made this statement in the court room and



PHOTO: PHL

tious food. I had only one way to respond to these brazen fabrications by refusing to take this mixture or vitamin injections on 4 May. On the 19th day of my hunger strike I was taken to an emergency hospital in Kyiv, and even after all of this the Prosecutor still claims Lutsenko is perfectly healthy.

UW: The European Court of Human Rights began to look into your case against the government. What does the case state?

– There is a bittersweet joke, that the European Court of Human Rights is the fairest court of Ukraine. It accepted my appeal against my illegal arrest and placed it in a high priority category to be investigated. I'm sure it will rule in my favour. Unfortunately, this will be yet another confirmation to how the Ukrainian judiciary is used for political oppression. The President and Prosecutor General still have a chance to improve the situation by admitting that all of these cases are completely against the law and release me on bail or after a pledge by myself to not leave the city. But they are blinded by their zest of revenge.

UW: Do you intend to seek damages against those who were involved in your arrest?

– I've faced criminal charges before. And I won them all, both in the opposition, and when I was in government. Still, I never felt like I really wanted to seek damages against my investigators. I realised they were just cogs in the imperial machine.

But, on this occasion it will be different. I will hold the investigators and judges liable for their appalling violations of the law and the Constitution. And it's not just because I'm sick and tired of having spent five months in jail. In addition to breaking the law, investigators are spreading lies and exerting pressure on my family. They are no longer cogs, but have become enthusiastic servants. Moreover, the ones who approved these illegal decisions were high-fliers within the General Prosecutor's office. There will come time to put them in their correct places.

UW: Some former officials who have also faced suits have claimed that investigators

promised to be more forgiving to them if they testified against Ms. Tymoshenko. Have you been offered any similar deal?

– The investigators offered me a deal that I should claim the celebration of the Police Day holiday was the initiative of the then prime minister and in return promised that I would then be changed to a witness rather than a respondent. Clearly, I said no by using a pretty rude response.

UW: If discharged, are you going to run with the opposition in the next parliamentary election?

– Regardless of the court's decision I will be involved in politics in order to replace the current anti-Ukrainian government. Being a Member of Parliament was never my ultimate goal. In fact, I felt most successful when I was among common everyday people, without a deputy's mandate or immunity from prosecution. In reality, sitting in parliament with all those notorious people is not a pleasant deal.

UW: What future do you see for your political party, People's Self-Defence (Narodna Samooborona)? Who should be blamed for its fragmentation?

– Narodna Samooborona was a super-successful insurgent project in the 2007 elections. I'm proud that we energised people into believing in their power and achieved pre-term election to the "Supreme Treason" as Ukrainians have been referring to their parliament for a while. And I'm proud that my party demonstrated the skill to unite throwing aside political egoism in favour of upholding national interests.

If you talk about defeat, please note that all of the problems and treason emerged out of the fact that the political force was still in its infancy. We had less than six months to organise the party, scrutinise people and so on. Right now we are finishing this stage. Yet, the price of treason by my party fellow members is a huge factor for me personally. At the same time, I appreciate my friends who have firm principles.

UW: Do you believe in a united opposition?

– The actions undertaken by myself during my entire political

spread it through my press-service. On 30 April, the administration of the detention centre asked me to notify them officially of my decision. Even though, no legislation requires this, I confirmed my decision to go on a hunger strike. My cellmates also confirmed it. Then I was left alone in my cell and a day later they saw that I had lost 14 kg and found acetone in my blood.

On 1 May they decided to force-feed me with a special mixture that was supposed to excrete the acetone from my body, while officials from the Prosecutor's office kept spreading falsehoods that I was eating fish, ham, nuts and other nutri-

THE MATTER OF PRINCIPLE. My task is to prove that not everything can be bought or sold, and that not everyone is scared

career answer this question. I was the one who successfully convinced Oleksandr Moroz to advise his voters in the 2004 elections to “either vote for Mr. Moroz, or Mr. Yushchenko, - but not Mr. Yanukovich”. This forced the Socialist Party of Ukraine led by Mr. Moroz to give its support to the Maidan and brought a victory to the united democratic forces. The partnership between Nasha Ukrayina, the party headed by Mr. Yushchenko, Narodna Samooborona led by myself and the Bloc of Yulia Tymoshenko proved its success in the 2007 pre-term elections.

It is the case that any squabbles within the democratic forces always led to their defeat. Not only for themselves, as they deserved defeat, but defeat for Ukraine. The latest presidential election is the saddest example of this outcome.

So why then ask about my attitude towards the unification of democratic forces in Ukraine? Of course, I’m all in favour of it. But, how we undertake it, though, is a different matter altogether. The only thing I can be sure about is that I will never stand in the way of any unification processes.

UW: In your opinion, why did the Party of the Regions prove to be more united when they were in opposition than the Orange coalition?

– The Party of the Regions is a business project of the wealthiest people in Ukraine. Their simple and clear goal is to evade taxes which they would have to pay if transfers of their windfall profits to offshore zones were restricted. These taxes are worth nearly UAH 500bn annually which is more than expenditure in the State Budget. Hence, the Party of Regions is a special project to organise the party and discipline its members. They have a vast array of instruments to maintain the party unified, from giving out diamond encrusted watches to a shot in the head at a hunting weekend (a reference to the “accidental” shooting of Yevhen Kushnariov).

Democrats have a different situation. Their ambitions often overtake their loyalties. The only way to teach them the virtues of unity and responsibility is to train them in election campaigns in the same manner as how you train dogs. Traitors to the Orange Revolu-



PHOTO: UNIAN

FIELD COMMANDER. Yuriy Lutsenko remains one of the few politicians who have not betrayed the ideals of the Orange Revolution

tion, such as Mr. Moroz and Mr. Yushchenko, should be removed from the political arena.

UW: The Orange Revolution was based on the slogan “Bandits will go to prison!” Yet, the president found a compromise with them instead...

– I realised this after just one conversation with President Yushchenko who suggested that I should “try and come to terms with then Kyiv Mayor Leonid Chernovetsky.”. When I told him in a sharp way that I could never come to terms with thieves and bandits, I heard the following answer from Mr. Yushchenko that I will never forget: “Yura, stop playing at being a cop. Remember that anyone who enters my cabinet wearing a tie will never go behind bars.” This was the moment of truth.

Suddenly, it turned out that I had been working all those weekends and ended up with a huge number of personal enemies only to see their leaders enter necessary cabinets wearing a tie and the Prosecutor-General would bury yet another case after their visit. All my pleas and demands to parliament to replace the Prosecutor-General fell on deaf ears. Now, all of these infamous prosecutors are, or will be, in parliament, such as one-time Prosecutor-General Sviatoslav Piskun who is now a Party of the Regions deputy, and Oleksandr Medvedko, another former Prose-

cutor-General, who will become a deputy after the 2012 elections. The Prosecutor-General has always been in place to assist the Kuchma-Yanukovich clan remain unpunished for a range of crimes, from theft to murder.

Yushchenko accepted these compromises to receive the presidency and he did this behind the back of all the people on the Maidan.

UW: Treason and conformism have become integral elements of Ukrainian politics. How long is this going to last?

– I know history pretty well. Based on this I can say that elites have betrayed people not only in Ukraine. Poland and the Czech Republic, Bulgaria, Spain, Italy and Germany, have all walked a long and thorny path to independence and responsible government before society. We are still on that path. Ukrainians have only just realised that they in fact can influence their fate. After the high hopes of the Orange Revolution were destroyed by yet another round of treason, Ukrainians fell into depression. Still, the process is moving in the right direction. Nobody can stop it or force it back into a barrack using cheap gas and an out of control government.

I am an optimist. Everything will work out well in the end, although I personally feel disgusted at living during a time when political asylum is being combined with that of a concentration camp. We lack teachers and promoters of trust, hope and love, as well as solidarity and the understanding that national interests should be paramount. A wise Pole once said, based on the novel *With Fire and Sword* by the Polish writer Henryk Sienkiewicz, that “Poland has placed its hopes on the well-disciplined Colonel Wolodyjowski and won back its independent state, while the ghost of Jan Zagłoba is still haunting the Black Sea steppes slaughtering all of his allies.”

UW: Do you feel sorry for not moving abroad like Bohdan Danylyshyn and Mykhailo Pozhyvanov?

– Of course, I had been aware of my upcoming arrest. But I wouldn’t have fled abroad even if I had realised that I’d never re-

HUMAN RIGHTS

turn home from jail. I was taught to be responsible for other people, not just for myself. I didn't give back enough to the people on the Maidan who made me one of their leaders. Now I must do my best to not let our beliefs and principles down. People with no dignity can sit in their state funded dachas and watch others trample on the Ukrainian flag. Defectors and quasi-oppositionists can squabble over petty handouts. My task is to prove that not everything can be bought or sold, and that not everyone is scared. This is the smallest contribution that I can make to Ukrainians who stood in support of the Orange Revolution.

UW: Can you read or follow the news?

– Books fill my days. Mostly, I read history and philosophy. Sometimes I go back to my favourite classics – Hemingway, Golding, Murakami, Marquez... This last week I've been reading poems by Joseph Brodsky. "The tint of shame flooded the flag," he wrote. Isn't that exactly about the games our government is playing with red flags today out of contempt for national consciousness and historical memories? I follow all the news from TV and printouts from the key media outlets that my lawyers bring to me. By the way, your Ukrainian-language magazine *The Ukrainian Week* is one of those.

UW: Has your attitude towards the world and people changed after all this time spent in prison?

– Spending four and a half months in a special regime ward with a murderer of two policemen has not been easy. Yet, many people in this country have fallen victim to the unjust and intolerant system which is similar to the one used by the soviet secret police, the NKVD. At least 30% of the prisoners could be at home, not behind bars, if they pledged to stay in the city or if they were released on bail. I keep reminding the ombudsman during my hunger strike that this is a wild remnant of the Stalin era. As to me, I remain the same Yuriy Lutsenko as I was before, a little tough and always ironic. The only unpleasantness I feel regularly is that I really miss my family. ■

The Right to Protection

Genevieve Garrigos, President of Amnesty International France, talks about how to defend human rights

Interviewer:
The Ukrainian Week

UW: Amnesty International has just published its annual human rights report. Which country is the worst?

– Unlike some other NGOs, we don't rate countries. We only disseminate the information we have collected on our own and verified through several sources. With certain human rights violations, like the death sentence, China is the worst. North Korea is the most closed country. In some other countries, such as Democratic Republic of the Congo or Somalia, human rights have been systematically denied for years.

UW: Have you noticed any common trends in FSU countries?

– I wouldn't draw general conclusions for the entire post-communist region. You can't compare Poland to Belarus, for instance, while Central and Middle Asia show different trends altogether. The North Caucasus is a whole different world in itself that lives by its own rules. Yet, they have a few things in common. In my opinion, all these countries still tend to show discriminatory instincts and behaviors towards gypsies, homosexuals and so on. People are still persecuted for their lifestyle in the Balkans, Hungary, Russia and Uzbekistan. Belarus, Ukraine and Russia have trouble with the freedom of assembly and civic activism. Their penitentiary systems are also not getting any better. We have seen the number of unjust sentences, unjustified house arrests and cases of prisoner torture increase in all three countries, while real criminals remain unpunished.

According to our report, the situation has deteriorated in Ukraine. Law enforcement agencies are fighting those who are trying to uphold the law. Amnesty International monitors how prisoners are being treated. We support people who are working to get unjust sentences overturned.

UW: What pushes former totalitarian regimes towards freedom?

– Some people believe that ensuring economic development is

enough and internal political freedom will emerge on its own. We often hear that with regard to China. But I believe that the real impulse for change is growing public awareness. Human rights have taken root only in places where people began to understand that these rights were for them - and began to fight for themselves.

UW: How can civil society become more effective – especially with a government that ignores human rights advocates?

– That's a tough question. For years we haven't been able to get permission to visit China or Myanmar. But that doesn't mean we don't have information from there. People have stopped being afraid. They find ways to get around prohibitions and inform the world about what's going on around them. In closed countries like that, we work through third parties. We work with diplomats, politicians, and activists from those countries that have access to territories we don't have access to. Mobilizing Western democracies keeps pressure on those governments that have the ear of those who are behind hermetically-sealed borders.

UW: How do you decide whom to protect?

– Our central office in London has an expert team. Requests have to be sent to them. This can be done by the persecuted person's lawyer or close relatives.

UW: What would you recommend to those who see that their country's government is becoming more authoritarian and the legal system is serving its repressive purposes?

– Remember that no country has the right to brutalize its own citizens. Don't expect to wait out political bad times. People say that if you keep your head down, you won't get hit. This isn't true. The history of all totalitarian regimes shows one thing: brutality entrenches itself only where there is no opposition. ■

GENEVIÈVE
GARRIGOS



BRIEF

Amnesty International is a worldwide non-government human rights organization. It has 2.2mn members and is represented in 43 countries. Its head office is in London. Amnesty International was given Nobel Peace Prize in 1977. AI is one of the most respected world human rights organizations. On May 28 it celebrated 50 years.

The Tymoshenko “prison photos,” which recently leaked into Western media, speak more convincingly than any statement and can clearly explain to the European community the practical application of political repression and selective justice, Ukrainian style. They are a telling example of the worth of our top officials’ declarations about “general equality before the law” and the “absence of human rights issues.” All this puts to question the association talks (let alone EU membership) between Europe and a country in which inhuman imprisonment conditions and torture are considered normal, and where opposition politicians are forced into these conditions. The Ukrainian regime’s attempts to neutralize the effect of the prison photos with the demonstration of luxury accommodation, which they tried to pass off as Yulia Tymoshenko’s cell, were exposed in her letter to the prison authorities in which she refuted all this window dressing.

Yet there is every reason to fear that without the prospect of European association, Ukraine’s leaders will lose even whatever dim awareness they have of the fact that such practices are wrong and should be eradicated. Simple logic suggests that it is the citizens of the country who should instil this feeling in the government. But the latter will turn a deaf ear, and society itself has not yet given the regime any reason to expect a public uproar. This is why those who want to live in a country not shaped by Yanukovich and Co. are appealing to Europe asking it “not to deprive Ukraine of its chance,” “not to abandon Ukraine,” and “to draw a line between Ukraine’s regime and society.”

It is perhaps only the most politically disengaged Ukrainians who have not asked the EU to at least initial, if not sign, the Association Agreement at the December summit. This appeal came from both NGOs, which collected signatures of “all progressive people” to present them to the EU officials, and opposition politicians. Tymoshenko, even though she was imprisoned and confined to bed by illness, also asked this of European Commissioner Stefan Fühle.

NO INITIALING, BUT SHELIVING

The problem is that the Association Agreement (including the provisions

The Need for an Intern Factor

A country in which tortures and inhuman jail conditions are of a norm cannot negotiate on the Association Agreement

Author:
Ivan Halaichenko

Based on the latest survey by the Razumkov Center,
45% of Ukrainians supported Ukraine's joining the EU,
34.2% spoke against it and
20.7% had no answer

on the Free Trade Area) is exactly that sign of moving towards Europe, which Ukraine’s leadership is allegedly so anxious to send. Far from guaranteeing membership, it would nevertheless testify to the parties’ will to get there. However, the implementation of this will greatly depends on formal procedures, whose progress reveal the real state of affairs in mutual relations. Making the Agreement effective involves its signing and ratification by Ukraine’s Verkhovna Rada, the European Parliament, and national parliaments of all the 27 EU member states. This is quite a long procedure. But before it can even be initiated, a number of mandatory formalities must be completed and any one of which can delay the process.

Early this year, when Kyiv demonstrated (now one gets a strong impression that it was a mere simula-

tion) a will for rapprochement with the European Union and dissociation with Russia, it seemed that these formalities would be completed in no time, and the signing of the Association Agreement and FTA would be part of the next EU-Ukraine summit’s agenda. Then the ratification process would follow, and some of the articles concerning free trade would even start working, which would thus lay the foundations for the growth of GDP and living standards. Under such conditions, most citizens would never even suspect of all sorts of “negotiation completion statements,” “document initialing” etc. Under normal circumstances, all the mundane details are left for the diplomats to take care of while the politicians smile for the cameras and reap election dividends.

However, Ukraine’s leaders preferred to astonish the world

al



PHOTO: AP

HOW TO MAKE THE REGIME HEAR YOUR VOICE

More and more EU officials are becoming aware of the sad fact: the EU has no effective leverage to influence Ukraine's regime. Sanctions take a political will and/or the spread of human rights violations in Ukraine on a scale comparable to that in Belarus. "Of course, we could impose sanctions against Rodion Kireev, but how will you benefit from that?" This is a rhetorical question. Thus all this gives rise to fears that Yanukovych and Co. could use the Association Agreement for their own legitimization at home: "We negotiate on equal footing, we issue joint statements and consequently, we are real, respected, and legitimate power."

When in 2004 the world (with the exception of Russia and a few other "paragons of democracy") disapproved of the second round of Ukraine's rigged presidential election and criticized the Ukrainian administration, society understood that it was not alone in its desire to change the malpractice in the top echelons of power. But if all TV channels broadcast a pretty picture with handshakes and declarations about Ukraine's European prospects (even with their traditional reservations), Ukraine's leaders will use this as a testimony of their victory, and of their worldwide recognition.

This is actually what the official coverage of the summit boils down to in this country. The Foreign Ministry even went as far as to offer an explanation blaming the delay on Europe: the Agreement was not ready for initialing, since the Europeans were allegedly too preoccupied with their own internal problems. What else can you expect from Yanukovych and his kind? The problem is whether Ukrainian society will be able to make them carry out the obligations (such as rights, liberties, free development, refusal from repressions and harassment of business, etc.), which they are going to assume for the umpteenth time. Replacing the government, or compelling it to act within a legal framework, is the citizens' right, privilege, and duty – especially if they will not agree to be subjects of the system built by the regime ■

with what is considered absolutely inadmissible in modern international relations – a point blank lie. Of course, the president and his entourage are now saying that nothing has ever been promised. Nevertheless, European diplomats openly (which has hitherto been unheard of) talk about the situations when they were informed of prospective revision of legislation, arrangements for a compromise and so on. Even on the day when Tymoshenko was convicted, Yanukovych was saying something about appellate procedure and the "norms which the judges will proceed from."

Thus, compensatory mechanisms were put in action, and the process of putting the Agreement into effect slowed down. So at the December 19 summit, the document did not even get dummy signatures. A political statement was

made that the negotiations were now completed. Now, in order to pass on to the signing stage, the document has to be initialed, i.e., all pages have to be signed. If necessary, this can be done very quickly. But the deliberate procrastination of the process before initialing is a clear message that



THE SAD IRONY OF THE SITUATION IS THAT ANY TOUGH SCENARIO FROM THE EU WILL HARDLY INFLUENCE THE SITUATION IN UKRAINE

Europe is not ready to sign serious treaties with these people. The sad irony of the situation is that this tough scenario will hardly influence the affairs in this country.



Cou

Interviewer:
Alla Lazareva

In her interview for *The Ukrainian Week*, Valentyna Telychenko, a human rights advocate and Myroslava Gongadze's attorney, analyzes the existing contradictions in laws on abuse of power, and comments on the Council of Europe's demands to improve Ukraine's Criminal Code.

“SOCIETY WILL NOT ACCEPT DECRIMINALIZATION WITHOUT PUBLIC DISCUSSION”

U.W.: When Ukrainian Justice Minister Oleksandr Lavrynovych spoke in Strasbourg before the members of the Monitoring Committee of the Council of Europe, he said that Articles 364 and 365 of Ukraine's Criminal Code (on abuse of power and administrative excess) are not Stalinist and that they were in fact introduced in 2001. Are these statements true?

– Abuse of power and office has long been considered a crime in Ukraine. The Criminal Code

that was in effect from 1960 to 2001 contained Article 165 on abuse of power and office and article 166 on exceeding power and office responsibilities. The maximum sentence for abuse was eight years in prison with confiscation of property and for exceeding power that caused grave consequences 12 years in prison.

The new Criminal Code, which entered into force on September 1, 2001, essentially copied all these articles (now they have numbers 364 and 365) and somewhat lowered the maximum sentence. Abuse will now entail six, rather than eight, years in prison and exceeding power 10, rather than 12, years. Moreover, confiscation of property was replaced with a fine of up to 1,000 tax-free allowances (UAH 17,000). Thus, there is a tendency to soften punishment.

Moreover, both articles in the new Criminal Code were complemented with a point about crimes committed by law enforcement of-

ficers. They will face heavier punishment, in particular up to 10 years in prison and possible confiscation of property under Article 364. It is understandable that this category must be punished more severely for these crimes than other citizens. However, there is no good reason to explain why only their property, and no one else's, may be confiscated. In both cases, it is the same crime committed for mercenary motives. In my opinion, confiscation would have to be well-justified.

U.W.: A draft Council of Europe resolution on Ukraine that will be discussed in Strasbourg on January 26 proposes that both of these articles should be decriminalized. To what extent will this step address the existing flaws, in your opinion?

– To decriminalize an article means to recognize that acts it refers to are no longer considered crimes. To decriminalize means to

courtroom Drama

Valentyna Telychenko:
“Dependent courts are a
bigger problem for
Ukraine than the
imperfect Criminal
Code”

PHOTO: UNIAN

remove a relevant article or its part from the Criminal Code through a special law. We have had cases of this happening to the articles on libel, speculation, etc. Everyone who has been convicted under a decriminalized article has the right to be relieved of the respective punishment. These persons must be acquitted by court.

I am convinced that a broad public discussion should be held about the need of decriminalization. Regardless of what the parliament decides, society will not accept a decision it does not understand. If that is the case, it will be another step toward negating the rule of law in our state.

“UNDER CURRENT LAW, CASES SHOULD BE OPENED AGAINST NEARLY ALL OUR POLITICIANS FOR PROTECTIONISM”

U.W.: What is the legal sense of the concept of abuse of power?

– Article 364 defines abuse of power as “use of power or official

position by an official contrary to the interests of the office performed intentionally, for mercenary motives or in other personal interests.” In simple words, it refers to any actions officials perform in order to obtain material or non-material benefit, except salary and legal bonuses. The key point is the benefit. Non-material benefit may be, for example, an improved personal, party or other reputation or image, concealing one's incompetence, careerism or protectionism.

U.W.: So abuse must have intent as its prerequisite, as is defined for example in French law – when a person is well aware that their actions will cause damage to society but still carries them through?

– Precisely. But article 365 of the Criminal Code, which establishes responsibility for exceeding power, does not say a word about intent. Exceeding power or office responsibilities is defined as “intentional actions that are performed by an official and clearly exceed the limits of rights or authority given to him if they have caused significant damage to the legally protected rights and interests of individuals, state or public interests or interests of legal persons.”

This article does not mention personal benefit, neither material nor non-material. The entire world defines corruption based on the criterion of deriving benefit. Exceeding power or office responsibilities, even if it has caused grave conse-



SOCIETY WILL NOT ACCEPT DECRIMINALIZATION WITHOUT PUBLIC DISCUSSION

quences but has not been aimed at obtaining benefits, is not a crime in Western democracies. If it has caused material damages, the aggrieved party may file a civil lawsuit to claim damages, i.e., it is a civil, rather than criminal, matter.

And so, parts 1 and 3 of Article 365 should be removed from Ukraine's Criminal Code, which will decriminalize the actions they refer to. Part two of this article, which establishes criminal responsibility for exceeding power and

office responsibilities accompanied by violence or the use of arms, should be kept in place.

“COURTS SHOULD NOT BE ASSESSING A POLITICIAN'S IMAGE”

U.W.: What arguments are there in favor of decriminalizing Article 364?

– Article 364 is very general, as is emphasized in the PACE draft resolution. Ukraine's Criminal Code has, so to speak, special articles: Article 191 on misappropriation, embezzlement or taking possession of property through abuse of office; Article 368 on accepting bribes (only by officials); Article 233 on illegal privatization of state and communal property. These crimes may be committed only through abuse of power or exceeding office responsibilities. When there is a general article and several that are specialized, there is room for manipulating charges, which makes criminal law less predictable.

Criminal law must be unambiguous and predictable, because it can significantly limit individual rights for a long time or even lifetime. It is all the more important in Ukraine where there are corruption, widespread mistrust in the judicial system, dependent and less-than-adequately qualified judges and limited access to legal assistance and protection for citizens. The law should not give the prosecutor a choice of qualifying actions under article 191 or article 365 or make the court assess a politician's image, because that is not its job.

We should remember that removing a specific article from the Criminal Code does not necessarily mean that certain actions are no longer socially dangerous. Ukraine's criminal law is not perfect. Removing the first two parts of article 364 does not legalize the offences they refer to but only removes a conflict of law that is now present in the Code.

U.W.: So what demands would you ask of Ukrainian authorities if you were authorized to suggest amendments to the PACE resolution?

– The first two parts of article 364 should be removed from the Criminal Code to make it unambiguous. At the same time, a definition ▶▶

of what abuse is should be added to the document and its features – criminal intent and a mercenary goal – should be listed. Also, part three of Article 364, which refers to actions of law enforcement officers, should be made clearer. A special procedure for reviewing previously delivered verdicts under Articles 364 has to be established, because its new redaction is needed only to remove a conflict of law.

Parts one and three of Article 365 should be taken out from the Code. Part two of the same article, which refers to violence and the use of arms, should be edited.

“TYMOSHENKO DID NOT DERIVE PERSONAL BENEFIT FROM THE GAS AGREEMENT”

U.W.: How adequately did the authorities apply articles on abuse of power and exceeding office responsibilities in the Yulia Tymoshenko case?

– The verdict, which has already entered into force, even though it still has to be go through a cassation court, pronounced Tymoshenko guilty of exceeding power. According to the court ruling, the excess occurred when she instructed the head of a state-run enterprise, Naftogaz, to sign a gas agreement with Russian Gazprom. The prosecution did not point out, and hence the court did not establish, any personal benefit that Tymoshenko would derive from this agreement. This circumstance – the absence of personal benefit – is a key factor for why Europe sees no *corpus delicti* in Tymoshenko’s actions. In European understanding, whether this agreement eventually turned out to be good or bad for Ukraine was a question of political responsibility only.

It should also be noted that in the Tymoshenko case the court drew what I believe to be the wrong conclusion when it ruled that her instruction to the Naftogaz chief, conveyed to him through the Fuel and Energy Minister, exceeded the authority invested in the prime minister’s office. Under paragraph 9 of point 2 of the Cabinet’s Regulations, the prime minister may issue instructions to members of the government and heads of other central government bodies that are mandatory for execution by the officials mentioned. Now article 365 of the Criminal Code speaks about



PHOTO: REUTERS

On January 26, PACE could decide on the Resolution regarding Ukraine with the recommendation that the government decriminalizes the Articles on abuse of power and administrative excess

actions that “clearly exceed the limits” of authority. The materials of the case contain the conclusion of Justice Minister Oleksandr Lavrynovych and Prosecutor General Oleksandr Medvedko that Tymoshenko did not exceed the limits of authority invested in the head of the government.

Finally, courts failed to comply with the law in the Tymoshenko case a number of times. It was often evident that the judges were not impartial or objective. All of these things are already being considered in the European Court of Human Rights.

U.W.: Was Yuriy Lutsenko also accused of exceeding office responsibilities? How substantial are the charges against him?

– The charges against Lutsenko are more complicated. He was charged with abuse of power over his allegedly unlawful instruction to

fairs for ordering festivities to mark Police Day in 2008 and 2009. Additionally, he was indicted under Article 191 of the Criminal Code for embezzlement: his assistant and driver was hired on his orders, and later the state provided him with an apartment.

Because the verdict in this case is yet to be delivered, I will refrain from a detailed analysis of the charges. I will only note that the imputed motive for abusing and exceeding power in this case is that Lutsenko pursued careerism and wanted to improve his image as the Interior Minister. No comment.

With regard to Article 191, the criminal investigation has yet to establish whether he did anything illegal. To me, the state prosecution has not presented any valid evidence to court so far.

U.W.: Before these two causes célèbres, how often were Articles 364 and 365 used for political purposes in Ukraine? Do you know of any similar cases? To what extent is what is happening in the trials of Tymoshenko, Lutsenko, Ivashchenko and other members of the previous government a rule in Ukraine’s judicial system? Or is it the know-how of the current government?

– I do not know of other examples except the ones you have mentioned. Fighting political opponents though controlled “justice” is something the current government has invented. If you analyze the legal practice of applying articles on abusing and exceeding power, you will see clearly that, with few exceptions, the sentences did not exceed five years in prison and were conditional at that. In other words, the convicted persons were relieved from the sentence if they did not commit a new crime within the probation period. Court verdicts were always very lenient under these articles.

Solving the problem of applying the Criminal Code articles on abusing and exceeding power is just one in a series of steps that need to be taken to improve legislation in our country. Moreover, there is an extremely acute problem with the courts’ independence. Last year, we saw it more clearly than ever. There cannot be a state without a justice administration system. We risk losing not only our European prospects but our future in general. ■



COURTS ARE NOT OBLIGATED TO ASSESS THE IMAGE OF A POLITICIAN

keep Volodymyr Satsiuk’s former driver, who was suspected of having a hand in Viktor Yushchenko’s poisoning, under surveillance. He was also charged with exceeding the power of the Minister of Internal Af-

Ukrainian Justice – Perception and Practice

Mikael Lyngbo: Ukraine has decent legislation, but lacks in procedural process

Interviewers
Oleksandr Mykhelson,
Dmytro Hubenko

Photo
by Andriy Lomakin



Mikael Lyngbo, a citizen of Denmark, does not have any official office. A former chief of police, public prosecutor and a ranking official in the Danish Security Service, he is now a representative of the Danish Helsinki Committee for Human Rights. Nevertheless, his reports largely shape Europe's view of causes célèbres in Kyiv. On December 1, Prosecutor General of Ukraine Viktor Pshonka even gave Lyngbo a public invitation to have a discussion on his reports to the Helsinki Committee. However, this took place only after a meeting with representatives of the Prosecutor General's Office (PGO) in the summer, while Pshonka himself saw Lyngbo only long enough to shake hands.

In terms of facial features and expression, Lyngbo bears a slight resemblance to Russian standup satirical comedian Mikhail Zadornov, and it seems he could easily use the latter's famous punch line: "The West cannot comprehend this!" But this is a serious matter to him. His reply to accusations that Europe is "interfering" with Ukraine's administration of justice is that under our laws, the norms of the European Convention on Human Rights which Ukraine recognized in 1994 when it joined the Council of Europe, are an integral part of Ukrainian law. The problem is that few people in Ukraine remember that.

U.W.: When did you first look at cases opened against Ukrainian officials?

I wrote my first report in April 2011. At the time, Ukraine was about to take the chairmanship in the Committee of Ministers of the Council of Europe, and I was monitoring only the cases of Yuriy Lutsenko and ex-Deputy Minister of Justice Yevhen Korniychuk. But later, after I spoke to people here, I also started monitoring the cases of Yulia Tymoshenko and former acting Minister of Defense Valeriy Ivashchenko. My second report in August was based on these four cases. I consider the August report my main report in which I give a broad description of the problems faced by the Ukrainian rule-of-law system. My third report, in November, only dealt with the new charges against Tymoshenko. I personally felt the need for it, and I got so many questions from the people I deal with in Europe about what was happening here. Is it legal? Can you actually prosecute someone for something that happened 15 years ago? What about the old tax cases? They've been dead and away for 6-7 years. Can you suddenly pull them out again? Therefore, I made the third report answering these questions on the specific new cases against Tymoshenko.

U.W.: President Viktor Yanukovich expressed his regret on several occasions that trials against former ranking officials must conform to imperfect Soviet legislation.

In my opinion, your legislation, both criminal and procedural, is not so bad, at least as far as I can tell relying on my own experience of enforcing laws in Denmark. You have pretty normal laws, but what surprises is the way they are enforced and perceived.

I am surprised over and over again to see how passive and middle-of-the-road the role is that Ukrainian judges play and how little they take upon themselves the role of what we would call court management – checking, controlling and making demands of both the prosecution and defense lawyers. I could sit for hours hearing them fighting about some detailed problem that any qualified judge I know of would have settled in 10 minutes. Probably they are afraid of authority.

U.W.: They have reasons to fear. Here is one example: several months ago a criminal case was opened in Crimea against the head of an appeals court, because his court's building did not have the so-called secluded room where judges meet for discussions. But in fact, such a room is missing in most appeals courts due to a lack of funding. There are many similar circumstances that a Ukrainian judge cannot alter but over which he can find himself under investigation and in a pre-trial detention unit.

I was not aware of this story. But there is another fact that I am also surprised to see in Ukraine – numerous disciplinary cases against judges. If they are the result of corrupt judges, then that's fine with me: of course, corrupt judges should be disciplined and removed. But if they are an attempt to discipline judges and make them do what they are "supposed to do", then I'm concerned. In a number of cases it turns out that a judge changes his mind in a certain case after an investigation was started and then proceedings end. This coincidence may be evidence that judges are simply being "pulled by the strings," right? Anything like this would be a huge scandal in Europe. I mentioned this in one of my reports.

Of course, there are corrupt judges in the West, too. But at least disciplinary cases against them are not handled by prosecutors. Prosecutors should not discipline judges – judges should discipline prosecutors. That's the proper balance of power. And judges should be disciplined by other judges. Unless, of course, it is a criminal matter, but disciplinary cases are normally not criminal matters. In principle, there

is nothing above the judge. There can be, say, higher court judges, Supreme Court judges, etc. And that's also the system we have, but not a system where the prosecution is the disciplinary authority of judges. It's unheard of.

U.W.: But we do have the Higher Council of Justice...

The reform of 2010 put it in a very powerful position, and its composition is far too influenced by the executive branch and the prosecution. But the ultimate question is: Who has the actual power? Who makes the actual decisions? Such an enormous concentration of power in the Prosecutor General's Office – that's what is setting the standard. According to the law, they are supposed to take the initiative in disciplinary cases. So this whole question of disciplinary cases undermines the authority of the court.

U.W.: You met with representatives of the Prosecutor General's Office. Did they try to change your critical view of this matter? What were their arguments?

Early on, I met with First Deputy Prosecutor General Renat Kuzmin. Deputy Prosecutor General Yevhen Blazhivsky, head of the investigative division in the Military Prosecutor's Office and department chiefs were also there. When Kuzmin was in Brussels to brief the Socialist group of the European Parliament, he was apparently once again met with arguments from my reports, as was the case wherever he went. Now they decided they

as one-sided, saying that I should have also contacted the PGO to have their version and their data. I couldn't agree [that we were biased]! I said that I based my information on what was in the media, public information. I also talked to defense lawyers. We met with the PGO the last time in July on our initiative. Since then we have contacted them a number of times to have meetings but have never succeeded. On a number of cases, when I met with specific prosecutors in court, I contacted them and tried to have a dialog with them. All of them said, "We are not authorized to talk to you." So I could only say, "We have actually tried to get your side of it. But we just couldn't."

Basically, I agree – I do want to have the information. In a number of cases, we got original documents and based our reporting on that. The outcome of the meeting was that we agreed and now they apparently want to meet with us regularly. A senior prosecutor has been appointed as our contact point. [On December 15] I sent her my first questions based on a meeting, because I received information from them that contradicted information I had from other sources.

U.W.: What was it about?

Among other things, it was about other investigations that had been started against Tymoshenko and whether she had been informed about them. There were a number of cases: a murder case (the murder of businessman Yevhen Shcherban. – Ed.), an attack on a detention center, an attempt to bribe Supreme Court judges, etc.

I need to constantly check and control both sides. I know that both sides will try to use me when I am accepted as an adviser by the EU ambassador, the American ambassador and international organizations. If that's the situation, of course, they'll try to manipulate me, and both sides do. So I have to check both of them.

U.W.: Why do you think it is so difficult to obtain truthful information? Is it a result of disorganization or an intentional effort?

Your prosecution has a secretive tradition, but in general you also need to respect the privacy of ▶



PROSECUTORS ENJOY XCESSIVE POWER IN UKRAINE

had to make an official, formal answer. So they are about to prepare a report answering my third report. And the people we met were, as I was told, tasked by Mr Pshonka with writing that report. In the near future, we can expect a report with the version of the PGO on the questions I have raised.

So that was the purpose of the meeting – to establish common ground and a common understanding. And that was the background for what was mentioned in the press release from the PGO on the meeting, because Kuzmin started criticizing my information

information. For instance, one of the things I am actually criticizing Kuzmin for is his statements on television on Friday night, October 28: in a live broadcast he mentioned that Tymoshenko was suspected of [involvement in the] killing of Shcherban and the attack on a detention center. But I had never heard about that before! It now turns out that no charges were brought against her for the murder. They're investigating whether there is background for opening a case, but it has not been opened. And again, no prosecutor should go public with a suspicion that is so unfounded at the time.

U.W.: What about the charge of attacking the detention center?

I had contradictory information. I asked Kuzmin during a meeting whether there was any investigation opened against Tymoshenko for that. He confirmed it. I asked him whether Tymoshenko knew that. He, again, confirmed it. Then I asked [Serhiy] Vlasenko (Tymoshenko's defense attorney. — Ed.) about it, and he denied it. So I went back again, and now they have confirmed that there was an investigation opened in 2004. This led me to the next question: What has happened since 2004?

The really important question in all these cases is "What is the motivation?" For example, when Tymoshenko is being prosecuted, is it the result of a professional legal assessment based on new information that was not available before? If that's the case, you can start discussing the question of opening an investigation based on something that happened 15 years ago. But of course, in itself, it does raise suspicions.

During the meeting in the PGO, Kuzmin completely agreed with me that it would have been incorrect to reopen these old cases if they had been legally closed or suspended at that time. However, he stated that that was not the case, because they had been closed illegally. I asked him and found out that it was due to a corrupt prosecutor general. This made me ask: "Does it mean that all the decisions made by Sviatoslav Piskun were about to be reviewed? Or only the decision in the Tymoshenko case?" If the latter was the case, it did not contradict the suspicion that there was a political purpose. If you have a corrupt



official, you have to review all his decisions, not just the ones that are convenient to you. Then we had another long discussion about why exactly this case had been chosen.

U.W.: During the Tymoshenko trial most witnesses for the defense and a good part of its

an impartial trial where both sides are allowed to present their evidence. A case in which the defense is not allowed to present relevant testimony will not be considered fair and will be overruled by the European Court.

That's the overall picture of it. I am not in a position to take sides on whether the individual decisions of the [Pechersky] Court on whether to allow witnesses or not was justified. The judge also has the task of concentrating [on the case] and not wasting time on irrelevant things. For example, I've seen a statement from the formal representative of Naftogaz who represented this company in the gas case against Tymoshenko. He concluded as a lawyer that Naftogaz had suffered no financial loss. And when he presented that, he was removed from the case and was dismissed. As a judge, I would be very hesitant to not allow such a witness. To me, he looks like a relevant witness. But, again, I'm not in a position to take sides. ■



MOTIVATION IS THE CRUCIAL POINT IN ALL THESE CASES

evidence were rejected by the court under various pretexts – for example, that ex-officials of her government could be partial to her. This was the judge's inner conviction, because no facts were provided. Is there a way in Europe to prevent situations in which a judge can pass decisions based on his beliefs but not solid facts?

Not at all. The only demand we have in the European Convention is Article 6 on fair trial. A fair trial is

The Presumption of Guilt



Thomas Hammarberg, the Commissioner for Human Rights at the Council of Europe, talks about his mission in Ukraine, the local judiciary system and the Tymoshenko case

Interviewer:
Alina Paštukhova

Thomas Hammarberg visited Ukraine to monitor the work of the courts and prison facilities, based on which, he will draft a report on the situation in Ukraine. He has also promised to focus on other issues, including the freedom of peaceful assembly. While monitoring the situation with human rights in Ukraine, Mr. Hammarberg talked to several officials. At a meeting arranged by *The Ukrainian Week* and Ye Bookstore, the Commissioner talked to NGOs and heard their complaints on human rights violations in Ukraine.

I spent a week in Ukraine to get a better idea about how the judiciary system works. I've met virtually all crucial parties to the process, including the Ministers of Justice and Foreign Affairs, the Prosecutor General, the Head of the SBU, security service of Ukraine; judges of the Constitutional Court, Supreme Court and High Special Court for Criminal Affairs, as well as MPs from the party in power

and opposition. I also talked to NGOs, the mass media and lawyers. My plan is as follows: my colleagues and I will go back to Strasbourg and start working on the report, based on what we've seen in Ukraine. It will be disclosed early next year.

My report will largely focus on the role of the Prosecutor in the judiciary. Its domination comes from the soviet model, I guess. The function of the Prosecutor's Office in Ukraine is still to supervise the system. This mechanism is totally obsolete and unacceptable in a democratic society. We've found that acquittals account for less than 1% of all verdicts in your country. In most other cases, the verdicts mostly correspond with the demands of the prosecutor. Needless to say, this is a big red flag: something's being done wrong.

The protection of the independent powers of judges is a fairly important priority in justice. This is the need for a strong barrier to separate politicians from judges. I've heard from many people I spoke to, that judges are under significant pressure from politicians. This will also be mentioned in my report.

The police, as a law enforcement agency, are the first link in the judicial chain. What I heard about this link from many, is associated with the continued brutal and inappropriate treatment of people that are arrested. I've heard many complaints about corrupt police officers. These problems must be solved as well.

The presumption of innocence should be the principle guiding preliminary detention. International standards are extremely strict in this respect: a person is deemed innocent as long as his or her guilt is not proven. Until that happens, a person cannot stay under arrest. Sometimes, a pre-trial investigation reveals the need for exceptions from the rule. However, these exceptions should be rare and applied in a very limited range of cases, when there are substantiated concerns that the suspect can escape, is likely to destroy evidence or exert pressure on witnesses. This is very important for the international commu-

nity in cases as important as those against Tymoshenko, Lutsenko and Ivashchenko. None of them contain circumstances that justify their detention until the court announces its verdict.

The presumption of innocence also means that the conditions under which people are detained should be humane. I discussed this with Nina Karpachova, the Ombudswoman, who had visited the biggest detention center before our meeting. She told me that the place was so overcrowded, that suspects had to take turns sleeping; they are simply short of beds. This is a big problem from the human rights perspective. People under preliminary detention also have the right to medical aid. All these problems with temporary detention centers are the reason for the increasing number of complaints filed to the European Court of Human Rights, which has ruled decisions on this many times.



NGOs SAVE DEMOCRACY WHERE POLITICAL PARTIES FAIL

Another important issue that has caused a lot of people to apply to the European Court, was the length of proceedings. The judiciary must be both independent and objective. It should also work effectively. The non-enforcement of verdicts is another problem of the inefficiency of courts.

I know that the government is in the process of drafting new laws aimed at improving the situation in Ukraine. One important aspect in legislation is how it will be enforced once in effect. Some view this with cynicism. They say it doesn't matter whether the laws are good or bad, because they're never implemented anyway. I don't agree with this. I think it's important that laws meet international standards. This allows lawyers, NGOs and everyone involved in the implementation of democratic principles in Ukraine to rely on international standards in their work.

I truly hope that all politicians will unite to support our recommendations when we submit them, and implement them through laws and the everyday work of courts and enforcement agencies. Needless to say, I want to believe that they won't do this simply to please Brussels. I believe their true goal will be to set up the foundation for protecting the rights and freedoms of their nation. At our meetings, government representatives said they were looking forward to seeing our report as soon as possible.

The EU will read our report on Ukraine. They will take our recommendations into account. This could affect relations between Kyiv and the EU. I say this based on my experience in other countries. The value of the Council of Europe is in building our analysis out of real facts without tackling political aspects.

Many NGOs in Ukraine complain about the pressure from the government, which interferes with their work. Their right to peaceful assembly are violated. I don't want to give all the details of everything that will be written in my report, but we'll definitely focus on these problems.

Civil society plays a crucial role in any country, including Ukraine. I was impressed by the representatives I met from human rights NGOs. They act constructively; they know what to do to change the situation. Just like us, they are doing their best to avoid politicization. They campaign for what I do too, in other words, for authorities to listen more carefully to the recommendations of NGOs and get involved in an active dialogue with them. I think groups like these will save democracy where political parties fail.

I feel there is a need to pass a very specific law to prevent corruption, with the real liability of ministers and top officials in law enforcement agencies. We will provide recommendations on issues related to fighting corruption, particularly in the judiciary. ■

Judicial Takeover

Those in power have removed all barriers from the path to a loyal Supreme Court



PHOTO: UNIAN

Author:
Alina
Paštukhova

The hysteria surrounding the election of the new Supreme Court Chief Justice is over. On 23 December, the Supreme Court Plenum chose Petro Pylypchuk as the next Chief Justice with only 6 judges out of the 47 registered at the plenum voting contra. It seems the Party of Regions has found ways to change the balance of power for its benefit and put a loyal person into the top office at the Supreme Court. Meanwhile, Vasyl Onopenko, the Chief Justice close to Tymoshenko's Bloc whose powers expired on 29 September, announced that he had changed his mind about nomination for a second term even though he enjoyed the support of most judges until recently.

Surprisingly, Mr. Onopenko dropped the issue of renewing his Chief Justice post right after the Pechersk District Court passed a verdict to release his son-in-law, Yevhen Korniychuk, from criminal liability under the amnesty law. Vasyl Onopenko denies any

connection between the verdict and amnesty for Mr. Korniychuk, yet this coincidence is not a new precedent.

Mr. Korniychuk served as Deputy Minister of Justice in Tymoshenko's Cabinet and went to jail in late 2010. Back then, the Prosecutor General opened a case against him under Article 365.3 of the Criminal Code, i.e. abuse of office causing significant damage. Mr. Korniychuk was charged with abusing his powers during public procurements. The prosecutor claimed the ex-deputy minister had signed a letter while in office authorizing a tender whereby just one subcontractor was chosen to provide legal support to Naftogaz Ukraine. On 30 December 2010, the Pechersk Court put Mr. Korniychuk under house arrest. The court later extended the term of arrest many times while rejecting all appeals from his lawyer. The day after Vasyl Onopenko met with Viktor Yanukovich and supported the judiciary reform offered by the President in February, his son-in-law was released on the condition that he remain in town.

The balance of power at the Supreme Court appears to have been altered by pressure placed on its judges as well. In November, the Supreme Justice Council initiated proceedings for the violation of judicial oaths of office by members of the Supreme Court's Chamber for Criminal Cases. They supposedly illegally revised the life sentence verdicts of 15 prisoners in 2009-2010, changing them to 15 years in jail. According to the Prosecutor General, decisions concerning people who have committed extremely dangerous crimes partly involved all justices from the aforementioned Chamber of the Supreme Court. The Prosecutor General also announced plans to open criminal cases against the judges. The latter denied all charges, claiming

the efforts were linked to the election of the new Chief Justice.

Mr. Onopenko is not the only candidate who quit the race. The Party of Regions' Serhiy Kivalov is no longer a nominee. His current priority is to replace Odesa mayor Oleksiy Kostusiev, who has frustrated many in the government and local business and is now hospitalized. Anatoliy Holovin, Chairman of the Constitutional Court and one of the most likely candidates for Mr. Onopenko's post, also denied plans to chair the Supreme Court. One of the plausible candidates was Ihor Samsin, a Supreme Court judge and Chair of the High Qualification Commission for Judges. Despite the efforts of Samsin's commission to block the election of the Chief Justice for the past few months, some new faces ended up on the candidate list.

Petro Pylypchuk is the Supreme Court judge who lost the Chief Justice election to Vasyl Onopenko in 2005. In October 2012, though, he will turn 65, the age limit for a Chief Justice by law. With this the Party of Regions subdues the turmoil surrounding the top Supreme Court post without "severely" violating the law, despite the fact that the Chief Justice should have been elected on 30 October by law. Perhaps, the government chose not to promote another Donetsk-born official to the Supreme Court in order to forestall further talk of its control over the judiciary. Instead, those in power could secure Mr. Pylypchuk's loyalty by agreeing to let him stay in office for the full five-year term. To achieve this, they would only need to amend the legal age limit for Chief Justice. President Yanukovich has already hinted at this scenario, asserting that judges should be allowed to work beyond age 65 as experienced professionals. ■

Which Way Will Ukraine Turn?

WHY won't Viktor Yanukovich free Yulia Tymoshenko? The Ukrainian president repeatedly insists that he is committed to signing a political and economic cooperation deal with the European Union. European leaders equally as often remind him that that is unlikely to happen so long as Ms Tymoshenko remains behind bars. Ms Tymoshenko, a former prime minister of Ukraine and Mr Yanukovich's main political rival, was sentenced to seven years in prison in October on charges the West deems politically motivated.

The agreement was reportedly almost ready for signing on the December 19 at the EU-Ukraine summit in Kiev. Yet although Ms Tymoshenko has appealed from her cell for the Europeans to go ahead, diplomats say that would look too much like "business as usual". The EU's credibility as a force for democratic change is, they reckon, on the line.

Mr Yanukovich assures his countrymen that "2012 will be Ukraine's European year". Such denial of the obvious is not uncharacteristic; it was in evidence earlier at a steelworks in Yenakiyevo, in the Donetsk region in eastern Ukraine. The air around the huge, Gormenghast-like plant, which dates from before the Soviet era, was thick with soot and grime. As Mr Yanukovich sang the praises of its environmental efficiency, the sand laid to cover the dirt during his visit was already turning black.

Mr Yanukovich is often cast as a wooden public speaker. But here he joshed with the steelworks' owner, Rinat Akhmetov, an old friend and backer as well as Ukraine's richest man. Mr Akhmetov's talk of "winning the world championship for workers' salaries" rang hollow among the gathered employees, who earn around €200 a month.

Yenakiyevo is home turf for Mr Yanukovich. He was born nearby, and it was this town's court that overturned, in 1973, his criminal convictions for theft and assault, after he had served jail time. Russian-speaking and raised on Soviet heavy industry, most of the 2m people in the metropolitan area of



PHOTO: UNIAN

Donetsk were opposed to the pro-European Orange revolution of 2004.

Mr Yanukovich rose to prominence as regional governor during the 1990s, a period dominated by mafia wars to which commentators have compared the Chicago of the 1930s. "That was a time when if you were in business, your life was in danger", says Oleksiy Panych, a long-term resident. "The people in charge of Ukraine today are still playing by the rules of that era, which means never forgive, and never show your weakness".

That may help explain the harsh treatment afforded to Ms Tymoshenko and her interior minister, Yuri Lutsenko, also behind bars. During their time in office they sought to have Mr Yanukovich sent back to jail.

Some observers say the EU should look no further than this personal vendetta in explaining Mr Yanukovich's behaviour, which seems to run contrary not only to Ukraine's national interest but also the business interests of Mr Akhmetov and other oligarchs, who want greater access to European markets.

Mr Yanukovich has been sending Europe mixed messages. At a summit in Warsaw in September he appeared to promise to resolve the Tymoshenko situation, but then failed to take any action. Since then Ms Tymoshenko has faced a number of further criminal investigations.

This could be the result of divisions among Ukraine's elite, with some business leaders, particularly in the gas industry, standing to gain more from pushing Ukraine into Russian rather than European arms.

But the need to eliminate Ms Tymoshenko as a domestic political rival seems less pressing. Her approval rating stands at only 14%. Mr Yanukovich fares little better, at around 20%, but if the rules are "winner takes all, loser goes to jail," perhaps he doesn't want to take any chances.

Most alarmingly for the president, his popularity is tottering even in his heartland. Several weeks ago around 20 veterans of the Chernobyl clean-up operation went on hunger strike in Donetsk protesting against cuts to their pensions. On November 27th one died after police cleared their camp. The death sparked solidarity actions as far away as Lviv, cultural capital of western Ukraine and in many ways the anti-Donetsk.

"These policies of [Mr] Yanukovich have united people against them, from east to west," says Vladimir Derkach, leader of the protesters. They set up a new camp after the death of their comrade, although they have since called a break in their action. Many say they were once paid-up members of Mr Yanukovich's party but that the scales have now fallen from their eyes ■



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