

**Contribution to the European Commission's Progress Report on
implementation of the ENP in Ukraine in 2009**
by International Renaissance Foundation, Ukraine
(Open Society Institute Network)

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1. Democracy and the Rule of Law

Judiciary

There has been no real step towards the reform of judiciary in 2009. Draft law submitted to the Parliament by the President of Ukraine and adopted in the first reading in 2008 still lacks support among some political parties represented in the Parliament (Yulia Tymoshenko's Bloc and Communist Party of Ukraine). At the same time there has been no alternatives elaborated. The key problem is the lack of political will to reform the judiciary, since main political players still prefer using direct influence on judiciary (especially for business and political dispute solutions).

The reform of the judiciary requires a number of steps and all of those have to be based on the Judicial Reform Concept adopted by the President of Ukraine in May 2006. Those require adoption of the amended draft law on judiciary and other active legislative and practical measures aimed at reforming the criminal justice system, law enforcement agencies, tackling all forms of corruption, including political corruption. They also require introducing amendments to the Constitution of Ukraine. Both the Parliamentary Assembly of the Council of Europe (PACE)¹ and the Venice Commission of the Council of Europe² support this approach and have offered detailed recommendations and opinions to Ukraine on these matters. The Venice Commission of the Council of Europe, for instance, has discussed the draft law concerning the reform of judiciary³ twice for the past two years and offered detailed expertise, which needs to be taken into account. Unfortunately the Parliament of Ukraine clearly demonstrates its inability to address any serious reforms (including constitutional, judiciary, administrative, legal aid, prosecution, criminal justice, etc).

Access to Justice

Rights of many defendants for legal representation are violated in a systematic way. Analysis of criminal cases done by the research group in Kharkiv region revealed that *68% of cases were dealt without a defender*⁴.

¹ <http://www.president.gov.ua/en/news/5977.html> Functioning of democratic institutions in Ukraine, paragraph 13, 15.5, 15.6. Resolution of PACE 1549 (2007)1

² The Opinion is supposed to be delivered in December 2009.

³ Unofficial English version submitted for the Venice Commission
[http://www.venice.coe.int/docs/2009/CDL\(2009\)111-e.asp](http://www.venice.coe.int/docs/2009/CDL(2009)111-e.asp)

⁴ According to the survey in 1.5% of cases the defender was a relative of the accused; in 13% of cases the defender was appointed (almost always in accordance with Article 45 of the Code of Criminal

Both the UN Committee Against Torture⁵ and PACE⁶ called on Ukraine to guarantee prompt access to lawyers and to ensure legal aid, including to persons at risk or belonging to vulnerable groups. Yet, the Ukrainian side has done little. Although the Concept on the Reform of the System of Free Legal Aid was approved by the Decree of the President of Ukraine back in 2006⁷ and successful pilot projects in several regions of Ukraine were implemented⁸, the new system based on the law has not been established and supported with sufficient funds. The Ministry of Justice submitted the draft law to the Cabinet of Ministers after the expertise done by the Council of Europe in autumn 2008. The draft was approved by the government and submitted to the Parliament was adopted in the first reading on June 10, 2009. The second reading is expected.

Criminal Justice

In 2009 some steps were made to implement the comprehensive criminal justice reform concept, which was approved by the National Security and Defense Council in April 2008 and later by the President of Ukraine. This concept is moving Ukraine's justice system and its institutions towards meeting EU standards. To implement the concept, the Action Plan was adopted by the Government of Ukraine in August 2008 and work has begun on its implementation, specifically focusing on the reform of individual law enforcement agencies. In particular, it is aimed at improving pretrial investigation procedures, strengthening protections of victims' rights, humanizing the conditions and procedures of criminal punishment, and eliminating corruption in the judicial process.⁹

Several priorities are worth paying particular attention. Firstly, the highest priority is ***improving criminal procedures***. The current legislation of Ukraine dates from 1960 and it reflects the soviet model of inquisitorial system. In 2009 the National Commission on Strengthening Democracy and the Rule of Law developed the new draft Criminal Procedures Code (CPC). It was supported by positive opinions of experts from different European countries and the United States. The government of Ukraine is now considering the draft CPC. The Ministry of Justice and its Minister are great promoters of the draft, but the general prosecutors office and the Ministry of Interior and among main opponents. A difficult discussion in the Parliament is expected once the government submits this new draft CPC to the Parliament, given that another version of the CPC was already adopted in the first reading, as well as the law on public prosecutor. Both these laws are aimed at preserving the soviet inquisitorial model of the criminal justice.

Secondly, the reform of the ***Prosecutor's Office*** is another important priority. Now it is a multi-functional soviet type institution, which is part of neither executive nor

Procedures on the mandatory participation of a defender in the case); and in 17% of cases the defender was contracted. The Survey of free legal aid system in Kharkiv region can be found at <http://pravo.prostir.ua/data?t=2&q=1003>.

⁵ See Conclusions and recommendations of the UN Committee against Torture. Paragraph.23 at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/433/65/PDF/G0743365.pdf>.

⁶ PACE Resolution 1466(2005), Honouring of obligations and commitments by Ukraine, paragraphs 13.12 and 13.13 (<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1466.htm>).

⁷ See Decree of the President of Ukraine №509/2006, 9 June 2006 at <http://www.legislationline.org/documents/action/popup/id/7060>.

⁸ Public Defender Offices in Ukraine <http://pravo.prostir.ua/data?t=2&q=1013>

⁹ <http://www.hrw.org/en/node/79345> Human Rights Watch World Report 2009

judiciary. It has excessive power of judiciary in some proceedings like extradition. In civil cases its competence contradicts to the principle of equality of parties. When Ukraine joined the Council of Europe in 1995 one of the reforms Ukraine committed itself to was to change the role and functions of the Prosecutor's Office in order to bring this institution in line with the Council of Europe standards.¹⁰ Ukraine has not yet fulfilled this commitment and in 2005 the PACE called again for the Prosecutor's office to be reformed.¹¹ In its latest Concluding Observations on Ukraine the UN Committee Against Torture noted: "*The State party should pursue efforts to reform the General Prosecutor's office, in order to ensure its independence and impartiality, and separate the function of criminal prosecution from the function of supervision of investigations into allegations of torture and ill-treatment.*"¹²

On 14 March 2009 the Parliament of Ukraine approved the draft law of Ukraine on the office of the Public Prosecutor in the first reading. The Opinion of the Venice Commission¹³ on it was extremely critical and argued "the draft does not bring Ukraine any closer to complying with the commitment towards the Council of Europe...[and] therefore be withdrawn"¹⁴.

The National Commission on Strengthening Democracy and the Rule of Law has started to work on the Concept of the public prosecutor's office reform. The Concept looks like a real step forward, but to bring the model of the prosecution close to the European standards the amendments to Constitution are needed. The Venice Commission of the Council of Europe confirmed this need¹⁵.

2. Human Rights and Fundamental Freedoms

Torture and ill-treatment

In 2009 no progress was made in this field. Department for the Execution of Punishments has not yet become a part of the Ministry of Justice, as required by the

¹⁰ PACE Opinion No.190 (1995), adopted 26 September 1995 (<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA95/EOP1190.htm>).

¹¹ PACE, Resolution 1466(2005), adopted on 5 October 2005, paragraph 13.4 (<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1466.htm>)

¹² Conclusions and recommendations of the UN Committee against Torture. Paragraph 10.

¹³ The Opinion was given in response to the letter submitted by the Minister of Justice of Ukraine, Mr Mykola Onishchuk on 18 May 2009.

¹⁴ "None of the major criticisms made by the Venice Commission in its earlier opinions of 2001, 2004 or 2006 have been taken on board in this new draft law. The draft law retains the features which were objected to by the Venice Commission in its earlier opinions. The prosecutor's office would remain a very powerful and excessively centralised institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic country. The draft does not bring Ukraine any closer to complying with the commitment towards the Council of Europe that "*the role and functions of the Prosecutor's Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards*". The draft should therefore be withdrawn. A comprehensive reform in line with the country's commitment to the Council of Europe would require, first of all, constitutional amendments such as those recently proposed by the President of Ukraine and, thereafter, an entirely different new law". Opinion on the draft Law of Ukraine on the office of the public prosecutor Adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).

¹⁵ Opinion on the draft Law of Ukraine on the office of the public prosecutor Adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009) [http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)048-e.asp#_ftn1](http://www.venice.coe.int/docs/2009/CDL-AD(2009)048-e.asp#_ftn1)

UN Committee Against Torture¹⁶. This preserves the separate and partly militarized status of the Penitentiary Department and, therefore, precludes oversight and accountability for executive decisions in the judicial branch of the government. Human Rights NGOs have no real access to prisons and pre-trial facilities despite the big number of reports about torture and ill treatment. The police is more likely to cooperate on monitoring its detention and arrest facilities, but lacks effective preventing measures.

Moreover, there is a widespread practice of police abuse and brutality, excessive use of force against detainees. According to estimates from Kharkiv Human Rights Group and the Ukrainian Helsinki Human Rights Union, *every year some 93.5 thousand people are subjected to torture by the police. According to unwritten rules, an investigator should send three cases to the court each month. Figures of “solved cases” are most important, and officers are punished for unsolved cases or acquittals*¹⁷. The UN Committee Against Torture called on Ukraine to *establish an effective and independent oversight mechanism to ensure prompt, impartial and effective investigations into all allegations of torture and ill treatment during criminal investigations*¹⁸. In 2006 Ukraine ratified the Optional Protocol to the UN Convention against Torture (OPCAT), but the National Prevention Mechanism (NPM) has not been established. It is still under discussion and no draft law has so far been submitted to the Parliament.

Discrimination

Ukraine has no clear and comprehensive anti-discrimination legislation. There are a number of reports about systematic discrimination of vulnerable groups. In its 2008 Concluding Observations the UN Committee on Economic, Social and Cultural Rights recommended that Ukraine *consider adopting comprehensive anti-discrimination legislation and amending its Criminal Code to include provisions on racially motivated crimes, train judges, public prosecutors and the police on the strict application of such provisions, and include in its next report detailed information, on an annual basis, on the number and nature of reported incidents of racial discrimination and violence, the criminal proceedings initiated and sanctions imposed on perpetrators, and on protection and assistance provided to witnesses and victims*.¹⁹ Amnesty International has raised the same concern on the issue of racial discrimination.²⁰

The UN Committee expressed concerns about *reports on police abuse and denial of effective protection against acts of discrimination and violence committed against ethnic and religious minorities, especially Roma, Crimean Tatars, Asian and African asylum-seekers, as well as Muslims and Jews, the reluctance of the police to investigate properly such incidents, and the tendency to prosecute and sentence perpetrators of such acts under lenient criminal law provisions on “hooliganism”*.

¹⁶ Conclusions and recommendations of the UN Committee against Torture, Paragraph 18.

¹⁷ <http://www.khpg.org/en/index.php?id=1232132355>

¹⁸ Conclusions and recommendations of the UN Committee against Torture. Paragraph 10.

¹⁹ <http://daccessdds.un.org/doc/UNDOC/GEN/G08/400/43/PDF/G0840043.pdf?OpenElement>.

Concluding observations of the UN Committee on Economic, Social and Cultural Rights. Paragraph 10, 11, 25, 27, 28, 33

²⁰ <http://www.amnesty.org/en/for-media/press-releases/ukraine-racial-discrimination-rise-20080710>
Ukraine: Racial discrimination on the rise

The Committee also expressed concerns on *the high prevalence of HIV/AIDS in Ukraine, including among women; discrimination against persons with HIV/AIDS and high-risk groups such as sex workers, drug users and incarcerated persons; disclosure of information about their HIV status by law enforcement agencies, healthcare and educational institutions; and the limited access by drug users to substitution therapy.*

Freedom of Assembly

Freedom of Assembly and freedom of expression are two main achievements in the human rights sphere for last 5 years in Ukraine. Yet, both the government of Ukraine and the Parliament made steps towards deterioration of the freedom of assembly. In 2009 the Parliament of Ukraine in the first reading adopted the draft law, which limits the gathering place for rallies, sets the terms for holding assemblies, significantly increases the powers of police and administration, and prohibits a spontaneous peaceful assembly (i.e. assembly without prior notice).

The current version of the draft law is the amended version of the draft law²¹ developed by the Ministry of Justice and approved by the government back in 2006. This version is worse than the previous one and ignores the joined opinion of the OSCE/ODIHR and the Venice Commission of the Council of Europe²². In December 2009 the Venice Commission will adopt the new Opinion on the draft law. Ukrainian human rights activists have also considered this draft law as a serious threat to fundamental freedoms in the country²³.

3. Treatment of Roma and Anti-discrimination

The government of Ukraine has not yet joined the Decade of Roma Inclusion 2005-2015 for the reasons of both lacking the finances to pay the membership fee and lacking the ability to fulfil the commitments, among them providing dwellings for Roma. Ukraine's joining the Decade, however, would allow solving Roma's problems more efficiently²⁴ by offering access to international practice and experience, and additional financial capabilities. This would improve Roma's access to education, health care institutions and other vitally needed services. With the aim to join the Decade, Ukrainian government has to develop and approve the 'National action plan on social integration of Roma of Ukraine'²⁵. This plan is also required by the *Council of Europe Action Plan for Ukraine 2008 –2011*²⁶.

²¹ Today Ukraine has no special law on holding assemblies.

²² Joint Opinion on the draft Law On Peaceful Assemblies in Ukraine by the Venice Commission and OSCE/ODIHR Adopted by the Venice Commission at its 68th Plenary Session (Venice, 13-14 October 2006)

[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)033-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)033-e.asp)

²³ Ukrainian Helsinki Human Rights Union: Legal Opinion on the Draft Law on Peaceful Assembly <http://helsinki.org.ua/en/index.php?id=1253615544>

²⁴ *Ukraine is populated by more than 130 ethnicities. According to the 2001 census, 47 917 persons declared their belonging to Roma minority. Unofficial data is different: from 120 000 to 400 000 persons.*

²⁵ *Government of Ukraine has requested the Council of Europe to provide technical expertise on development of the plan.*

²⁶ *Council of Europe Action Plan for Ukraine 2008 –2011 (DSP(2008)15 of 25 June 2008).*

There is no National programme on Roma's medical mediators in Ukraine. Development and approval of such a programme by the Cabinet of Ministers of Ukraine would allow Roma to have a better access to medical services, and thus would decrease the level of socially dangerous diseases and improve the state of health of Roma in general. Such a programme is the most effective way to solve the problem of Roma's health that has proven its efficiency in a number of countries where Roma live²⁷.

The problem of segregation of Roma is widespread in Ukraine. In particular, Roma children are still isolated from other children in the majority of schools (separate classes and separate schools for Roma children exist). Another problem is that Roma children, unlike other ethnic minorities children, cannot study in Roma language, neither learn it (apart from Sunday schools managed by non-governmental organizations). In August 2008 the European Roma Rights Centre (ERRC) drew attention of the Ministry of Education of Ukraine to this problem twice, requesting solutions²⁸. Yet, the Ministry of Education did not take any steps to respond.

Roma rights are systematically abused in Ukraine. In particular, the European Roma Rights Centre reported on several cases of attacks on Roma settlements and misuse of force towards Roma by law-enforcement bodies. Non-governmental organizations in Ukraine also regularly report on such cases of ill-treatment of Roma as taking off their passports, taking fingerprints, detaining Roma, beating in the places of detention and other brutal actions. However, there is no state statistics on these abuses. The Ministry of Interior should closely monitor these abuses and organize prevention and protection.

4. Civil Society Development

Public authorities of Ukraine have not paid any special attention to the development of civil society. This is particularly true about the Parliament of Ukraine. A number of draft laws such as "On Civic Organizations" (No. 3371), "On the Organization and Conduct of Peaceful Actions" (No. 2450), "On Social Services" (No. 2131), etc have not been considered by the Parliament for a long time. This does not only neglect the bills that expand public involvement in decision-making and local affairs, but directly violate those. For instance, in March 2009, MPs refused to grant citizens the right to submit electronic requests to public authorities and voted against the bill "On Citizens' Requests" (No. 3064). It should be noted that these draft laws have been developed either directly by representatives of civil society institutions or with their active participation. These bills have largely sought to abridge the procedures for registration of civic and charitable organizations, establish conditions for local funding, and simplify access to public information among other improvements.

In 2009 only two draft laws - "On Access to Public Information" (No. 2763) and "On Amending Some Laws in Ukraine concerning Public Participation in Development and Implementation of Public Policy and Resolving Local Policy Issues" (No. 3654) were passed in the first reading. The first bill sought to ensure transparency and openness of power entities and create implementation mechanisms for access to

²⁷ *Mediating Romani Health: Policy and Program Opportunities – Open Society Institute, 2005.*

²⁸ *See ERRC, Letter to the Minister of Education, Mr Ivan Vakarchiuk from 1 August 2008, "Romani Children Face Problems in Accessing Quality Education in Ukraine". Internet: www.errc.org*

public information. The second bill suggested regulating certain activities of the civic councils working with central government institutions and local self-government and procedures for public consultations on key issues regarding national and local development.

On the executive authorities' performance, one should note the adoption of Ordinance (No. 858-p) of July 22, 2009 by the Cabinet of Ministers in Ukraine that amended the Concept for Promotion of Civil Society Development by Executive Authorities enacted in 2007. The document approved an important provision suggesting that executive authorities shall analyse the progress of the Concept's implementation at the end of each year and develop annual action plans to implement the Concept.

At the same time, the Cabinet of Ministers in Ukraine issued Resolution No.1103 on October 14, 2009, which changed certain clauses of the Provisions to Promote Public Examination of Executive Authorities, which had been enacted with the Government Resolution No. 976 of November 5, 2008. These changes restrict public control (Public Examinations) over the executive. For example, the clause, which charges the Ministry of Justice with development of an act on electronic registry of public examinations, was abolished. The act in question was already drafted by civil society organizations in cooperation with the Ministry of Justice, and it was discussed at various public events. Instead, the decision was made to publish information about public examinations on the official web site "Civil Society and Government". This will restrict access to information about public examinations, since no procedural regulations on the placement of such documents on the website exist (unlike the official registry, which would have all obligatory procedures developed and functioning).

To improve the situation in 2010 the following steps have to be taken:

- adopting the laws "On Civic Organizations" and "On Charitable Organizations" that provide procedures for establishment of those organizations, abolition of their territorial status, reductions of costs associated with institution of new NGOs, approval of additional funding sources, etc;
- adopting of the above mentioned draft laws "On Access to Public Information" (No. 2763) and "On Amending Some Laws in Ukraine concerning Public Participation in Development and Implementation of Public Policy and Resolving Local Policy Issues" (No. 3654) ;
- amending the Law "On Citizens' Requests", to provide an opportunity for civil society institutions to submit electronic requests to public authorities and local self-government;
- abolishing amendments to Decree of the Cabinet of Ministers of Ukraine #976 of November 5, 2008, and adopt the Provisions on the Electronic Registry of Public Expert Examinations;
- approving amendments to tax laws to enable allocation of a share of taxes paid by physical persons to support civil society institutions.

5. Local Self-Government Development

In 2009 the Parliament of Ukraine did not adopt any legal act that could positively affect the development of self-government in Ukraine. During this period, the Ministry of Regional Development and Construction of Ukraine developed a range of

legal acts to reform Ukraine's administrative and territorial structure and the local self-government system. In particular, the Ministry drafted and presented for public discussion the Concepts for Reform of the Administrative and Territorial Structure of Ukraine and the Law of Ukraine "On Administrative and Territorial Structure of Ukraine". The documents laid down both conceptual approaches and a regulatory basis for the future administrative and territorial structure of the country. However, those documents were never approved, not even at the level of the Cabinet of Ministers of Ukraine.

The situation with the self-government reform is somewhat better. The Ministry of Regional Development and Construction of Ukraine has also developed several legal acts that are critical for the reform, primarily the National Regional Policy Concept and the Concepts for Self-Government Reform. The latter was approved by Resolution No.900 of the Cabinet of Ministers of Ukraine on July 29, 2009. The document seeks to improve life quality by creating conditions for sustainable development of territorial communities as independent and successful social entities whose members should be able to effectively defend their rights and interests through participation in local policy decision making.

Special attention should be paid to the very slow adoption of territorial community charters by local governments. In compliance with the Law of Ukraine "On Local Self-government in Ukraine", these documents shall regulate such forms of local democracy as town halls, public hearings, local initiatives, and others. The lack of approved charters virtually incapacitates the territorial communities or significantly complicates the exercise of the right by their members to directly participate in local affair management. The situation affects both small communities and the oblast centres, as the charters of territorial communities have not yet been approved by the City Councils in Odessa, Vinnytsia, Zhytomyr, Ternopil, and other cities.

The current problems of local self-government can be resolved in 2010 with the following actions:

- adopting the Laws of Ukraine "On Administrative and Territorial Structure of Ukraine", and new versions of laws "On Local Self-Government in Ukraine", and "On Local Public Administrations" that should lay down a legal basis for the formation of a spatial framework for local self-government, as well as reallocation of authority between local public administrations and local self-government institutions of different levels on the basis of decentralization of public management and a subsidiary principle to prevent double subordination and duplication of functions and tasks; transformation of the basic level of administrative and territorial system to form a local self-government agent, i.e. territorial community with the proper legal, financial and other resources to provide community members with full-fledged public services and create a comfortable and safe living environment in villages, towns, and cities; legal formalization and establishment of own executive agencies within local self-government institutions of the regional and district levels;
- introducing compulsory approval of the charters of territorial communities to ensure legal regulation of various forms of local democracy by the Law of Ukraine "On Local Self-Government in Ukraine";
- adopting a new version of the Law "On Public Self-Organisation Bodies (neighbourhood associations)" to simplify the procedures for instituting public

- self-governing entities, electing their members, defining terms of the office, and safeguarding their activity, etc;
- adopting the law “On General Meetings of Territorial Community Members in the Place of their Residence” to resolve procedural aspects of convocation and conduct of the general meetings, decision-making procedures and consideration of the decisions by public authorities and local self-government.

The report is prepared by Roman Romanov, Rule of Law Program Director, Oleksiy Orlovsky, Civil Society Program Director, Natalia Kyyak, Roma Program Director, and Dmytro Shulga and Iryna Solonenko, IRF’s European Program. For more information please contact Iryna Solonenko at solonenko@irf.kiev.ua

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