

Brief legal analysis of the human rights related bills considered during the Plenary Meeting of the Ukrainian Parliament on January 16, 2014 and signed by the President of Ukraine on January 17, 2014

1. Procedural Violations

The procedures for the consideration of draft laws (bills) and adoption of laws were violated by the Verkhovna Rada (the Ukrainian Parliament) at the Plenary Meeting on January 16, 2014. The procedures established by law¹ provide for special expert examination of any new legislature. Relevant Parliament committees are responsible for expert examination. When and if relevant committee issues a positive conclusion on the new bill and communicates this to all deputies at least two days prior to the voting, this draft is included in the agenda². The Ukrainian Parliament overlooked the above requirement for expert conclusion, thus, making newly adopted laws unconstitutional.

Also, according to the rules of the³ Verkhovna Rada, bills are generally considered according to the procedure consisting of three readings (passes):

- (1) first reading - discussion of general principles of the bill and adoption of it as a basis,
- (2) second reading = discussion of the bill article by article, and
- (3) third reading - adoption of the bill in general.

At the plenary meeting on January 16, 2014, the bills were voted for "in general" without any discussion of the general principles or particular articles of the bills.. This deprived the interested deputies of the right to provide their objections or proposals to the respective bills.

The voting "by hands" procedure was used during the adoption of these laws. The publicly available video materials covering the voting process on January 16, 2014 also show that there was no calculation of votes, as well as no prior discussion of the documents at all.

Based on the official Parliament's web-site all the bills were submitted on January 14, 2014. At that, based on the mentioned web-site, all the bills were considered by 15 relevant Parliamentary Committees on January 15, 2014. On January 16, 2014, that is to say the same day the documents has been voted for, the Speaker has signed the bills in violation of the Parliamentary Procedure. Moreover, already on January 17, 2014 the President of Ukraine signed the considered bills.

Therefore, the described order of hearings, voting and signing in violation of the established Parliamentary Procedure of the documents in question constitutes unprecedented fact of adoption of volumetric laws directly influencing numerous areas of social life in three days.

¹ The Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine".

² Clause 2 of Article 96 of the Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine".

³ Article 102 of the Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine".

2. Violations of International Treaties and Domestic Legislation

2.1. Severe violation of the right to freedom of peaceful assembly

The right to freedom of peaceful assembly is significantly restricted by the document adopted on January 16, 2014 (namely by the bill No. 3879).

The right to freedom of peaceful assembly **has been previously** established by the following provisions, which are binding for Ukraine:

- Article 20 of the Universal Declaration of Human Rights;
- Article 21 of the International Covenant on Civil and Political Rights;
- Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the “**Convention**”);

Article 39 of the Constitution of Ukraine (the “**Constitution**”).

The following guarantees of the right to freedom of peaceful assembly by the people of Ukraine provided by Section 2 of Article 11 of the Convention and Paragraph 2 of Article 39 of the Constitution were ignored:

- Only those restrictions may be applied that are necessary in a democratic society;
- Any restrictions of the right to freedom of peaceful assembly may be imposed by a competent court only.

The following amendments have legalized severe administrative and criminal liability for organizers, supporters, facilitators and participants of peaceful protests.

The proposed amendments to Article 185-1 of the Code of Ukraine on Administrative Offences provides for **more strict administrative liability** for:

- Both organizers and participants of peaceful assemblies for, among others, organizing of peaceful protests which do not comply with requirements of the established procedure. However, no such established procedure that is applicable to the peaceful assembly currently exists. Liability allows for up to 15 days jail time. **This lays grounds for potential mass arrests of participants of peaceful protests based on subjective and unclear grounds.**
- Participants of peaceful assemblies may be jailed for 15 days for wearing a mask or a helmet that prevents identification of a person, or for wearing clothing “which resembles uniform of law enforcement agencies”. The arrest may take place without the person having any harmful intentions or participating in such activities. **This new restriction prevents peaceful protesters from anonymous participation in peaceful assemblies.**
- Participants of peaceful assemblies may be jailed for up to 15 days for installation of a tent, stage, any small construction or audio equipment used for holding a rally, without having previously obtained a permission of the internal affairs authorities. **The requirement to obtain permission of the internal affairs authorities may prevent democratic society from efficient peaceful protests against these authorities, as well as against their government or their president, which have the power to instruct these authorities. This ground for liability also creates additional restrictions for exercising the right to assembly not through a court, but through the internal affairs authorities.**

The proposed amendments to Article 185-2 of the Code of Ukraine on Administrative Offences outlines harsh punishment (up to 10 days in jail) for business and organization leaders for supporting and facilitation of peaceful assemblies, which are deemed non-compliant with the established procedure. **A risk of sanction in form of arrest may prevent potential supporters and sponsors from supporting and facilitating peaceful protests.**

More strict criminal responsibility is introduced for the following:

- Blocking of administrative buildings and premises (up to 5 years restriction of liberty, or up to 5 years of imprisonment);
- Seizure of buildings (up to 6 years of imprisonment);

- Blocking of roads and transport (up to 2 years of imprisonment);
- Violation of public order as member of a group, mass disorder which leads to, among others, interference with transportation (up to 2 years of imprisonment);
- Resisting law enforcement officers, etc.).

This strict criminal liability may lead to justified criminal repressions towards organizers and participants of peaceful protests based on very subjective and biased criteria, such as assessment of negative effects from protesters actions.

Individual responsibility of vehicle owners. Bill No. 3855 violates the fundamental principle of individual responsibility set forth by Article 61 the Constitution. In particular, according to Article 61 of the Constitution, each person shall be individually liable under the law. However, Article 1(1) of bill No. 3855 sets forth the responsibility on vehicle owners for any breach of traffic rules in the event that another person operates the vehicle. Bill No. 3855 makes it a responsibility of the vehicle owner to prove that he or she did not drive the vehicle in question.

We believe that the above Article 1(1) of bill No. 3855 also contradicts the fundamental principle of assumption of innocence provided by Article 62 of the Constitution, as well as by Article 11(1) of the Universal Declaration of Human Rights. Therefore, we believe that application of Article 1(1) of bill No. 3855 by Ukrainian authorities constitutes a violation of the basic human rights of Ukrainians.

Tyrannical sanctions for driving in a procession. The new laws introduce tyrannical sanctions to the drivers or vehicle owners. In particular, according to Article 1(1) of bill No. 3879, traffic police may fine a driver of a vehicle in a procession consisting of more than five vehicles, without having previously obtained a police permit, and if the procession has interfered with the traffic. Please note that Article 1(1) of bill No. 3879 is silent on how serious must be the interference to the traffic. As an example, the above Article means that now the traffic police is allowed to fine each driver of a funeral procession for unintentionally and briefly blocking a part of an intersection.

Per Article 1(1) of bill No. 3879 the traffic police is permitted to revoke drivers licenses and/or confiscate vehicles. These confiscations constitute unprecedented sanctions for breaching traffic rules.

In other words, this regulation is aimed at preventing vehicle processions from taking part in peaceful protests.

2.2. Severe violations of freedom of expression and freedom of information

Freedom of expression is protected nationally and internationally by the following acts:

- Article 19 of the Universal Declaration of Human Rights
- Article 19 of the International Covenant on Civil and Political Rights
- Article 10 of the European Convention on Human Rights
- Article 34 of the Constitution of Ukraine

Slander is re-introduced in the Criminal Code of Ukraine after almost 13 years of being decriminalized (since 2001 when then new Criminal Code did not include defamation as a crime and Ukraine started applying civil remedies in defamation cases).

The newly adopted law No 3879 introduces criminal liability for defamation and, therefore, we can reasonably expect that as a result of this, “insulted” public officials, local governors, businessmen, and MPs will prefer to initiate criminal prosecution against media instead of civil law procedures.

Article on **extremist activity** assumes liability for production, possession for sale or distribution, and sale or distribution of extremist materials. Such actions committed via mass media or Internet will be sanctioned by a fine, or a 3-year imprisonment term in case of the repeated offence. Extremist materials are defined in a considerably vague and extensive manner and, moreover, the activity stipulated by the new article on extremism is *de facto* already covered by the existing Criminal Code articles (e.g. hate speech), so there was no need in introducing “additional protection” against extremism. There is obviously a high risk that any critical material against the incumbent government will be classified as extremism and punished as a criminal offence.

Both articles are expected to have a chilling effect on the media.

Based on the adopted bills, **it is forbidden to collect and disseminate information concerning law enforcement officers, executives and judges.** Criminal liability is now envisaged for illegal collection and dissemination of confidential information about a judge (or one's family members), as well as for dissemination of materials or information which are clearly offensive and demonstrate flagrant contempt to a judge or justice. The sanction for the crime is up to 4 years of imprisonment (amendments to Article 376 of Criminal Code of Ukraine). The sanction for the similar actions against law enforcement officer or executive (or members of their families) is up to 3 years of imprisonment (amendments to Article 343 of Criminal Code of Ukraine). **Herewith the same criminal liability falls due even when "clearly offensive" information is truthful.**

Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10) guarantees everyone the freedom of expression. This freedom includes freedom to honor one's opinion, get and convey information and ideas without interference of state jurisdiction. The Constitution of Ukraine (Article 39) guarantees everyone the freedom of thought and expression of one's opinion and convictions, as well as guarantees the right to free collection, keeping, using and disseminating of information.

Based on various reports and researches, Ukraine is ranked as a country with extremely high level of corruption. Due to passed bills, the law enforcement officers and judges who perpetrate illegal (criminal) actions, pass illegal (criminal) decisions etc., are now protected against transparent civil and media investigations. From now on, citizens may be imprisoned for 3-4 years for the dissemination of the information concerning illegal (criminal) actions and decisions, perpetrated by corrupted law enforcement officers and judges. Even a personal claim concerning illegal and unreasonable decision of a judges may be regarded as offensive information and attract the same criminal liability. Independent media, who conducting journalist investigations, collect and spread information about felonies of corrupt law enforcement officers and judges, also may attract such criminal liability. **Therefore, introduction of such criminal liability violates the right to freedom of thought and speech in Ukraine.**

Criminal liability for calling up to block lodgings, buildings and other facilities. Based on the passed bill, criminal liability for up to 6 years of imprisonment is envisaged for calling up to block access to lodgings, buildings and other facilities (amendments to Article 295 of Criminal Code of Ukraine). The previous wording stated criminal liability only for calling up to capture buildings and facilities.

The Constitution of Ukraine (Article 39) guarantees everyone the right to assemble peacefully, without arms, and to hold meetings, protest rallies, marches and demonstrations. The Constitution of Ukraine (Article 34) also guarantees everyone the right to freedom of thought and speech, freedom of expression of one's opinion and convictions. Convention for the Protection of Human Rights and Fundamental Freedoms guarantees everyone the right to freedom of peaceful assembly (Article 11) and freedom of expression of one's opinion (Article 10). Subject to the present political situation in Ukraine, it is obvious that such criminal liability is introduced specifically to deprive the citizens of the right to hold meetings, demonstrations and other actions under the state institutions (Administration of the President, Parliament of Ukraine, Cabinet of Ministers of Ukraine etc.), as well as close to the buildings where the state officials reside, and even to call up to hold such meetings and demonstrations. **Since the legislation does not clarify what exactly "blocking of lodgings, buildings or facilities" means, any action (meeting, demonstration and others) may be regarded as blocking. Thereafter, such action or even a call to such action may attract criminal liability.**

Introduced requirement for the registration of all online media as information agencies and fines established if any media functions without state registration does **not** correspond to the international principle of the necessity in a democratic society in the interests of national security, territorial integrity or public safety.

Independence of the national broadcasting regulator, the National Council of Ukraine on TV and Radio Broadcasting, is severely hindered by this requirement. The Law entitles the Parliament and the President to dismiss any member of the Council at any time. this provision clearly contradicts to the recommendations of the Council of Europe which state that "*... the rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.*" New provisions will lead to an extreme vulnerability of member of the National Council and will induce bias and corruption among them.

Innovations of the newly adopted law 3879 aimed at establishing total control over the media in Ukraine, as well as total control over the licensing of Ukrainian broadcasters represent a harsh and cynical attack against freedom of expression in the country. Restrictions for the implementation of freedom of expression established

by this law do not meet the requirement of being necessary in a democratic society, and as such violate national and international legal instruments protecting freedom of expression.

New Article 361-3 of the Criminal Code of Ukraine (threat to freedom of expression). Law No. 3879 introduces three new articles into the Criminal Code of Ukraine, formally designed to protect the integrity and operability of state-owned websites and networks. However, among three new articles one article (361-3) raises the most concerns. Article 361-3 establishes criminal liability for "*unauthorized interference with the operation of state electronic information resources, objects of nationally-critical information and telecommunication infrastructure, which lead to leakage, loss, forgery or blockage of information, distortion of processing or routing of the information*". The punishment consists of 2 to 5 years of imprisonment with a ban on occupying certain positions for up to 3 years. Further, the Criminal Code expands the term "*objects of nationally-critical information and telecommunication infrastructure*" to include any information or telecommunication system, the disruption of which affects any aspect of the operation of the government or its bodies, including any informational efforts. In view of the ongoing civil unrest in the country, these provisions are clearly aimed at dealing with the online civil protest in the form of Ddos attacks on government websites. It may seem like a legitimate aim to protect government-owned Internet resources. However, given harsh penalties and objectively weak processing capacities of the servers hosting the nationally-critical IT infrastructure (downtime of government websites has always been a major issue) in practice this could mean random or targeted criminal prosecutions of persons who unknowingly contribute to the failure of the elements of this infrastructure by attempting to access or use it legitimately.

Moreover, the wave of criminal prosecutions could also sweep, randomly or targeted, Internet users whose hardware (personal computers, mobile devices) had been unknowingly to them infected by trojans and other viruses, which resulted in their hardware becoming a part of a bot-network used by third persons for carrying out Ddos-attacks on government-owned websites. This will negatively affect the ability and even willingness of the population to use government IT infrastructure or the Internet generally, effectively causing massive self-censorship and undermining the government's efforts to promote the access to the Internet and information in general. This poses, on a state-wide level, a direct threat to the population's right to access, receive and disseminate information, which is an essential element of a person's **right to freedom of expression** guaranteed by Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 34 of the Ukraine's Constitution, which are all binding for the Ukrainian government.

Changes to the Law of Ukraine "On Telecommunications" (threat to freedom of expression). A massive blow to the Ukrainian population's ability to access information (i.e. exercise the right to freedom of expression) is also made by introduction of new norms via Law No. 3879 into Articles 18 and 42 of the Law of Ukraine "On telecommunications". In Article 18, a new provision grants the National Committee on State Regulation of Communication and Development of Information Systems the power to restrict access to any website containing "*content, the dissemination of which is contrary to the law*" based on a the decision of an "expert". Neither a clear definition of "*content, the dissemination of which is contrary to the law*", nor the procedure for appointment and requirements of the "expert" are given. This provision will result in an extremely broad and arbitrary interpretation of what the mentioned content is and the granting of extraordinary powers to individual government agents to control the population's access to the Internet and information in general. Also, changes to Article 42 introduce a mandatory state license for the provision of Internet access, which results in total government control over the activities of ISPs (Internet service providers), and thereby total control over the population's use of the Internet. The Ukrainian legislation has never seen such a restrictive legislative regime for the population's access to and dissemination of information. Coupled with the newly-formed oppressive regime, such models of national Internet governance is akin to that of the most authoritarian regimes in the modern world (e.g. China and Iran).

NGOs as foreign agents. The NGO receiving any material support from abroad are now considered to be "foreign agents". In particular, bill o. 3879 introduces a bunch of amendments to a number of Ukrainian laws. Regardless of the statutory documents of particular NGO, bill No. 3879 sets forth:

- A special procedure for the registration of NGOs as foreign agents if they intend to receive any material support or donations from abroad (the "**International NGOs**");
- all material support received by these International NGOs is subject to the local corporate tax;
- International NGOs will have to bear the wording of "the Foreign Agent" in their names and this wording may not be shortened; and

- International NGOs will have to publish the results of their activities in Ukraine on the Internet and one of the governmental newspapers quarterly.

Therefore, these new regulations segregate the International NGOs. This segregation is likely to be in breach of Article 22 of the Universal Declaration of Human Rights (UDHR), thus, restricting the rights of Ukrainians for international co-operation.

3. Severe violation of the Right to a fair trial

Criminal proceeding in absentia is introduced.

As proposed by the bill No. 3587, the prejudicial inquiry and criminal court proceedings may be conducted without the presence of a person suspected and charged with a crime.

The decision on criminal proceeding in absentia is made by the criminal investigator (adhere to the prosecutor's position), the prosecutor, or the court.

To arrive at such decision it is enough for the person to face the double failure to respond to a notice to appear without reasonable excuse. The legislation does not contain a list of reasonable excuses, thus, reasonability of the excuse is established by the person, who makes a decision on criminal proceeding in absentia application.

Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6) guarantees everyone the right to a fair trial, including the rights:

- to a fair and public hearing by an independent and impartial tribunal;
- to be informed of the accusation;
- to have the time and opportunities to prepare the defense;
- to defend oneself in person or through legal assistance.

The Constitution of Ukraine (Article 62) guarantees a suspect, accused or defendant the right of defense.

Subject to a lofty level of corrupt practice in Ukraine (especially – in investigating bodies, public prosecution and courts), introduction of criminal proceeding in absentia creates substantial and real menace, massive breach of human rights stated above, and in the first place – concerning protesters. Considering the high level of corrupt practices, it is expected the decisions on criminal punishment (including imprisonment) may be pronounced in short terms without informing about the availability of the criminal proceeding.