



Resolution 1862 (2012)¹

Final version

The functioning of democratic institutions in Ukraine

Parliamentary Assembly

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

2. The Assembly expresses its concern with regard to the criminal proceedings initiated under Articles 364 (abuse of office) and 365 (exceeding official powers) of the Criminal Code of Ukraine against a number of former government officials, including the former Minister of the Interior, Mr Yuriy Lutsenko, the former acting Minister of Defence, Mr Valeriy Ivashchenko, and the former first Deputy Minister of Justice, Mr Yevhen Korniychuk, as well as the former Prime Minister, Ms Yulia Tymoshenko.

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

4. The Assembly regrets the numerous shortcomings noted in the trials against former government officials and considers that they may have undermined the possibility for the defendants to obtain a fair trial within the meaning of Article 6 of the European Convention on Human Rights ("the Convention", ETS No. 5). In this respect, the Assembly takes note of the fact that the European Court of Human Rights decided to fast-track an application of Ms Tymoshenko concerning her detention in which she alleges violations of Articles 3, 5 and 18 of the Convention.

5. In the view of the Assembly, these shortcomings are the result of structural deficiencies in the justice system in Ukraine. These deficiencies are not new and have been long-standing concerns of the Assembly, relating, *inter alia*, to the lack of independence of the judiciary; the excessive recourse to, and length of, detention on remand; the lack of equality of arms between the prosecution and defence, as well as the inadequate legal reasoning by the prosecution and courts in official documents and decisions.

1. . Assembly debate on 26 January 2012 (8th Sitting) (see [Doc. 12814](#), report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), co-rapporteurs: Ms Reps and Ms de Pourbaix-Lundin). Text adopted by the Assembly on 26 January 2012 (8th Sitting).



6. With regard to the independence of the judiciary, the Assembly:
 - 6.1. reaffirms its deep concern about the lack of independence of the judiciary and considers that this is the principal challenge for the justice system in Ukraine;
 - 6.2. considers that the current judicial appointment procedure undermines the independence of the judiciary. It invites the authorities to abolish, or at least considerably shorten, the five-year probationary period for judges and to remove the Verkhovna Rada from the appointment process;
 - 6.3. considers that judges in their probation period should not preside over politically sensitive or complex cases;
 - 6.4. considers that the composition of the High Council of Justice runs counter to the principle of separation of powers and also undermines the independence of the judiciary. The Assembly therefore asks for amendments to be adopted to the relevant laws that effectively remove the representatives of the Verkhovna Rada, the President of Ukraine and the Prokuratura from membership in the High Council of Justice. Pending the adoption of these amendments, these three institutions should appoint non-political members to the High Council of Justice;
 - 6.5. invites the Verkhovna Rada to promptly adopt the necessary constitutional amendments that would remove the provisions which impede the implementation of the Assembly's recommendations mentioned in paragraphs 6.2 and 6.4;
 - 6.6. expresses its concern about the many credible reports that disciplinary actions have been initiated, and judges removed from office by the High Council of Justice, on the basis of complaints from the prosecutor's office because the judges in question had decided against the prosecution in a given court case. Such practices are incompatible with the principle of the rule of law and should be stopped at once.
7. With regard to detention on remand, the Assembly:
 - 7.1. expresses its concern regarding the excessive recourse to detention on remand, often without justification or valid reasons, in the Ukrainian justice system;
 - 7.2. notes in this regard that unlawful and excessive detention on remand is one of the major issues in judgments handed down against Ukraine by the European Court of Human Rights;
 - 7.3. reaffirms that, in line with the principle of presumption of innocence, detention on remand should only be used as a measure of last resort when there is a clear risk of absconding or subversion of justice;
 - 7.4. calls on the authorities to ensure that the Criminal Procedure Code provides a clear procedure for the review of the lawfulness and duration of detention on remand. In addition, guidelines should be given to ensure that detention on remand is only applied as a measure of last resort and only on the basis of a well-grounded decision by a court.
8. With regard to equality of arms between the prosecution and defence, the Assembly:
 - 8.1. notes with concern the bias in favour of the prosecution which is endemic in the Ukrainian justice system;
 - 8.2. calls on the authorities to ensure that, in the Criminal Procedure Code, equality of arms between the prosecution and defence is guaranteed both in law and in practice;
 - 8.3. invites the authorities to ensure in particular that the Criminal Procedure Code explicitly provides for the defence to be given a copy of the case file of the prosecution and a reasonable amount of time to familiarise itself with the file, under the control of a judge;
 - 8.4. welcomes the fact that the President of Ukraine has submitted a new draft criminal procedure code for consideration by the Verkhovna Rada and calls on the Verkhovna Rada to promptly adopt this law, which fully takes into consideration the recommendations made by the Council of Europe during its analysis of the draft law.
9. With regard to the structural deficiencies in the legal system, the Assembly regrets that the reform to bring the prosecutor's office in line with Council of Europe standards, which is one of Ukraine's accession commitments, has yet to be carried out. As a result, the Prokuratura remains an excessively centralised institution with excessive powers.

10. The Assembly notes with concern reports that the health of the former Minister of the Interior, Mr Yuriy Lutsenko, and of the former acting Minister of Defence, Mr Valeriy Ivashchenko, who are in detention on remand, is rapidly deteriorating and that both of them need medical treatment outside the prison system. The Assembly asks that both men be released at once for humanitarian reasons pending the outcome of their trial, and in view of its concerns regarding recourse to detention on remand in Ukraine. The Assembly also expresses its concern about the deteriorating health of Ms Tymoshenko and calls on the authorities to allow, without preconditions, medical examinations and, if necessary, treatment by independent doctors outside the prison service.

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

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

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

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

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

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

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

15.3. is concerned that the raising of the threshold for the proportional elections to 5%, combined with the prohibition on parties to form electoral blocs to run in the elections, might negatively affect the opportunities for new or smaller parties to enter parliament. The Assembly is concerned that these provisions could reduce pluralism and further increase polarisation in the new parliament. It recommends that the threshold be lowered and the prohibition on electoral blocs be removed from the electoral legislation before the next parliamentary elections. In order to increase pluralism and encourage participation of national minorities in public life, the Assembly recommends that, when delineating constituencies for the 2012 parliamentary elections, the Central Electoral Commission ensures inclusion in a single constituency national minority groups that live compactly in certain areas;

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

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

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

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

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