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Chapter 12

System of Human Rights Protection and Judicial Protection in Ukraine during the War and Its Compatibility Problems in the Context of EU Integration

ABSTRACT

In order to ensure the smooth and efficient operation of the judicial system and non-judicial institutions that protect human rights, especially during the period of martial law in Ukraine, the existing legal framework that regulates the activities of the Constitutional Court and the Commissioner for Human Rights in Ukraine is analyzed. The article examines the supremacy of the Constitution as a prerequisite for the judicial system and the protection of human rights. It is emphasized that the Constitution should have a system of internal self-defense, contain the necessary constitutional guarantees of ensuring the rule of law, real distribution of power, recognition, guarantee and protection human rights. The concept of "militant democracy" is studied in connection with Russia's military aggression against Ukraine. The article aims to investigate the functioning of the highest state authorities of Ukraine in the conditions of martial law. The problem of banning political parties and the judicial practice of Ukraine in this area is studied. The article reveals the features of reforming the system of selection of judges of the Constitutional Court of Ukraine and judicial authorities in Ukraine as a condition for Ukraine's membership in the European Union. The article pays special attention to the peculiarities of the administration of justice in the conditions of military aggression.

The article also aims to determine whether the Ombudsman as a non-judicial institution is endowed with sufficient powers, resources and flexibility to achieve its goals under such a specific state of martial law in Ukraine. Interest in the status and powers of the Ukrainian Commissioner for Human Rights is dictated by Russia's military aggression, which is taking place on the territory of Ukraine, since human rights violations committed as a result of the aggression are being investigated by various international organizations and Ukrainian state institutions, including Commissioner of the Verkhovna Rada of Ukraine on human rights. In addition to the legal status of the Commissioner for Human Rights, the article analyzes his/her relations with other state institutions (Parliament of Ukraine, Government of Ukraine, Constitutional Court of Ukraine, etc.), as well as the scope of his/her functions and powers (mandate). Despite the fact that the current Ukrainian legislation, which regulates the powers of the Commissioner, meets European and international standards, there are some factors that indicate that it needs improvement in connection with Ukraine's accession to the European Union.

Keywords: rule of law, the supremacy of the constitution, distribution of power under martial law, militant democracy, prohibition of rights abuse, conditions of Ukraine's membership in the EU, Constitutional Court of Ukraine, judicial system, justice under martial law, Ombudsperson, human rights, the mandate of the Ombudsperson, Ukrainian Parliament Commissioner for Human Rights

1. Constitutional Supremacy as Precondition for the Judiciary System and Protection of Human Rights

The constitution—the supreme law of the country—results in a limitation of state power. Decisions taken by the state must meet the requirements established in the constitution. Constitutional control bodies usually investigate whether the established restrictions have not been violated. But the foundations of the constitutional legal order can also be violated by non-fulfillment of constitutional prescriptions, when what should be regulated according to the constitution is not regulated.

Control of non-performed or poorly performed actions is no less important as a guarantee of the guarantee of eliminating inconsistency from of the legal system, which is based on the constitution. The purpose of constitutional courts is to guarantee the constitutionality of the legal system. This function is carried out through the control of the constitutionality of laws and other legal acts, as well as the implementation of other competences assigned to constitutional courts. Thus, the results of the actions of state bodies are investigated.

Constitutional control, which is carried out by the constitutional courts, is important also in defining gaps in the law, identifying them as shortcoming impor-

tance also by the definition of gaps in the law. For example, a legal gap exists when the current norms adopted by law-making bodies do not contain any provisions that allow the court to decide the case on its merits (Azerbaijan, Hungary). Several constitutional courts (Spain, Belarus) noted that judicial practice recognizes the authority of state bodies to solve problems caused by gaps in the law. In this context, gaps can be eliminated not only by ordinary law-making bodies, but also by the courts themselves in the law-making process; in fact, such an opportunity for courts exists in private law (Lithuania, Turkey), but it is also possible in public law (Switzerland).

The formation and development of constitutional justice is a complex and long process. The effectiveness of the activity of the constitutional court is determined by the constitutional field. The constitution must have a system of internal self-defense, contain the necessary constitutional guarantees of ensuring the rule of law, real distribution of powers, recognition, guarantee and protection

Human rights constitutional reform in the area of justice was necessary and contributes to solving the problem of creating a complete mechanism of this kind. The introduction of the institution of an individual constitutional complaint is justified and complements the mechanism of protection of human and citizen rights and freedoms in Ukraine.

The Constitutional Court of Ukraine takes an active part in the sphere of a bilateral and multilateral format of international cooperation, in particular between bodies of constitutional justice, international organizations, without which it is impossible to imagine the organic development of the institute of constitutional control in the country.

Attention should be paid to cooperation with Europe by the commission "For Democracy through Law" (Venice Commission), membership in the Conference of European Constitutional Court, which allows for information exchange between member courts on issues of their work methods and judicial practice of constitutional control, as well as the exchange of ideas about institutional, structural, and functional issues in the field of constitution justice. During the 86th plenary session, which took place in March 2011, the Venice Commission approved a report on the rule of law (CDL-AD (2011) (Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary session, 2011) Thanks to this Report, the main characteristics of the supremacy of law were revealed.

The new generalized report revealed the relationship between legal norms with one, on the one hand, and democracy and human rights, on the other ("Rule of law in the favorable environment").

The main directions of development of the higher legal entities are considered: legality, legal certainty; termination of abuse of full importance; equality before the

law; access to justice. The fundamental condition the supremacy of law depends on is the eradication of corruption and abuse of official position.

In the Report of the Venice Commission, the superiority of the rule of law is a universally binding concept.

"General provision and observance of overprotection of law both at the national and at international levels" was confirmed by member states of the United Nations in a 2005 document. The rule of law, as specified in the preamble and Article 2 of the Agreement on the European Union, is one of the fundamental values that unite the participating states of the EU. In 2014, as part of the program to strengthen the rule of law, European Commission reminds that "the principle of the rule of law is progressively becoming the dominant organizational model of modern constitutional law and international organizations that regulate the exercise of these public powers" (p. 3-4). In the same year, the European Commission adopted the mechanism in order to address the systemic problems of the rule of law in the member states of the EU. This "new EU initiative to strengthen the rule of law" establishes an early warning tool based on "data obtained from available sources and recognized organizations, including the Council of Europe."

According to the United Nations, the rule of law is a universal principle already used by the Organization of American States, namely, the Inter-American Democratic Charter and the African Union. References to the rule of law can also be found in documents adopted by the League of Arab States. At the UN level, following the publication of the Rule of Law Indicators in 2011, the UN General Assembly in 2012 adopted the Declaration of the High-Level Meeting of the General Assembly on of the rule of law at the national and international levels, which recognizes that "the rule of law belongs equally to all states and intergovernmental organizations."

The Preamble of the Statute of the Council of Europe refers to the rule of law as one of the three principles "which lay the foundation for a true democracy," along with personal and political freedom. Article 3 of the Charter recognizes respect for the rule of law as a precondition for the entry of new candidate states into the organization. The rule of law, together with the concepts of human rights and democracy, make up the basic paradigm of values that underlie the Council of Europe.

The report of the Venice Commission emphasizes that especially the countries of the new democracies should pay attention to the fact that the concepts of "government based on laws" or even "law based on laws" are not equivalent to the rule of law, but rather a distorted interpretation the rule of law (paragraph 15 of the Report).

It is also emphasized that, despite the difference in positions, there are general features of the rule of law that cannot be contradicted. These include an accountable and democratic law-making process, legal certainty, prohibition of arbitrariness, access to justice provided by independent and impartial courts (including judicial

review of administrative actions), respect for human rights, and equality before the law. Standards are needed to determine whether the parameters of the rule of law have been implemented. The following will be applicable for legal parameters. In Europe, for example, these are legal assessments regarding the European Court of Human Rights, the Venice Commission, the monitoring bodies of the Council of Europe and other institutional sources. For practice-related parameters, different sources should be used, including institutions such as the European Commission for the Performance of Justice and the European Union Agency for Fundamental Rights.

Apart from the rights, the rule of law concerns also democracy, i.e., the third core value of the Council of Europe. Democracy is related to the participation of people in the decision-making process in society. By establishing the protection of human rights, it becomes possible to protect people from arbitrary and excessive interventions by the state, to provide them with freedoms and privileges, and also to protect human dignity.

The main characteristics of the rule of law are summed up in the following parameters: whether the rule of law is recognized; whether state authorities act on the basis of and in accordance with the law; the relationship between international law and domestic law (the principle of legality in international law); legislative powers of the executive power; legislative process: whether the law enters into force in a transparent, accountable, universal and democratic manner; exceptions in emergency situations: whether the law provides for exceptions in emergency situations; the duty to apply the law: what measures are applied to guarantee the effective implementation of the law by public authorities; private structures that are responsible for public tasks (does the law guarantee that non-state entities fully or partially take on public tasks and functions, subject to the requirement of the rule of law).

The next dimension of the rule of law is legal certainty, which is characterized by the following parameters: availability of legislation, availability of court decisions, predictability of laws, stability and consistency of application of laws, legitimate expectations (public authorities must not only comply with laws, but also fulfill society's expectations), lack of retroactivity (non-retroactivity), whether the principle of "no crime without law and no punishment without law" is applied, whether respect for res juridicata (principle of the inadmissibility of appeal against the final decision) is guaranteed.

The next part of the rule of law is the prevention of abuse (misuse) of power, which implies the presence of legal guarantees against arbitrariness and abuse of power (*detournement de pouvoir*) by public authority. At the same time, the discretionary powers of the executive power, which lead to unlimited power, contradict the rule of law. Therefore, the law should establish the framework of such discretionary

powers in order to protect against arbitrariness. Abuse of discretionary powers should be regulated by a judicial or other independent control body. Appropriate safeguards must be clear and accessible.

The next group of parameters of the rule of law concerns the principle of equality of all before the law and the absence of discrimination. The principle of non-discrimination requires the prohibition of unequal treatment and guarantees equal, effective protection of everyone against discrimination on various grounds.

A separate and important block of indicators is access to justice, which implies independence and impartiality.

In view of all the above , in the modern conditions of reforming the constitutional system, the role of the Constitutional Court of Ukraine as a subject of constitutional control should be increased.

According to Kes Sunstein, as an important component of the supremacy of the constitution, the legitimacy of the activities of constitutional courts should be ensured. As Katarina Sobota rightly writes, "Law-guaranteed judicial protection against injustice on the part of the state means no less than that the state must recognize its own legal wrongdoing."

Democratic rule under martial law is a new challenge of the 21st century. Russia violated the sovereignty, territorial and political integrity and independence of Ukraine. But its armed aggression is also an attack on Ukrainian constitutional order. Ukraine is a constitutionally governed democracy that is waging an existential war for survival. The fight against the brutal attack on the civilian population eclipses all others problems and Ukrainian constitutional law directly or indirectly recognizes the need for exceptional powers during martial law. Obviously, the war for survival shifts power from the parliament to the executive power, and many fundamental principles of democracy must be suspended , even so defining features of democracy as elections.

Some historical observations about how constitutional democracy reacts to war may be made. No form of state organization can cancel out the main thing: the task is survival and collective security. For Ukraine, this means that war determines all internal considerations and that overcoming difficult external relationships is the key to survival; both violate the normal parliamentary prerogatives in a healthy constitutional order. Let us make three observations about the presidency, the role of parliament in wartime, and reasons for hope for Ukrainian warfare.

First, the president is an inspirational leader in the face of unimaginable losses and challenges. There is absolute certainty in the chain of command. Not only should there be clarity about who will be the successor to the presidential post, but also about who, in turn, will be next. Since the aggressor's army still occupies large parts of the country, Ukraine cannot afford such uncertainty. A clear line of "in-

heritance" must be established and high-ranking officials in the line of inheritance should be kept away from Kyiv in case of an emergency.

Second, it is necessary to follow the process of introducing martial law.

But what exactly is the legislative function in wartime? Probably the most important function of the legislature in the conditions of an emergency is to be accessible, that is, it is important for the legislature to function.

The constitutional provisions regarding the Verkhovna Rada of Ukraine, the central institution of the Ukrainian constitutional system, were observed, despite the fact Kyiv suffered an attempted attack. However, the routine activity of the Verkhovna Rada under these extraordinary circumstances was very difficult is.

In Ukraine, there is a semi-presidential system of government, which combines a directly elected president with a serving prime minister approved by the Verkhovna Rada of Ukraine. According to Article 75 of the Constitution of Ukraine (Constitution of Ukraine. The Official Bulletin of the Verkhovna Rada of Ukraine (BVR), 1996, No. 30, Article 141.), sole legislative power belongs to the Verkhovna Rada of Ukraine (see also Article 85(3)). The legislative power of the Verkhovna Rada continues to exist during armed conflict and state of emergency. And in fact, the Verkhovna Rada plays an important role in such situations.

The fundamental constitutional significance is that the legislative power of the Verkhovna Rada continues to exist during times of war and emergency state, that is, even under these circumstances, the Constitution of Ukraine does not delegate legislative powers to the President of Ukraine. According to the chairman of the Verkhovna Rada of Ukraine Ruslan Stefanchuk, from the beginning of the full-scale Russian invasion in Ukraine on February 24, 2022, the Verkhovna Rada held seven plenary sessions and adopted 13 resolutions and 88 laws. In addition, 18 draft laws are currently being read at the first stage.

Besides, the Verkhovna Rada has a constitutionally established quorum in two thirds in accordance with Clause 2 of Article 82 of the Constitution of Ukraine (Ibid.), which is preserved during martial law and emergency, as well as the requirement regarding the adoption of decisions by the Verkhovna Rada exclusively in plenary sessions meetings by voting in accordance with Clause 2 of Article 84 of the Constitution of Ukraine.

At present, four questions are of concern.

First, the Regulations of the Verkhovna Rada of Ukraine do not establish special procedures of the "expedited" legislative process during martial law. In particular, there is no fast-track legislative process for reviewing laws on matters of national security after the declaration of martial law. Instead, there is only one legislative process that is applied both in peacetime and to all legislation during wartime. These difficulties in the process of decision-making under extreme pressure of war must

be immediately resolved to secure continued adherence to the supremacy of rights The legislative process is flexible and can be adapted to wartime circumstances, then the executive will continue to resort to the necessary legislative changes. And vice versa: if the legislative process is cumbersome and slow, the executive will have more incentives to implement executive. But at the same time, a "fast" legislative process must include the "basic structure" or "essential features" of this process in conditions of constitutional democracy.

Second, the Regulations of the Verkhovna Rada of Ukraine do not establish special mechanisms for meetings of its members that take place in different institutional forms and functions. As a legislative body, the Verkhovna Rada must meet in plenary sessions and as parliamentary committees.

In addition, the Verkhovna Rada of Ukraine is an important platform for debate about Ukraine's response to the Russian invasion, in which both pro-government and opposition deputies participate. In addition, the Verkhovna Rada of Ukraine performs an important supervisory or control function through temporary special and investigative commissions. The supervisory function of the Verkhovna Rada does not stop in wartime. On the contrary, as the Russian invasion continues, an intense surveillance is more important than ever. Indeed, the participation in the exercise of control and debate in the parliament confirms the commitment of the Verkhovna Rada of Ukraine to constitutional democracy.

Despite significant security threats, Ukrainian deputies continue their work. The Regulations of the Verkhovna Rada of Ukraine do not specify any alternative approaches for the safe and uninterrupted work of the Verkhovna Rada as the only legislative body in Ukraine.

Third, should there be a procedure for replacing members of the Verkhovna Rada of Ukraine who died during the Russian invasion, for example, as a result of hostilities? Fortunately, this tragedy has not happened so far. Should it happen, though, no parliamentary elections could replace them, since in practice elections cannot be held while martial law is in effect. Should there be a mechanism of appointment of an acting deputy of the Verkhovna Rada of Ukraine, especially in a situation when it is necessary to ensure a quorum? What should be the role of different political parties in this process?

Fourth, it is difficult for the Verkhovna Rada of Ukraine to ensure the transparency of its activity. The Verkhovna Rada is extremely active during the war. However, most of its decisions are made under the guise of secrecy for reasons of national security. National security is at stake in the discussed issues, therefore the debates themselves and the facts of the meetings of the Verkhovna Rada of Ukraine become military targets. The Ukrainian people only received information about these meetings and decisions taken after the fact. How can the regulations of the Verkhovna

Rada of Ukraine be balanced with the national need security and transparency? There is no simple answer to this question.

It is clear that Ukraine's commitment to constitutional democracy and the rule of law must continue, no matter how brazen the attempts to blow this up. For example, on April 28, 2022, Russia launched a missile attack in Kyiv during the visit of UN Secretary General Antonio Guterres, which is nothing more than a blatant rejection of the basic principle, provided for in Article 2 (4) of the United Nations Charter: "Members must refrain in their international relations from threats of force or its application against territorial integrity or political independence of any state" (United Nations Charter, 1945) The continuation of the work of the Verkhovna Rada of Ukraine is a strong confirmation of the political independence of Ukraine.

No country allows one-sidedness of the executive power in key functions of emergency situations: declaring a state of emergency, definition of emergency powers, review of the implementation of emergency powers and determination of the moment of termination of the state of emergency. In modern democracies, France typically requires that the legislative body remains in session during martial law so that the Constitution is not changed by the executive power. According to Article 16 of the current Constitution, France allows to declare a state of siege with the corresponding potential for termination of political rights and civil liberties. At the same time, Article 16 the Constitution of France preserves the political responsibility of the president, requiring the legislature to remain in session during the war state, and protects the power to impeach the president even during official martial law. Ukraine wisely follows this model.

On the other hand, the only historical example of a full presidential model comes from the Weimar Republic. Article 48 of its Constitution, which allowed to announce emergency situations through exceptional presidential actions, combined with Article 25, allowed the president to dissolve the parliament. Not surprisingly, no post-war constitution followed the Weimar model.

Fifth, Ukraine defends itself. This is partly due to the nature of the war. Countries which are no longer prone to the military conflict are more likely to win when forced to defend. This trend also predicts a historical advantage for those countries that tend to fight only when necessary; those on the defensive have a natural advantage over their adversaries, which Sun Tzu recognized a long time ago in *The Art of War*. To the extent that deliberative processes of democracy require citizens who are convinced of the necessity of a defensive battle or the individual advantages of aggressive wars, democracies will be more inclined to wage defensive, than offensive, wars and they will avoid impulsive wars, which are waged by autocracies. But the success can be attributed, at least, to democratic governance. This may seem paradoxical, because the centralization of power, inevitable during the war, should

become a source of weakness for the noisy and fractional division of democratic power. However, historically speaking, democracies tend to do better at war than societies with undemocratic political structures. Political scientists Dan Reiter and Allan S. Stem provide important empirical support for this in their work *Democracies at War*, which demonstrates that democracies are disproportionately successful in conflict situations. One of the highlighted reasons and factors that immediately resonates in Ukraine is democratic laws. This allows for the creation of a wider class of junior military officers with more discretionary powers. On the contrary, long-time autocratic leaders are afraid of coups under the leadership of colonels and juniors ranks of the officer corps.

By now, the war has exposed the weaknesses of the autocratic rule, beginning from corruption that siphoned off or replaced Russian military resources of the military grade with fraudulent goods. In particular, Russian troops did not show flexibility in battle after the campaign on Kyiv was repulsed. Partly, it is the result of their army based on generals loyal to the regime and deprived of intermediate officers who could actually take over the tactical command in battle. Despite the fact that Ukraine was dwarfed in respect of the number of troops and material resources, it survived the onslaught by delegating authority to direct operations at the field level. Therefore, even during the times of extreme stress in wartime, democracy is the only effective help.

Liberal constitutional democracies began to consolidate in the mid-1990s based on three criteria: elections, freedom of speech, and freedom of associations The combination of these three factors contributed to a certain model of relations between citizens and authorities which is based on the assumption that the institutionally organized collective freedom (democracy) should reflect the views of its members within the established boundaries due to the restriction of human rights.

Post-WWII neo-constitutionalism incorporated fundamental rights in constitutional charters. Fundamental rights have provided an embedded form of constitutional freedoms and values.

Freedom of speech often suffers during war. Patriotism sometimes passes into banter, and civil liberties take a backseat to security and order. On April 14, 2022, the Verkhovna Rada of Ukraine adopted a statement on the value of freedom of speech, guarantees of activities of journalists and mass media during martial law. The key tasks of the authorities should include "ensuring the constitutionally established guarantees of freedom of speech, free acquisition, assembly and dissemination of information taking into account the laws of Ukraine restrictions related to martial law."

First of all, the above restrictions apply to the information that contains state secrets, including, in accordance with the Law of Ukraine "On state secret," informa-

tion about the content of strategic and operational plans and others combat control documents, military training and operations, strategic and mobilization deployment of troops, as well as about others most important indicators that characterize the organization, the number, deployment, combat and mobilization readiness, combat and other military training, armament and logistical support of the Armed Forces of Ukraine and other military formations. Such information is classified as a state secret in a special order and with mandatory inclusion in the Compendium of Information, which constitute a state secret.

At the same time, in accordance with Article 21 of the Law of Ukraine "On Information," the information cannot be assigned to "information with limited access" if it concerns facts of violation of human and citizen rights and freedoms or illegal actions of the state authorities, local self-government bodies, and their officials and officials. The condition of limiting access to necessary information is that the harm from the disclosure of this information prevails over public interest in obtaining it.

It should also be noted that, in connection with the war in Ukraine, the study of the concept of "militant democracy" was intensified. The debate about self-defending democracy or the theory of militant democracy is not new. However, the first coherent theories of militant democracy appeared in the 1930s. In view of the rapid rise to power of the Nazi and fascist movements in Western Europe, legal scholars and political scientists began to develop complex theories about how to avert this threat. The origin of the term "militant democracy," at least in the English language, is usually attributed to Karl Loewenstein, a German scholar of Jewish descent who immigrated to the United States in 1933. Although K. Lowenstein was not the only one to publish on this topic at the time, his ideas proved to be very influential and thus he is widely regarded as the "father" of the concept of militant democracy.

According to Loewenstein, the justification for military measures can be found in analogy with the state of emergency during the war, when it is generally recognized that constitutional guarantees are suspended. Similarly, in the context of militant democracy, democracy is at war with fascism (in the modern context, with racism) and European democracies are in a "state of siege." According to Loewenstein, democracy "must meet the requirements of the times, and all possible efforts must be made to save it, even at the risk of violating the basic principles."

The second world war was a tragic experience that led to a growing interest in the concept of militant democracy. The failure of the Weimar Republic was not easily forgotten, and the feeling of "never again" dominated democratic thinking at the time. As a result, after World War II, the concept of militant democracy became a serious part of constitutional thinking, and measures of defensive democracy were incorporated into most European constitutional orders.

In post-war Europe, in recent decades, militant democracy has gradually emerged as a new archetype of statehood. An analysis of how the issue of democratic self-defense is resolved in different countries shows the diversity of models. Militant democracy or self-defending democracy is not a universal template that can be equally applied in any democratic state.

Applying the concept of militant democracy always takes into account the distinctive characteristics of a particular democracy. How the elements of militant democracy are implemented in any legal order depends on the country's history and legal culture. The concept of militant democracy does not presuppose the method of protecting democracy. Protective measures can be provided for in the constitution of the state or derive from administrative or criminal law (or even private law, as in the case of the Dutch provision which is the basis for the declaration illegal political parties).

Some states have readily accepted the rationale of militant democracy. Especially in Germany, the concept of militant democracy strongly influenced the development of the Basic Law, which came into force in 1949. Germany's post-war constitution is replete with militant measures to prevent a return to an anti-democratic regime, including the prohibition of abuse of rights in Article 18 of the Basic Law.

In fact, Germany developed the clearest—and most far-reaching—theory of militant democracy. Therefore, it is often called the cradle of the concept of militant democracy, first of all, because the created doctrinal position of the Federal Constitutional Court of Germany was demonstrated in the practice of other constitutional courts in the process of consideration of similar cases and the practice of the ECtHR. The constitutionalization of the concept of militant democracy transformed the question from whether the state has the right to fight with anti-democratic forces to what form this fight should take.

Since the adoption of the Constitution in 1949, two parties have been banned in Germany. In 1952, the Federal Constitutional Court of Germany declared the activities and program goals of the Socialist Party of the Reich (SPR) unconstitutional. In the context of the Federal Republic of Germany, this refers to the "basic free democratic order," which, in addition to democratic procedures, also includes the protection of fundamental rights and the rule of law. In 2003 and 2017, there was a case pending before the Federal Constitutional Court of Germany regarding the anti-constitutional activities of the National Democratic Party (NDP). In 2003, the Federal Constitutional Court dismissed the case on procedural grounds. In 2017, the court found the submissions regarding the banning of the People's Democratic Party not sufficiently proven in the court's view that the party lacked the means to achieve its unconstitutional goals. The clear and widespread implementation of the concept of militant democracy in Germany is exceptional.

Many European states have adopted legislative provisions aimed at protecting the democratic structure, but sometimes without directly recognizing the concept of militant (defensive) democracy as the main constitutional principle. Subsequently, although interest in militant democracy waned for a time after the 1970s, the concept was revived after the fall of the Iron Curtain in 1989 and the collapse of the Soviet Union, when the concept of militant democracy became of interest for the new democracies in Central and Eastern Europe. In light of transitional justice and under the mantle of the Council of Europe, these states faced the problem of securing democracy in the future.

After the collapse of the Soviet Union, many of these Eastern and Central European states banned communist ideology in a manner similar to the ban on neo-Nazism in Western Europe. According to the militant narrative, many of these new democracies took steps to protect themselves from both communism and fascism, for example by banning parties, or sometimes even symbols, associated with these totalitarian movements.

In addition, in the years after the war, the concept of militant democracy also entered the international arena. At that time, various international documents on human rights were developed on the basis of the UN and the Council of Europe, such as the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), as well as International Covenants, respectively, on civil and political rights and economic, social and cultural rights (1966). All these treaties shared the ambition of the time to create stable democracies that would not be swept away by the next anti-democratic wave. Elements of protected democracy, in particular provisions on abuse of rights, are therefore present in all these treaties.

The traditional focus of militant democracy has been on the prohibition of political parties whose programs and activities disregard fundamental democratic principles or are openly aimed at their destruction. Banning a former ruling party may be particularly justified in periods of transition and consolidation, but may not automatically extend to stable democracies. Arguably, this paradigm of banning political parties may be particularly relevant in the context of transitional justice. The concept of "militant democracy" emphasizes three elements: value orientation, preventive protection of democracy, and readiness for protection.

Banning the party. The court could make a decision on the specified issues, among other things, when members of a banned party appealed against the ban. In particular, the practice of the ECtHR in considering cases on the banning of political parties should be classified into the following categories: first, cases that concerned the banning of political parties that promoted the ideas of secession or granting autonomy to certain national minorities (for example, United Communist Party of Turkey and Others v. Turkey, 1998); (United Communist Party of Turkey and Others v. Turkey,

No. 19392/92, ECtHR (Grand Chamber), 30 January 1998) second, cases related to the banning of parties whose activities were based on religious fundamentalism; third, cases related to the banning of political parties that used violent methods or were affiliated with terrorist organizations); fourth, the cases related to the banning of political parties whose activities promoted totalitarian ideology (for example, KPD v. Germany, 1957) A separate category includes a number of cases that were under consideration by the ECtHR related to the prohibition or termination of the activities of political parties for procedural reasons (for example, Republican Party of Russia v. Russia, 2011) during the consideration of these cases, the following were applied: Art. 11 (freedom of association and assembly, the framework of this freedom), Art. 17 (prohibition of abuse of rights) of the Convention on the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms, 1953) (European Convention) and Art. 30 of the Universal Declaration of Human Rights. The latter was introduced as a means of countering the totalitarian movement, which is designed to destroy democracy.

For the first time, the ECHR considered the issue of banning a party in 1957. It concerned the Communist Party of Germany under Article 17 of the European Convention, which stated that no one can use the rights guaranteed by the Convention in order to cancel other rights. The Commission did not consider it necessary to consider the case regarding the violation of Art. 9, 10 and 11 of the Convention and supported the ban of the party for the reasons that the dictatorship of the proletariat, which the communist doctrine professes, is incompatible with the Convention because it involves the destruction of most of the rights and freedoms guaranteed by it. Therefore, the declaration of a dictatorship is incompatible with the European Convention, even when constitutional methods are used to introduce it. In 2009, the ECtHR upheld the decision of the Spanish Supreme Court to ban the separatist Batasuna parties.

Second, the ECtHR uses a three-pronged test to determine whether the interference was required by law, had a legitimate purpose (in other words, introduced to protect a legitimate interest), and was necessary in a democratic society.

In Ukraine, from 2014 to 2022, the activities of 13 political parties were banned. Until 2014, the domestic legal system had had the experience of dissolving political parties only on procedural grounds. Ukrainian courts did not use the three-fold test during the consideration of cases. Some components of the test were usually considered separately and fragmentarily. In addition, the court completely ignored the question of the need for intervention in a democratic society, one of the mandatory criteria that the ECtHR calls, using a three-pronged test. The legality of this interference with the freedom of association through the suspension of the party's activity in the specified case is considered highly controversial.

Since 2014, a number of administrative trials have been held in our country regarding the banning of pro-Russian parties whose leaders and members helped in the annexation of the Crimean Autonomous Republic. And since 2015, administrative courts have issued a decision to terminate the activities of parties that professed communist ideology or used communist symbols in violation of the Law of Ukraine "On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols." (Law of Ukraine on April 9, 2015 № 317-VIII) The specified anti-communist law of July 16, 2019 was recognized as constitutional.

On July 16, 2019, the Constitutional Court of Ukraine issued a decision in the case based on the constitutional petition of 46 People's Deputies of Ukraine, who submitted their petition to the Constitutional Court of Ukraine (hereinafter referred to as the Constitutional Court) regarding the conformity of the Law of Ukraine "On Condemnation of Communist and National Socialist of (Nazi) totalitarian regimes in Ukraine and the prohibition of propaganda of their symbols" with the Constitution of Ukraine (its constitutionality) (Decision of the Constitutional Court of Ukraine on July 16, 2019 № 9-p/2019). CCU noted that the communist regime denied and limited human rights and made the democratic organization of state power impossible. A political party whose founding, programmatic and other official documents contain objections to the fundamentals of the constitutional system of Ukraine, the right of the Ukrainian people to their own independent state, calls for the liquidation of the independent Ukrainian state; a violation of its territorial integrity or any other goal that does not correspond to the democratic essence of the content of the Constitution of Ukraine cannot be legitimate, and there is no legal basis for its legalization in Ukraine. Such illegal armed formations use the symbols of the communist regime to oppose Ukrainian state symbols and the idea of Ukrainian statehood and to discredit the idea of democracy. They pose a real threat to human rights, the state sovereignty of Ukraine and its territorial integrity. Therefore, the ban on the use of these symbols and the propaganda of totalitarian regimes has a legitimate goal, which is to prevent a return to the undemocratic functioning of public power, to prevent violations of fundamental human rights.

This decision of the CCU was based on the concept of "militant democracy," but the Constitutional Court of Ukraine did not use this concept in all of its decisions. Thus, the decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 139 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of the decrees of the Presidium of the Verkhovna Rada of Ukraine "On the temporary suspension of the activity of the Communist Party of Ukraine" and "On the banning of the activity of the Communist Party of Ukraine" (the case on the decrees of the Presidium of the Verkhovna

Rada of Ukraine regarding the Communist Party of Ukraine, registered on July 22, 1991) dated December 27, 2001. On August 30, 1991, the Presidium of the Verkhovna Rada of Ukraine issued Decree No. 1468-XII "On the Prohibition of the Activities of the Communist Party of Ukraine." Referring to the conclusions of the Temporary Commission, according to which it was recognized that the leadership of the Communist Party of Ukraine "by its actions supported the coup d'état and thereby contributed to its implementation on the territory of Ukraine," the Presidium of the Verkhovna Rada of Ukraine banned the activity of the Communist Party of Ukraine on the basis of Part 2 of Art. 7 of the Constitution (Basic Law) of the Ukrainian SSR of 1978, according to which the creation and activity of parties aimed at changing the constitutional system through violence and in any illegal form of the territorial integrity of the state, as well as undermining its security, inciting national and religious enmity, is forbidden. The CCU recognized as unconstitutional Decree of the Presidium of the Verkhovna Rada of Ukraine "On the Temporary Suspension of the Activities of the Communist Party of Ukraine" dated August 26, 1991 No. 1435–XII, and Decree of the Presidium of the Verkhovna Rada of Ukraine "On the Prohibition of the Activities of the Communist Party of Ukraine" dated August 30, 1991 No. 1468–XII.

If we talk about the shortcomings of this decision, first of all, it should be noted that the Constitutional Court of Ukraine actually ignored the issue of the coup d'état of August 1991, because no legal assessment was given to the coup attempt. The decision stated only that there were no results of the investigation by the General Prosecutor's Office of Ukraine into the possible involvement of the leadership of the Communist Party of Ukraine in the events of August 19–21, 1991. The Constitutional Court of Ukraine also indicated that the programmatic goals of the Communist Party of Ukraine did not contradict the Constitution, but at the same time, it did not consider extensively any program document of the party.

In our opinion, the problem that arose in 2015 and has continued to this day, regarding the ban on the activity of the Communist Party of Ukraine, originates precisely from the time this decision was issued by the Constitutional Court of Ukraine. We also believe that the CCU acted against democracy, although it could and should have applied the amendments of the European Court of Human Rights regarding the issue of banning the activities of political parties.

However, it is worth noting that not only the Constitutional Court of Ukraine created the basis for the current problems with the Communist Party of Ukraine; legislators played an equally important role in this.

On September 5, 2022, the Administrative Court of Cassation as part of the Supreme Court of Ukraine rejected the appeal of the pro-Russian political party "Op-

position Platform—For Life" (OPZZH) and, thus, finally banned its activities in our country.

The Committee of the Verkhovna Rada on State Building and Local Self-Government recommends to the deputies to adopt in the first reading the government draft law No. 7476 (Проект Закону про внесення змін до деяких законодавчих актів України щодо визначення правових наслідків ухвалення судом рішення про заборону політичної партії для статусу депутатів місцевих рад) on amendments to some laws of Ukraine regarding the consequences of the court's decision to ban a political party for the status of deputies of local councils, which provides for the termination of the powers of deputies of local councils chosen from the political power since the announcement of the decision to ban it. During the committee meeting, some of the deputies proposed to develop an alternative draft law based on the four registered ones, but in the end, the majority of the deputies recommended supporting the government draft, and the rest to be included in the agenda and rejected as a result of the review.

The government draft law proposes to supplement Article 5 of the Law "On the status of deputies of local councils" with the following new clause: "The powers of a deputy of a local council are terminated prematurely without a decision of the relevant council in the event that a court decision banning the activity of a political party from which the local organization was nominated and the relevant person was elected as a deputy of the local council, as well as the entry of the deputy of the local council into the deputy faction of the local organization of a political party whose activity is prohibited by a court decision that has entered into force."

We fully agree with the opinion of Yu.G. Barabasha, who noted that when the Constitution was adopted, the parliament potentially had a chance to put an end to this problem once and for all in the matter of banning communist ideology like, for example, their Polish colleagues did in Article 13 of their Constitution which clearly prohibited three ideologies: Nazism, Fascism, and Communism). However, it is quite clear that this was unlikely given the presence in the Verkhovna Rada of Ukraine of approximately one hundred people's deputies representing the same Communist Party (and, therefore, the existence of a serious demand in society for this ideological movement).

Summarizing all of the above, we can come to the conclusion that the concept of militant democracy is just beginning to be implemented in Ukraine, which is extremely necessary in connection with the events currently taking place in the country.

2. Reforming the System of Selection of Judges of the Constitutional Court of Ukraine and Judicial Governance Bodies in Ukraine as a Sondition for Ukraine's Membership in the European Union

On June 17, 2022, the ECommission presented its opinion on Ukraine's application for EU membership and recommended the Council to grant this country candidate status, recognizing that certain steps should be taken in a number of areas. On June 23, 2022, the EU granted candidate status to Ukraine and Moldova. Ukraine received the status of a candidate country for joining the EU in accordance with Article 49 of the Treaty on the European Union, which states that all European countries that meet the criteria can become members.

The EU requirements to Ukraine: adopt legislation on the procedure for selecting judges of the Constitutional Court, which should include a pre-selection process based on an assessment of integrity and professional skills; complete integrity checks of candidates for membership of the High Council of Justice and selection of candidates for the High Qualification Commission of Judges of Ukraine; strengthen the fight against corruption, in particular among top officials; complete the selection and appoint a new director of NABU and a prosecutor of the SAP; ensure compliance of anti-money laundering legislation with the standards of the Financial Action Task Force (FATF); adopt a comprehensive strategic plan for reforming the law enforcement sector; implement the law on oligarchs; bring the mass media legislation into line with the European audiovisual legislation; complete legislative reforms for national minorities.

Implementation of the seven recommendations that Ukraine received along with the candidate status does not mean the automatic start of negotiations. Ukraine will need to work on building a consensus within the EU to start negotiations.

The process of negotiations is called "negotiations," but it is actually the process of introducing European norms, rules, directives and regulations in Ukraine, their transfer into the system of Ukrainian legislation. Each further step in this process of EU enlargement requires the unanimous consent of all member states. And there are many such steps in this process. On June 23, the European Council published seven recommendations on various areas of reform, on which Ukraine should carry out further efforts. The European Commission presented seven recommendations for the implementation of the necessary reforms.

Having signed the association agreement and seeking to pave the way for membership in the European Union, Ukraine has begun the process of adapting legislation to EU law, including constitutional legislation.

At the same time, it is worth noting that at the end of the 1980s, the countries of Central and Eastern Europe voluntarily initiated programs to adapt their politi-

cal, economic and legal systems to the European community. It was a unilateral initiative, without any legal obligations under international law. Even before the Association Agreements, Hungary and Slovenia introduced procedures for examining the draft law for its compliance with EU legislation. Therefore, a question arises about which methods can be used for the effective implementation of adaptation and how the sources of European Union law can influence the choice of adaptation method.

The Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine have determined a list of priority bills in the fields of European and Euro-Atlantic integration for 2022 and a list of EU legal acts that must be implemented in accordance with the Action Plan for the Implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand, bills that are under consideration in the committees of the Verkhovna Rada of Ukraine and need to be checked for compliance with the EU acquis, in particular, we are talking about European integration bills that coincide with the list of bills in the fields of European and Euro-Atlantic integration for 2022, which are defined by the Government as priority. Issues in the field of constitutional regulation include:

– Draft Media Law—Directive 2010/13/EU of the European Parliament and of the Council on audiovisual media services of March 10, 2010, as amended by Directive (EU) 2018/1808 of November 14, 2018;
– Draft Law of Ukraine on Amendments to the Law of Ukraine "On Immigration"—to comply with Article 16 "Cooperation in the field of migration, asylum and border management" of Chapter III "Justice, Freedom and Security" of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand;
– The Draft Law on Amendments to the Law of Ukraine "On the Security Service of Ukraine" regarding the improvement of the organizational and legal basis of the Security Service of Ukraine's activities—to comply with the Association Agreement Chapter III "Justice, Freedom, Security" strengthening political and security convergence and efficiency; the effectiveness of democratic institutions, the rule of law and respect for human rights and fundamental freedoms, etc. (Articles 4, 6, 7; 14, 22, 23);
– Draft Law on Amendments to Certain Legislative Acts of Ukraine in Connection with the Ratification of the Convention on Choice of Court Agreements—to comply with the Convention on Choice of Court Agreements dated June 30, 2005, Article 14 "Rule of Law and Respect for Human Rights and Fundamental Freedoms" of the Agreement on association between Ukraine, on the one hand,

and the European Union, the European Atomic Energy Community and their member states, on the other hand;

– Draft Law of Ukraine "On the procedure for resolving issues of the administrative and territorial system of Ukraine"—the subject of legal regulation of the draft act is covered by the Regulation of the European Parliament and the Council (EC) No. 1059/2003 of May 26, 2003 on establishing a common classification of territorial units for statistics (NUTS);
– Draft Law of Ukraine "On child-friendly justice" is covered by Article 14 of Chapter III "Justice, Freedom, Security" of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand.

However, the matter of the competitive selection of judges of the Constitutional Court of Ukraine remains a key issue, as this is a requirement of trust to the Constitutional Court of Ukraine and the depoliticization of its activity as a body that ensures the supremacy of the Constitution of Ukraine.

The issues submitted to the Constitutional Court of Ukraine are at the highest level: where law and politics meet. These are problems related to the organization and functioning of state authorities or the standards production system; or even to decide on what is called a "social choice" of enormous importance to individuals. In addition, the decisions of the constitutional courts often call into question the acts of the highest authorities of the state, in particular, the laws of the parliament, which are considered to be the expression of the general will.

The Constitutional Court of Ukraine did not stop exercising its constitutional functions under the conditions of martial law. The Court is holding meetings and a number of decisions have already been made, in particular, regarding the enhanced protection of military personnel, the exercise of the right to judicial protection, the presumption of innocence, and the individualization of legal responsibility. The Constitutional Court of Ukraine cited statistical data on the acts adopted by the Court during this period, the total number of which is 204 acts.

And today, the body of constitutional jurisdiction is an element of the system of checks and balances, the appropriate balance between the branches of government, and regulates that they remain within law. It is for this that the Court is given constitutional powers and can recognize laws of the parliament and presidential decrees as inconsistent with the provisions of the Basic Law.

Due to objective reasons, the employees of the Court Secretariat ensure the fulfillment of the assigned tasks remotely or in the administrative building of the Court. In particular, they continue to prepare materials for holding Court sessions, receive and process constitutional complaints, requests for public information, and appeals received by the Constitutional Court of Ukraine, etc.

Since the beginning of the year, the Court has received 71 constitutional complaints. According to the results of their preliminary inspection, 34 constitutional complaints were distributed to judge-rapporteurs. 36 complaints that did not meet the requirements of the Law of Ukraine "On the Constitutional Court of Ukraine" were returned to the subjects of the right to constitutional complaints. One constitutional complaint is being processed at the Court's Secretariat.

Over the past few years, the Constitutional Court of Ukraine has been diligently destroying its reputation and authority. These "merits" include, for example, the looting of some important assets of the anti-corruption reform, which caused the constitutional crisis of 2020, the inhibition of judicial reform, in particular the launch of mechanisms to clean the High Council of Justice and the Supreme Court of unscrupulous judges, constant resistance to the involvement of international experts as to the reform of the Court itself as well as other bodies responsible for judicial appointments, independence and discipline. That is why, in order to further serve the rule of law, the CCU must be significantly improved.

The Venice Commission has repeatedly expressed its comments and suggestions regarding justice reforms, in particular the functioning of the CCU (for example, in the conclusions CDL-AD(2016)034 (Opinion on the draft Law on the Constitutional Court, adopted by the Venice Commission at its 109th Plenary Session, 2016) dated 12.12.2016, CDL-PI(2020)019 (Urgent opinion on the Reform of the Constitutional Court of Ukraine issued pursuant to Article 14a of the Venice Commission's Rules of Procedure, 2020) dated 10.12.2020, CDL-AD(2021)006 (Opinion on the draft law on Constitutional Procedure (draft law no. 4533) and alternative draft law on the procedure for consideration of cases and execution of judgements of the Constitutional Court (draft law no. 4533-1) adopted by the Venice Commission at its 126th Plenary Session, 2021) dated 03.22.2021. The absolute majority of the recommendations of the commission in the specified conclusions were ignored by parliamentarians of Ukraine, but this time disregarding the instructions of the Venice Commission ""For Democracy through Law" may cost much, because one of the conditions of the European Commission is "Adoption and implementation of legislation on the procedure for selecting judges of the Constitutional Court, including the appointment of judges of the Constitutional Court of Ukraine based on an assessment of their integrity and professional skills, as recommended by the Venice Commission."

Amendments to the Constitution of 2016 introduced a new principle of competitive selection of judges, which, however, still requires finalization. In the currently established procedure, behind the facade of the independent appointment of judges by three different entities, the absence of a real competition that would guarantee the integrity of the candidates is hidden. Thus, the congress of judges, the parliament and the president can, at their own discretion, set competitive procedures for

their quotas of judges, involve or not involve independent commissions, even set different selection criteria, since the Constitution uses only vague concepts of "high moral qualities" and "recognized level of [legal] competence." Therefore, the risk of the influence of political motives has not disappeared, and the verification of the candidates' integrity may be hidden from society, which raises doubts about the appropriateness of the results of the competition in general.

In June 2022, the Supreme Court proposed a reform mechanism for the selection of judges of the Constitutional Court, which is required as part of the judicial reform from Ukraine as a candidate for EU membership. According to V. Knyazev, it concerns the requirement that candidates for the position of judge of the Constitutional Court undergo a preliminary integrity check before they are appointed to the position. He noted that today the Ethical Council has been created with the participation of Ukrainian judges and international anti-corruption experts, which is already functioning for the purpose of evaluating candidates for membership of the High Council of Justice.

"It was created on a democratic basis, it is already working, it has to check 60 candidates and it copes with it quickly. So checking 10 more candidates for the position of judge of the CCU will not be a big additional burden for it, especially since it is already financed, working, and all this can be done within a month or two," said the head of the Supreme Court.

At the same time, as Knyazev notes, the congress of judges, which should, among other things, elect two judges of the CCU from the judicial community, was scheduled for mid-July this year. And since there is a requirement that these candidates must be pre-screened for integrity, in his opinion, it will be necessary to postpone the date of the congress of judges to quickly resolve at the legislative level the issues of screening candidates for the position of a judge of the CCU. "In the future, the congress of judges will choose two judges of the Constitutional Court from among the list of honest candidates to fill these vacancies," said the head of the Supreme Court.

The European Commission's recommendation to grant Ukraine the status of a candidate for the EU was a kind of advance for which we are expected to complete only seven steps. The main among them are requirements designed to become the foundation for the reconstruction of an independent judicial system in the state. In fact, the establishment of a clearly defined procedure for the selection of judges at the heart of the constitutional system of the state, the constitutional court, should not be a demand from abroad, but a self-evident step. Likewise, the end of the epic with judicial governance should be the instinct of a state with the rule of law, not a forced measure.

Credibility in constitutional justice appears to suffer when one component is overrepresented or even exclusively represented. Furthermore, a constitutional ju-

risdiction consisting of "pure" lawyers, that is, those who had no other activity in the political or trade union spheres, would certainly not be fully accepted. Conversely, if "politicians" were too dominant, there would also be a compositional dispute.

The constitutional experience of constitutional judges is different. In fact, only a practitioner with extensive experience as a judge, barrister, civil servant, professor or politician can be appointed. Most countries look for a combination of these five groups to bring different experiences of constitutional review.

The real sanction of the legitimacy of constitutional justice is given or provided by public opinion. It is public opinion that, after all, accepts or rejects the institution regarding its jurisprudence and its activities in the state. The composition of the jurisdiction will be criticized if this is not satisfied. However, public opinion is certainly sensitive to the appointment of prominent figures to constitutional bodies, and the recent American example of the highly sensitive confirmation of Justice Thomas shows that attention should be paid to the reaction of public opinion.

In 2021, the start of a competition for the selection of candidates for the post of judge of the Constitutional Court of Ukraine for persons appointed by the President of Ukraine was announced. The competitive commission for the selection of candidates for the post of judge of the Constitutional Court of Ukraine for persons appointed by the President of Ukraine was established by the Decree of the President of Ukraine No. 167 of April 20, 2021. Its personnel was approved by the Decree of the President of Ukraine No. 365 of August 17, 2021, in accordance with the Law of Ukraine "On the Constitutional Court of Ukraine" and its decision (Protocol No. 1 of August 20, 2021) announced the beginning of the competition for the selection of candidates for the position of judge of the Constitutional Court of Ukraine for persons appointed by the President of Ukraine.

The procedure and conditions for conducting a competition for the selection of candidates for the position of judge of the Constitutional Court of Ukraine are determined by the Law of Ukraine "On the Constitutional Court of Ukraine" and the "Regulation on holding a competition for the selection of candidates for the position of judge of the Constitutional Court of Ukraine for persons appointed by the President of Ukraine," approved by the Decree of the President of Ukraine of August 17, 2021 No. 365.

The requirements for a judge of the Constitutional Court of Ukraine are determined by the Constitution of Ukraine and the Law of Ukraine "On the Constitutional Court of Ukraine."

Despite serious reservations about the legality and timing of the competition, expressed by individual members of the Competition Commission in separate opinions, the competition was announced on August 23, 2021. The conclusion of the Venice Commission, adopted in 2020 at the request of President V. Zelensky

after the constitutional crisis, states that the appointment of judges should take place only after competitive selection. This should stop the practice of political dependence of judges, which is the main source of problems in the CCU. The Venice Commission twice emphasized the need to introduce a competitive procedure, but four judges of the Constitutional Court have already been appointed contrary to this recommendation.

On July 28, 2022, the Verkhovna Rada of Ukraine appointed a judge of the Constitutional Court contrary to the Constitution of Ukraine because the People's Deputy did not submit his parliamentary mandate before the election, which is a clear violation of Part 3 of Article 11 of the Law of Ukraine "On the Constitutional Court of Ukraine." According to the norm of this article: "A judge of the Constitutional Court must meet the criterion of political neutrality. A judge may not belong to political parties or professional unions, publicly show support for them, or participate in any political activity. In particular, a person may not be appointed a judge of the Constitutional Court who, on the day of appointment:

1) is a member or holds a position in a political party, other organization that has political goals or participates in political activities;
2) is elected to an elected position in a state authority or local self-government body, has a representative mandate;
3) participates in the organization or financing of political campaigning or other political activities.

A judge of the Constitutional Court cannot combine their position with any position in a body of state power or a body of local self-government, a body of professional legal self-government, with the status of a people's deputy of Ukraine, a deputy of the Verkhovna Rada of the Autonomous Republic of Crimea, oblast, district, city, district in a city, village council, with another representative mandate, with advocacy, with entrepreneurial activity, hold any other paid positions, perform any other paid work or receive other remuneration, with the exception of carrying out teaching, scientific or creative activities and receiving remuneration for them, and also cannot be a member of the governing body or supervisory board of a legal entity whose purpose is to obtain profit."

The voting results indicate a gross violation of the procedure for appointing judges of the Constitutional Court of Ukraine by the Parliament of Ukraine.

It should be noted that the judge from the parliament was appointed to the post of judge of the Constitutional Court of Ukraine S. Shevchuk, who was dismissed from his post on May 14, 2019 due to gross procedural violations. S. Shevchuk appealed to the Kyiv District Administrative Court, by whose decision he was reinstated, but the Acting Chairman of the Constitutional Court of Ukraine, O. Tupytskyi, who is currently wanted internationally, refused to comply with this court decision.

S. Shevchuk appealed to the European Court of Human Rights with application No. 474/21 (Application no. 474/21 Stanislav Volodymyrovych Shevchuk against Ukraine lodged on 28 December 2020 communicated on 22 November 2021). The applicant complains under Article 6 § 1 of the Convention that the CCU was not an "independent and impartial court established by law" because (i) the CCU did not follow the rules when considering the issue of the applicant's dismissal, in particular, there was no decision of the plenary session of the CCU to authorize the permanent commission of the CCU to consider the disciplinary case, and the applicant was not properly informed about this proceeding; (ii) some of the CCU judges who sought disciplinary proceedings against the applicant or were witnesses in relation to the disciplinary charges participated later in the CCU proceedings. Referring to paragraph 1 of Article 6, the applicant claims that the commission on the regulations of the CCU and the plenary session of the CCU did not ensure equality of the parties since the applicant was not given the opportunity to defend himself personally or through his lawyer and to refute the disciplinary charges. The applicant also complains under Article 6 § 1 and Article 13 that the national administrative courts violated his right of access to a court, as they refused to exercise their jurisdiction to review the decision of the SSC to dismiss the applicant. The applicant complains that his dismissal violated Article 8, as it had a serious impact on his private life, and Article 10, as it was a measure of retaliation in response to public comments he made in March 2019 concerning the election of the President of Ukraine.

Therefore, the new judge was appointed by the Parliament of Ukraine to the position of the judge of the Constitutional Court of Ukraine, regarding whom the legal dispute had not been resolved.

On August 12, 2022, the People's Deputies of Ukraine registered the draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving the Procedure for Selecting Candidates for the Position of Judge of the Constitutional Court of Ukraine on Competitive Basis" No. 7662, which provides for amendments to the Law of Ukraine "On the Regulations of the Supreme of the Council of Ukraine," the Law of Ukraine "On the Constitutional Court of Ukraine," and other normative legal acts. The main novelty proposed by the People's Deputies is the creation of an Advisory Group of Experts which includes: 1) one person appointed by the President of Ukraine; 2) one person designated by the Verkhovna Rada of Ukraine; 3) one person determined by the Congress of Judges of Ukraine; 4) one person designated by the Venice Commission "For Democracy through Law"; 5) two persons designated by international and foreign organizations who, in accordance with international or interstate agreements, have provided Ukraine with international technical assistance in the field of constitutional reform and/or rule of law, and/or human rights protection, and/or prevention and anti-corruption.

The draft law defines the procedure for conducting a competition for the position of judge of the Constitutional Court of Ukraine by constitutional subjects of appointment, however, the holding of a competition by the President of Ukraine in accordance with Article 102 of the draft law remains unchanged, in particular, "Selection of candidates for the position of judge of the Constitutional Court on a competitive basis for persons appointed by the President of Ukraine is carried out by the competitive commission created by the President of Ukraine. The composition of the competitive commission created by the President of Ukraine is formed from the number of lawyers with a recognized level of competence who do not participate in the competitive selection for the position of judge of the Constitutional Court." Therefore, the President of Ukraine delegates his candidate to participate in the work of the Advisory Group of Experts on conducting the competition by the Parliament and the Congress of Judges of Ukraine, but this body does not participate in the competition conducted by the President of Ukraine. Moreover, the question of forming a rating of candidates remains unresolved, which, as practice shows, is not taken into account when appointing judges.

Thus, in order to implement the recommendations of the Venice Commission, while not violating the Constitution of Ukraine, it is possible to create a single body for vetting candidates for the position of judge of the CCU, which would include international and public experts, which would ensure a transparent vetting of candidates, as well as the selection of candidates according to the same criteria: in addition to formal ones based on age and seniority also on clear criteria of moral qualities and level of competence. Further, according to the assessment of such a body, a single list of candidates who have passed the check would be sent to the powerful subjects for their own appointment to positions. However, as we can see, this did not find support in the draft law on amendments to the Law of Ukraine "On the Constitutional Court of Ukraine."

Particular attention should be paid to the peculiarities of the administration of justice in conditions of military aggression. In connection with the full-scale invasion of the Russian Federation on the territory of Ukraine, the conduct of active hostilities and the temporary occupation of certain territories, a number of courts in the Donetsk, Zhytomyr, Zaporizhzhya, Kyiv, Luhansk, Mykolaiv, Sumy, Chernihiv, Kharkiv, and Kherson regions have suspended their activities. As a result, by the relevant orders of the Chairman of the Supreme Court "On changing the territorial jurisdiction of court cases under martial law," taking into account the impossibility of courts to administer justice during martial law, the territorial jurisdiction of court cases considered in these courts was changed.

The implementation of such powers by the Chairman of the Supreme Court became possible thanks to the legislative changes to the seventh part of Article 147

of the Law of Ukraine "On the Judicial System and the Status of Judges" adopted at the beginning of March 2022. This article in its current version stipulates that in the event of the impossibility of justice by the court for objective reasons during a state of war or emergency, in connection with a natural disaster, military operations, measures to combat terrorism or other extraordinary circumstances, it is possible to change the territorial jurisdiction of court cases considered in such a court, by a decision of the High Council of Justice, which is adopted at the request of the Chairman of the Supreme Court, by transferring it to the court that is closest territorially to the court that cannot administer justice, or to another specified court. In the event that the High Council of Justice is unable to exercise such authority, it is exercised by order of the Chairman of the Supreme Court. The corresponding decision is also the basis for the transfer of all cases pending before the court whose territorial jurisdiction is changing.

If the period from the end of February to mid-April 2022 was marked by permanent changes in the territorial jurisdiction of many courts that found themselves in the occupied territory or were in the immediate zone of hostilities, then starting from April 21, the Supreme Court adopted an order to restore the territorial jurisdiction of court cases.

According to the recommendations of the Council of Judges of Ukraine dated March 2, 2022, judges are recommended to postpone the consideration of cases (with the exception of urgent court proceedings) and to remove them from consideration if possible, to take into account the fact that many participants in court proceedings do not always have the opportunity to submit an application for postponement of the consideration cases due to involvement in the operation of critical infrastructure, joining the ranks of the Armed Forces of Ukraine, territorial defense, volunteer military formations, and other forms of countering armed aggression against Ukraine, or cannot appear in court due to danger to life.

Cases that are not urgent are recommended to be considered only with the written consent of all participants in the court proceedings.

At the same time, courts are increasingly actively using the possibility of holding hearings remotely, in the mode of video conferences. This is not surprising, since the negative consequences of military aggression against Ukraine, fuel shortages and disruption of transport connections between cities make it much more difficult for the participants in the process to move to other regions of Ukraine.

The temporary suspension of the work of the Unified State Register of Court Decisions, as well as the compromised functionality of the website of the judiciary "Status of Cases" due to the military aggression of the Russian Federation significantly affected the ability to receive information about the progress of court cases and court decisions.

Now the participants in court proceedings have to do the same as they did 8-10 years ago: look for the court phone number in available sources, call the reference or office of the court (recordkeeping department) and find out information about the case there, or look for the phone number of the assistant or secretary of the court session to get the necessary information on the case. You can also inform by phone that you have sent a petition signed by the KEP by e-mail and ask to check whether it has not gone to spam.

Along with this, although the "Electronic Court" system is positioned as one of the effective methods of remote judicial proceedings and was created to replace offline court sessions, its use is not always easy. One of the examples—in addition to the usual network problems when the system "freezes" for various reasons—can also be a situation when the parties to the proceedings are given access to the case materials in electronic form, but for various technical reasons, the litigant cannot get acquainted with them. As a result, it is necessary to postpone the consideration of the case so that everyone has the opportunity to get acquainted with its materials. And even in such cases, judges go to meet the parties and send scanned copies of cases and individual materials to the e-mail address specified by the disputant.

The Ukrainian judicial system continues to function and decently overcome the difficulties caused by the war. The uninterrupted functioning of the system is ensured by the Supreme Court by changing the territorial jurisdiction. Access to justice can be ensured either by direct participation in court sessions or by video conferencing. At the same time, it can be stated that judges show more understanding to litigants who, for various reasons caused by martial law, cannot attend court sessions and prepare procedural documents on time. This is expressed in the fact that court sessions are postponed, and the deadlines for submitting procedural documents are extended.

Implementation of continuous and proper justice in force majeure conditions requires certain legislative changes and additions, primarily of a procedural nature, in particular, regulation of the remote form of work. The fact is that judges continue to consider cases and make court decisions, and the VRP has already received complaints about the remote form of work of judges with a request to bring them to disciplinary responsibility.

In an extreme situation in Ukraine due to the state of war, in order to protect both the parties to the court case and the judges, special tools must also be created. For example, a judge can be in a safe place if he alone makes a court decision and there is an opportunity to sign it with an electronic signature. In the case of consultations and meetings with colleagues, judges can be at home and connect to a video conference through secure communication systems. In the case of an oral hearing, according to the speaker, only one of the judges (perhaps the presiding judge) should be in court to ensure openness and publicity of the judicial process.

The working group under the Committee of the Verkhovna Rada of Ukraine on legal policy, which includes judges and lawyers, representatives of the State Judicial Administration of Ukraine, and the Ministry of Digital Transformation of Ukraine, prepared a draft law in March 2022 which provided for the simplification of judicial proceedings. The judges proposed to use written proceedings more widely without notifying the parties, without holding a court session, to notify the participants of the case by all means of communication known to the court: by regular mail, e-mail, through social networks, text messages, as well as by phone. In addition, there was a proposal to ensure the possibility and obligation of notification of the participants in the court case through the "Action" system.

In the first version of the draft law, remote working outside the court premises for judges and court staff was also proposed, but later it was decided to submit this issue in a separate draft law, since the initiative was not supported by the majority of the members of the Committee of the Verkhovna Rada of Ukraine on Legal Policy.

Unfortunately, draft law No. 7316 on amendments to the procedural codes regarding judicial proceedings under conditions of martial law or state of emergency did not receive the required number of votes in the Verkhovna Rada of Ukraine. The working group will continue to work on it, improve it and propose it as a new draft law.

Taking into account the fact that in the conditions of military aggression against Ukraine, personal participation in the court session can be dangerous for the participants in the case, participation in the court session outside the court premises in the mode of video conference is actively practiced. Jurisprudence shows that the courts mostly grant the petitions of the participants in the case to participate in the court session in the mode of video conference outside the court premises if the appropriate technical possibility is available.

So, for example, the Grand Chamber of the Supreme Court, considering a cassation appeal, noted in its decision dated June 7, 2022 in case No. 910/10006/19 that in view of the conditions and environment under which justice must be administered and the need to observe the principles of equality all participants in the legal process before the law and the court; transparency and openness of the judicial process; adversarial nature of the parties and reasonable terms of consideration of the case, applying to the court with a request for consideration of the case in the mode of video conference will allow to investigate and evaluate the arguments of the cassation appeal without violating the specified principles of judicial procedure and at the same time guarantee, and not expose the visitors of the court session to threats to, their life, health and safety, which may arise in the conditions of military aggression against Ukraine.

However, taking into account that many courts do not always have the opportunity to hold sessions in the video conference mode, the participant in the court

process should clarify the relevant information in court in advance. In addition, the availability of the appropriate technical capability in the court may be indicated in the decision to open proceedings in the case.

Thus, the martial law in Ukraine resulted in adjustments to the process of consideration of court cases. However, even under martial law, a person's constitutional right to judicial protection cannot be limited. Therefore, the measures that are currently implemented in the judicial system are aimed at ensuring the possibility of considering court cases and not endangering the life and health of the participants in the judicial process.

3. The Legal Framework and Practical Issues of Implementing Activities of the Ombudsperson during the State of Martial Law in Ukraine[1]

To enable smooth and efficient work of the Ukrainian Parliament Commissioner for Human Rights (Ombudsperson), especially during the state of martial law in the country, the existing regulatory and legal framework governing the activities of the Ombudsperson in Ukraine should be analysed clearly, precisely, and comprehensively. This section seeks to identify if the Ombudsperson is provided with enough powers, resources, and flexibility to achieve his/her goals in this specific state.

The interest to the status and mandate of the Ukrainian Ombudsperson is dictated by the military aggression of Russia taking place on the territory of Ukraine, since the human rights violations committed because of the aggression are investigated by various international organizations and Ukrainian state institutions, including the Ukrainian Parliament Commissioner for Human Rights. Besides the legal status of the Ukrainian Ombudsperson, this section analyses his/her relations with other state institutions: Verkhovna Rada (the Ukrainian Parliament), the Cabinet of Ministers (the Ukrainian government), the Constitutional Court of Ukraine, other courts, etc., together with the scope of the Ombudsperson's functions and powers (mandate). It should be emphasized that in the recent years, the legal evaluation of the status of the Ombudsman in constitutional and administrative jurisprudence has received attention in Europe since the Ombudsperson's mandate is evaluated in the interconnections with the fundamental rights such as an individual's right of effective legal protection (Resolution of Constitutional Court of the Republic

[1] In this analysis, the terms "Ompudsperson in Ukraine" or "Ukrainian Parliament Commissioner for Human Rights", "Ombudsman" or "the Commissioner" are used.

of Lithuania, 2011; Resolution of the Constitutional Tribunal of the Republic of Poland, 2021). Notwithstanding the fact that the existing Ukrainian law governing the mandate of the Commissioner follows European and international standards, some factors indicate that it needs to be improved.

I. Status of the Commissioner in the State Institution Landscape

As an independent and constitutionally defined body, the Parliamentary Commissioner for Human Rights in Ukraine holds an important place in the institutional structure of national authorities. The activities of the Commissioner are a constituent part of the national system for protection of human rights and are important in the light of the Russian aggression on the territory of Ukraine. The Commissioner is an integral part of the system of constitutional rights and freedoms that includes the judiciary, the President of Ukraine, the Verkhovna Rada of Ukraine, and supranational judicial authorities. It can be maintained that the establishment of the Commissioner institution on the constitutional level and a wide mandate given to them contributes significantly to the development of democratic accountability of state authorities.

The Commissioner is not a part of or under a direct control of any public authorities. Even though he has strong ties with the Parliament, he operates autonomously from the legislator as well as executive government, and the courts.

The legal norms defining the status—among others, rules for appointment, cessation, and accountability of the Commissioner, his competence and relationship with other state institutions—are established in several sections of the Constitution of Ukraine: Section II "Human and Citizens' Rights, Freedoms and Duties," Section IV "Verkhovna Rada of Ukraine," and Section XII "Constitutional Court."

The constitutional norms, which are set out in Section II "Human and Citizens' Rights, Freedoms and Duties," establish a strong mandate for the Commissioner in the sphere of the protection of human rights. In this regard, two points should be made.

First, pursuant to Article 55(2) of the Law of the Commissioner, everyone has the right to appeal for the protection of his or her rights to the Ukrainian Parliament Commissioner for Human Rights (Ombudsmen). In this case, the name of the ombudsman clearly reflects his mandate. The Commissioner has an express human rights protection role. The legal context of that provision must also not be overlooked. The fact that the constitutional provisions are laid down in the section of the Constitution which is aimed at establishing certain catalogue of human rights might be seen as an extension of constitutional rights.

Second, in the Constitution, the Commissioner is provided with a similar institutional background to that occupied by the courts. In this regard, the position of legal norms regarding the status of the Commissioner in the text of the Constitution should be noted. These norms are introduced immediately after legal provisions establishing that everyone shall be guaranteed the right to challenge in court the decisions, actions, or inactivity of State power, local self-government bodies, officials, and officers (Article 55(1) of the Constitution). Thus, under the Constitution it is for the courts and the Commissioner to protect human rights and freedoms.

Section IV of the Constitution extends the mandate of the Commissioner further. The Commissioner is not only vested with the responsibility to protect human rights and freedoms but is also under a duty to observe the situation regarding the implementation of the human rights in general. More precisely, pursuant to Article 101, the Ukrainian Parliament Commissioner for Human Rights shall conduct the parliamentary control over *observance* and protection of human and citizens' constitutional rights and freedoms.

This section of the Constitution also clearly defines the relationship between the Commissioner and legislative branch of the government. As provided for under Article 85(17), it is for the Verkhovna Rada of Ukraine to appoint and remove from the office the Ukrainian Parliament Commissioner for Human Rights; and to hear the Commissioner's annual reports on the situation in the sphere of observance and protection of human rights and freedoms in Ukraine.

Lastly, Section XII of the Constitution further strengthens the position of the Commissioner in the institutional landscape. Article 150(1) of the Constitution expressly entitles the Commissioner to apply to the Constitutional Court regarding the questions of constitutionality of certain legal acts. It is important to underline that constitutionality issues shall also be considered upon request from the President of Ukraine, a group of no less than forty-five people's deputies of Ukraine, the Supreme Court of Ukraine, or the Verkhovna Rada of the Autonomous Republic of Crimea. Thus, in this regard, the Commissioner holds a very strong position that can be compared to the one occupied by key state institutions.

The constitutional provisions are accompanied by legal norms laid down in the Law of the Commissioner. The norms set out in this Law provide for a more detailed description on the Commissioner's status and his exact role and purpose. It further stresses that the Commissioner is independent from the government or any other body or person. Statutory independence is formalised under Article 20 of the Law of the Commissioner. As far as the relationship with other state institutions is concerned, one shall particularly note Article 4(2) of the Law of the Commissioner which provides that the Commissioner supplements legal remedies for violation of constitutional human rights and freedoms. It neither repeals them nor results in

reviewing the competence of state bodies which ensure protection and restoration of violated rights and freedoms.

In summary, the explicit recognition for the Commissioner in the Constitution ensures that the activities of the Commissioner come with increased protection. After all, the more complicated it is to amend the legal basis for the activities of the Commissioner, the more likely that the Commissioner will continue to operate on a permanent basis. It also serves to ensure that the findings of the Commissioner regarding the activities of public authorities are taken as seriously as judicial protection.

Under this heading, special mention shall also be made on the questions regarding Commissioner's activities in wartime, because it deals with the access to public information and personal data protection. Dualism of the Commissioner's functions (first, as a national institution for human rights protection and additionally as a controller in the spheres of personal data protection and access to public information) makes it somewhat difficult to describe the position of the Commissioner within the institutional background of Ukrainian public authorities with a sufficient legal certainty.

II. Guarantees of the Commissioner

It may be argued that the legal framework offers every requisite guarantee of independence to the Commissioner.

First of all, it should be stressed that the status of the Commissioner is established in the Constitution of Ukraine. Thus, independence of the Commissioner is enhanced through constitutional recognition. Further, the Commissioner is granted formal independence underpinned by the legislative connection. The Commissioner is separate from the law-making bodies and the executive branch. It is an important and necessary condition of impartiality and effectiveness.

The legal notions regarding the guarantees of the Commissioner are contained in a few articles of the Law (mainly set out in Article 4, Article 20, and Chapter III).

Certain institutional separation of the Commissioner's office from the legislator is reflected by the legal norms laid down in Article 4 of the Law. It is provided that the powers of the Commissioner shall not be suspended, restricted in case of termination of the Verkhovna Rada of Ukraine or its dissolution, the introduction of martial law or the state of emergency in Ukraine or in its certain areas. Likewise, legal provisions are set out in the Law on the Legal State of Emergency and the Law on the Legal Regime of the State of War.

As regards the independence from the executive, one should refer to Article 4 and Article 20 of the Law of the Commissioner. As provided for under Article 4(2) of the Law, the Commissioner performs his duties independently from any state authorities or their officials. This guarantee is further supported by more elaborate legal regulation laid down in Article 20. Pursuant to Article 20(1), any interference in the work of the Commissioner by the public authorities, local governments, public associations, enterprises, institutions, and organizations irrespective of ownership and their officials is prohibited. In addition to this, the Commissioner is not obliged to provide any explanations on details of the cases under consideration (Article 20(2) of the Law of the Commissioner).

For the Commissioner to be able to implement his functions effectively, it is necessary for him to be assisted by the competent administration. In this regard, Article 10 of the Law establishes that the activities of the Commissioner shall be secured by the Secretariat (detailed in a separate paragraph below). The structure of the Secretariat, distribution of duties and other organization matters fall into the discretion of the Commissioner. In addition to this, the Commissioner is entitled to appoint Representatives (for further details, refer to Article 11 of the Law).

The above-mentioned guarantee of administrative nature is closely connected with financial independence. The activity of the Commissioner is funded from the state budget of Ukraine and is annually envisaged in a separate line. The Commissioner develops, submits for approval by the Verkhovna Rada of Ukraine and performs its estimate of costs (Article 12 of the Law of the Commissioner). A point of criticism is that once approved, the budget usually is not revised despite existing legal regulation on the issue.

Finally, the guaranties of individual kind shall be discussed, as they are provided for under Article 20 of the Law of the Commissioner.

First, the protective immunity of the Commissioner has been established and maintained regarding criminal and administrative liability. Under Article 20(3) of the Law, in performing his duties, the Commissioner cannot be, without the consent of the Parliament, held criminally liable, subject to administrative punishment imposed by the court, detained, arrested, subjected to search and personal examination. The criminal proceedings against the Commissioner may be instituted only by the Prosecutor General of Ukraine.

Second, the Law establishes certain social and health protection guarantees setting out that the state provides the insurance in the event of death, trauma, disability, or illness developed during performance of official duties.

Third, additional guarantees regarding the expiration of the term of the Commissioner are also worthy of special mention. According to Article 20(4), upon the expiration of the term, the Commissioner retains the right to return to his previous

post or be appointed to an equivalent one. Nevertheless, there arise certain concerns for implementation of this guarantee in practice.

In this context, it is of importance to point out that the Law of the Commissioner is silent on the rank of the Commissioner vis-à-vis other state officials. The status of the Commissioner is not linked to other high-level officials in terms of remuneration, allowances, or pension. In addition to this, the Law of the Commissioner does not provide for an immunity established for the Office that would extend to the inviolability of the institution's possessions, documents, and premises.

Guarantees of independence of the Commissioner are also manifested in various legal provisions of the Law, especially regarding the appointment, re-election, and cessation of the office procedures. Each of them shall be discussed below in more detail.

Appointment

The Commissioner is appointed for the term of five years by the parliament. Article 85(17) of the Constitution establishes that the Commissioner is appointed and removed from the office by the Verkhovna Rada of Ukraine. The same legal notions are provided by the Law of the Commissioner.

The parliament has also been given an active role in the selection procedure for the position of the Commissioner. As described by Article 6(1) of the Law of the Commissioner, candidates may be nominated by the Chairman of the Verkhovna Rada of Ukraine or one-fourth of People's Deputies of Ukraine. There is no limit as to the number of candidates and more than two candidates may take part in the election procedure.

The Law of the Commissioner grants rather wide opportunities to stand as a candidate in the procedure for the Commissioner's appointment. The Commissioner shall be chosen from among persons who are citizens of Ukraine and who have been residing in Ukraine for the last five years and who will have attained the age of 40 on the day of election. In addition to this, candidates shall have good command of the state language, high moral qualities, and experience in human rights protection (Article 5(2) of the Law of the Commissioner). It should also be pointed out that in 2012 certain restrictions relating to good repute of candidates were introduced to the Law of the Commissioner. Current legal regulation requires the candidates to provide an assets and income declaration. The candidates must also be checked in light of the framework for preventing and counteracting corruption. In 2012, the Law of the Commissioner also established a direct prohibition to stand as a candidate for

individuals who have a criminal record which is not expired or who have been given an administrative punishment for corruption over the past year.

The Commissioner is elected by the absolute and not the qualified majority of parliament members' votes (Article 6(4) of the Law of the Commissioner). Following the line of arguments also presented by competent international organisations (e.g., Council of Europe. Recommendation 1615 (2003); Venice Commission's 'Compilation of the Ombudsman Institution', 2011; Transparency International Report on National Integrity System Assessment Ukraine, 2015) it is desirable to review the Law in a way which ensures that the Commissioner has full support of the parliament.

Re-election

The Commissioner is eligible for reappointment. The Law of the Commissioner does not establish any prohibition for the outgoing Commissioner to be nominated again, even though there is no legal notion setting out that the Commissioner shall be eligible for reappointment. In this regard, one can also point out that the first Commissioner of Ukraine, Nina Karpachova, remained in the office for three consecutive terms (in 1998, 2003, and 2007).

Cessation of the Commissioner's Duties

Article 85(17) of the Constitution of Ukraine and, accordingly, Article 9(6) of the Law of the Commissioner establish that it is for the Verkhovna Rada of Ukraine to adopt a decision regarding the cessation of the Commissioner's duties. Further conditions for the cessation of the Commissioner's duties are laid down in the Law of the Commissioner. The Commissioner shall cease to exercise his duties either at the end of his term of office or on his resignation or dismissal.

The first grounds, set out in Article 9(1) of the Law, concern the termination of authority. These cases include: (1) the resignation, (2) conviction with definitive judgment, (3) legal declaration of missing or presumed dead, (4) the start of the authority of newly elected Commissioner, and (5) the death.

The second group of grounds for the cessation of the Commissioner's duties concerns the dismissal from the post (see Article 9(2) of the Law). Accordingly, the Commissioner may be dismissed from the post in the following cases: (1) violation of the oath, (2) failure to meet the restrictions applied to the Commissioner' status, (3) the loss of nationality, (4) inability to continue in his present duties for certain medical reasons.

Out of all these grounds, it is worthy to address a violation of the oath separately. Pursuant to Article 7 of the Law, the Commissioner swears to protect human rights and freedoms honestly and scrupulously, conscientiously perform duties, honour Constitution and law, and be guided by justice and personal conscience. He also commits to acting in independent and unbiased manner, serving human rights. This ground is vague and potentially very wide. This is even more so since the legal framework does not provide for impeachment procedure or establishment of competent investigation commissions at the parliament.

The application of Article 9(2)(2) setting out that the Commissioner shall be dismissed in case he starts activities incompatible with the duties of Commissioner is also subject to separate mention. As provided for under Article 8(1) of the Law, the Commissioner shall not have representative mandate, hold any other positions at state authorities or perform any other paid or unpaid work, except teaching, scholarly or any other creative activities. The Commissioner also shall not be a member of any political party. It should be pointed out that the application of Article 9(2)(2) is only triggered where the Commissioner fails to meet the requirements within ten days once the incompatibility is discovered (see Article 8(6) of the Law).

In this context, it is interesting to note that the failure to continue to be eligible for the post the Commissioner may result in different legal consequences. For example, in the case when the Commissioner no longer holds the citizenship of Ukraine, a decision on his dismissal shall be adopted. Meanwhile, a conviction with definitive judgment shall result in termination of the authority. In regard to this, it can be maintained that there is room for improving the coherency of the existing legal regulation.

There are no legal notions that would aim to directly regulate the situation where, save in the event of the dismissal, the Commissioner's mandate comes to an end, however, the new Commissioner has yet to be appointed. Nevertheless, the systemic reading of the legal norms may lend some support for the temporary solution of the situation. In this regard, one can note that the Law of the Commissioner does not establish explicitly that the authority of the Commissioner terminates when the term of the office expires. This may be interpreted as entitling the outgoing Commissioner to perform the duties until the newly elected Commissioner takes the oath; this is especially so where Article 6(2)(3) is read in conjunction with Article 9(4).

Even though this interpretation of the law covers the case when the office of the Commissioner expires, the same cannot be said with certainty regarding the resignation of the Commissioner. As provided for under Article 9(1)(1), the resignation is a ground to terminate the authority. Accordingly, once the authority of the Commissioner has been terminated, Article 6 of the Law of the Commissioner requires that the candidates shall be nominated within twenty days. The voting at the parliament

takes place in another twenty days at the latest. However, where there is no agreement in the parliament, which shall be expressed by the majority of votes, the candidates shall be nominated again. Thus, it cannot be excluded that the application of current legal regulation could result in legal uncertainty.

In addition, after the start of the full-scale invasion, the Law on the Legal Regime of Martial Law (Закон України Про правовий режим воєнного стану) was amended regarding the functioning of local self-government during the period of martial law. Article 11 of the Law on the Legal Regime of Martial Law now specifies that "during the period of martial law, the President of Ukraine may make a decision to remove an official from his/her position, the appointment and dismissal of whom are within his powers, and assign duties to another person for the corresponding period. A person who is entrusted with the performance of the duties under this part must meet the requirements established by law for occupying the relevant position, considering the provisions of this law." With the package of amendments, the wartime legislators also expanded their powers to dismiss the Commissioner for Human Rights or ministers. It is assumed that during the period of martial law, the Verkhovna Rada (the Ukrainian parliament) may express no confidence in officials it appoints (except for officials whose appointment and dismissal are carried out by the Verkhovna Rada of Ukraine at the request of the President of Ukraine or the Cabinet of Ministers of Ukraine).

The issue of expressing no confidence can be initiated by the Chairman of the Verkhovna Rada of Ukraine or at least one-fourth of the People's Deputies of Ukraine from the constitutional composition of the Verkhovna Rada. Such an issue is considered at the plenary session of the Verkhovna Rada immediately in accordance with the Regulations of the Verkhovna Rada of Ukraine, without considering the procedures provided for by special laws determining the legal status of the relevant officials. The decision to express no confidence is considered adopted if most of the constitutional members of the Verkhovna Rada voted for it. The expression of no confidence by the parliament results in the dismissal of an official from his position. Thus, based on the procedure specified above, the Ukrainian parliament dismissed the previous Commissioner for Human Rights, L. Denisova, and appointed D. Lubinets to this position.

III. Mandate of the Commissioner in General

The Office of the Commissioner has been established as an independent constitutional body charged with the duties to observe and protect human rights. To this end, over the years the Commissioner's Office has grown in competence and

has been assigned legal powers, among others, within legislative, executive, and judicial spheres.

From a historical point of view, it should be mentioned that the Law of the Commissioner was adopted on December 23, 1997 and entered into force on January 15, 1998. Over the years, there have been several amendments to the Law which essentially extended the Commissioner's mandate. In 2008, it was established that the Commissioner has the right to exercise control over the ensuring equal rights and opportunities for women and men. In 2012, the Law was supplemented with the legal notions setting out that the Commissioner has the right to submit proposals for improvement of the legislation and the activities of institutions working in the sphere of the protection of human rights. In the same year, the Law was also supplemented by Article 19-1 which laid down the legal notions regarding the performance of functions of national preventive mechanism by the Commissioner. In this regard, the Commissioner is entrusted with functions of national preventive mechanism pursuant to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In addition to this, Article 13 of the Law of the Commissioner was amended on several other occasions in 2014. The mandate was expanded by establishing that the Commissioner is entrusted with the function to observe the implementation of the right to access to public information. Independent of his participation in the court proceedings, the Commissioner was also given the power to initiate the review of court judgments. It was also established that the Commissioner has the right to exercise other authorities set out in the law.

In the legislative area, the Commissioner's input is given on future and existing legislation since the fact whether legislation regarding human rights is sound and effective is a theme commanding Commissioner's constant attention. Indeed, the Commissioner has been given different legal instruments to be used prior to legislation being drafted and those to be used in response to existing legislation. Without doubt, the evolved and strengthened role of the Commissioner shall result in the development of a more structured relationship with the legislative bodies.

The core function of the Commissioner continues to be protection of individuals from unfair actions of the state. The law has no exceptions and extends the jurisdiction of the Commissioner to the legal relationships between private individuals and state authorities, bodies of local self-government, any other institutions irrespective of their form of ownership, and their employees. To this end, the Commissioner has the right to consider individual complaints and issue authoritative opinions and recommendations. Where appropriate, the Commissioner may assist in facilitating access to available legal and judicial remedies. Over the years, as reflected by annual reports, the Commissioner has investigated many issues including social welfare

pension claims, serious misbehaviour in prisons, protection of mentally ill persons, etc. Nevertheless, moving from specific and individual concerns towards solutions on systemic problems within public administration shall be of no less importance.

Lastly, the Commissioner's mandate on the protection of human rights also includes additional or secondary duties such as personal data protection and access to information. Further, protection of the right to private life or the right to access to information is supported by coercive measures and sanctions. Under these circumstances, these functions of the Commissioner require further consultations since the legal framework and practical experience in implementing it seem to suggest at first that this role may overshadow the other functions of investigating maladministration and preventing human rights violations. Creation of separate state institution, so-called the Information Commissioner having double powers in fields of personal data protection and access to information, could be an alternative solution to the problem (The Commissioner has launched a public consultation on the creation of the institute of the Information Commissioner).

IV. Mandate of the Commissioner in a Protection of Human Rights Investigating Individual Complaints

Within the current legal framework and the conditions laid down therein, the task of the Commissioner is to start an objective investigation into the behaviour of the state authority in the sphere of human rights protection. The field of investigation covers all administrative actions, including inaction or delays.

The Commissioner is sufficiently freely accessible to natural or legal persons. Pursuant to Article 2(2) and Article 17(1) of the Law of the Commissioner, any citizen, foreigner, stateless persons or their representatives, as well as a legal person may refer a complaint to the Commissioner in respect of an instance of human rights violations in the activities of state authorities. The Law of the Commissioner sets out single limitation applied for lodging individual complaints. Pursuant to Article 17(2), complaints shall be submitted within the period of one year after disclosure of human rights violations. In the case of exceptional circumstances, this time limit may be extended by the Commissioner but should not exceed two years. The Law of the Commissioner sets out in no other conditions under which a complaint may be referred to the Commissioner. However, one should note that certain requirements to individual complaints are laid down in the Law on Citizens' Appeals.

Additionally, the investigation may also be started on Commissioner's own motion (as foreseen under Article 16(3) of the Law of the Commissioner). The same

article establishes that the relevant information regarding possible human rights violations may also be submitted by People's Deputies of Ukraine. The investigations ex officio are usually directed at the systemic problems in the sphere of the protection of human rights. The Commissioner addresses the international human rights norms and refers to the case-law of the European Court of Human Rights in the resolution of individual complaints or constitutional submissions.

The Commissioner has been given strong powers of investigation. There are no indications that the legal regulation lacks any guarantees for a full access to all the elements required for the performance of his duties. The powers of investigation include access to classified information or documents; legal duty of the state authorities to supply the Commissioner with any information at his request; the right to invite officials, civil servants, and private persons to obtain oral and written explanations on circumstances under review, and other powers provided under Article 13 and Article 22 of the Law of the Commissioner. Thus, in considering individual complaints or performing investigation on his own motion, the Commissioner's activities are inquisitorial in nature, i.e., he can review documents, access all kind of information, request explanations from the state bodies concerned. He can, therefore, adopt a decision based on information that may not be available to the person who lodges the complaint.

The Law of the Commissioner does not provide any special rules or procedures to be followed where the Commissioner receives individual complaint or performs investigation on his own initiative. As it is established in Article 17(1) of the Law, in performance of his investigative duties the Commissioner follows the procedures laid down in the Law on Citizens' Appeals. The Law on Citizens' Appeals sets out the requirements to individual complaints, grounds for refusing to consider complaints, procedural rights of private individuals, time limits for consideration of individual complaints, duties of the competent authority in considering complaints and other fundamental aspects of administrative procedure. The rules set out in the Law on Citizens' Appeals are not entirely compatible with the proper and efficient implementation of Commissioner's functions. For example, the Law on Citizens' Appeals establishes that individual concerned shall be given the opportunity to appear in person during administrative procedures. However, due to its ambiguity, in practice this norm is regarded only as declarative. Another example concerns the scope of the application of the Law on Citizens' Appeals, i.e., the Law is aimed at regulating legal relationships between natural persons and public authorities. Meanwhile, legal persons do not fall within the scope of application. This is contrary to the Law of the Commissioner, which does not establish any distinction of this kind. Even though more than one draft law aimed at improving the Law on Citizens' Appeals has been introduced, none of them has been efficiently considered.

In addition to the abovementioned examples, it should also be noted that the application of the Law on Citizens' Appeals is not fully coherent. For instance, the Commissioner applies legal provisions of the Law on Citizens' Appeals to declare anonymous complaints, as well as complaints repeatedly lodged by the same persons and raising the same issues, inadmissible. At the same time, there is still a degree of uncertainty whether legal provisions of the Law on Citizens' Appeals should be disregarded when they become concurrent regarding the legal regime established in the Law of the Commissioner.

A point of criticism is also that the Law of the Commissioner does not provide for any principles of law related to the administrative procedure carried out by the Commissioner. The legal regulation is not entirely clear regarding what composes review criteria employed by the Commissioner, e.g., if this checklist is similar or wider to the ones used by courts. It is not quite clear at this point what the resolution of individual complaints by the Commissioner is targeted at, i.e., whether the Commissioner assesses the conduct of state authority in regard of their illegality, procedural unfairness, manifest errors, or all of these components together. In addition to this, it is not certain whether the Commissioner applies duty of care or good governance criteria since the legal regulation does not expressly provide for any legal principles aimed at establishing legal imperative of good administration.

Upon conclusion of the investigation, the Commissioner presumably draws up a decision, in which he opens a case on human rights violations. However, the criteria for choosing the matters in which to start the case are not clearly represented. One should also note that not all investigations end up in opening the case. Frequently, the Commissioner may adopt a document in which he explains what legal measures the individual concerned should take up, transfers the complaint to competent state authority or refuses to consider the complaint. However, the Law of the Commissioner fails to set out particular grounds for each of the above decisions.

Having in mind strong investigative powers vested to the Commissioner, the outcome of the investigation may reveal a wide spectrum of unlawful conduct. However, there are no legal provisions regarding additional measures, or in some cases duties, that could be made of use by the Commissioner, e.g., if appropriate, informing state institution concerned about the actions of the civil servants that may call into question the disciplinary responsibility; informing the Verkhovna Rada, which shall make appropriate representations; or informing competent bodies about the facts calling into question the application of criminal law.

V. Main Functions of the Ombudsperson in Ukraine During the Martial Law

Currently, the primary function of the Commissioner remains within the sphere of implementation of human rights, mainly it concerns the objective examination of individual complaints. With this aim, the Commissioner responds to the established violations of human rights and ensures that public service activities are carried out properly, fairly and per legal acts. In this respect, the legislative framework governing the work of the Commissioner, adopted in 1997 and amended in 2012 and 2014, allowed for wider powers of investigation in the sphere of particular human rights, for instance, regarding the protection of data and access to public information.

On the 24th of February 2022, the full-scale invasion of the troops of the Russian Federation into the territory of Ukraine began, which shocked the world with its cruelty and disregard for the norms of international humanitarian law.

The shelling of the entire territory of Ukraine and the subsequent temporary occupation of certain areas opened another phase of the international armed conflict, which began in February 2014 with the invasion of Russian troops and the temporary occupation of the Autonomous Republic of Crimea and the city of Sevastopol, complemented by the temporary occupation of parts of the Donetsk and Luhansk regions.

The full-scale Russian invasion of Ukraine caused an unprecedented humanitarian crisis throughout the country (Звіт про повернення в Україні…, 2022, p. 11). The decree of the President of Ukraine dated February 24, 2022 No. 64/2022 "On the introduction of martial law in Ukraine" introduced martial law in the country, whose term was subsequently extended.

As a consequence of the Russian aggression, there is a significant number of injured civilians: killed and wounded as well as people who were forced to leave their places of permanent residence and either became internally displaced persons or received temporary protection in other countries. It is estimated that around $100 billion worth of property was destroyed and damaged, about half of which accounts for damage to residential buildings. As a result, the social, economic, cultural, and other rights of millions of Ukrainians have been violated.

In December 2022, the new Commissioner prepared a Special Report on the observance of the rights of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine in the period from February 24 to October 31, 2022. The challenge for the preparation of the Report was the absence of national legislation defining the circle of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine. It does not cover all categories but focuses on the most numerous. Therefore, the Report actualizes the need to regulate the issue of the legislative definition of victims of the armed aggression

of the Russian Federation against Ukraine, and this task is to be resolved by the parliament in 2023. Additionally, the special report covers certain aspects of observing the rights and freedoms of civilians who suffered as a result of armed aggression and offers measures aimed at ensuring compliance with their rights under European and international standards. It highlights the situation with observance and violations of international humanitarian law and international human rights law committed on the territory of Ukraine within its internationally recognized borders, which occurred in the context of a full-scale armed invasion of the territory of Ukraine (Special Report on the observance of the rights of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine in the period from February 24 to October 31, 2022).

The long-term, permanent complication of the situation, the increase in the number of shelling throughout the territory of Ukraine, and the destruction of houses and infrastructure result, first of all, in the displacement of a significant part of the Ukrainian population both within the country and abroad. The number of internally displaced persons (IDPs) in Ukraine is greater than the population of many countries of the world, including European ones (for example, the population of Montenegro is 647,000 people, and Estonia is 1,265,000 people) According to the Ministry of Social Policy, from the 24th of February to the 20th of October 2022, 3,439,070 IDPs were registered, and as of November 11, 2022, the number of IDPs amounted to 4,846,189. However, considering the fact that, for various reasons, not all IDPs have been registered after changing their place of residence, the number of such persons may be even higher. Therefore, the Unified Information Database on IDPs, which is formed and managed by the Ministry of Social Policy, potentially contains underestimated indicators regarding the real number of IDPs in Ukraine.

As it emerges from the Annual reviews of the Activities of the Ombudsperson, the investigation of individual complaints has constituted the largest part of the Commissioner's workload for a few years now[2] and after the full-scale invasion, this workload increased because of the crimes of armed aggression as well as the protection of the rights of internally displaced persons.

The Commissioner receives numerous complaints of the IDPs regarding the refusal to accept their applications for appointment and payment of financial assistance based on applications made by the 30th of April 2022 using the mobile application of the "Diia" Portal.

For instance, Yuriy S. addressed the Commissioner with the following issue. After moving to the city of Dnipro on the 30th of April 2022, he registered through the "Diia" Portal as an IDP. Taking into account that his accommodation allowance was

[2] http://www.ombudsman.gov.ua/ua/page/applicant/statistics/.

not paid for a long time, he turned to USZN (Department of Social Protection of the Population) of the Shevchenkiv district council in the city of Dnipro. However, the applicant was informed there that the register of IDPs in the Unified Information Database of IDPs has no indication of his stay, therefore, he would be granted housing assistance only from the moment of applying to the administration.

After making changes to the Procedure for providing accommodation assistance to IDPs, approved by the Resolution of the Cabinet of Ministers of Ukraine dated March 20, 2022, No. 332 regarding the possibility of granting IDPs accommodation assistance during the period when they were entitled to it, Yuriy S. appealed to the department again and provided information stored on the phone that confirmed the fact that he had submitted the application using the "Diia" Portal and the screenshot of the message. However, the employees of the department did not consider the information provided by the applicant, citing that the notification did not include the immediate date of the application, and they did not have appropriate measures to provide accommodation assistance.

Given this, the Commissioner sent the requests to the Ministry of Digital Transformation of Ukraine to confirm the date of submission of Yuriy S.'s application through the "Diia" Portal and to the Ministry of Social Policy to provide relevant methodological recommendations to the USZN employees regarding the practical application of the changes made to the Procedure. Due to the assistance of the Commissioner, the information about the submission of the application by Yuriy S. through the means of the "Diia" Portal on April 30, 2022 was confirmed, and the department was instructed to take measures for the appointment and payment of assistance to the applicant for the previous period (Special Report on the observance of the rights of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine in the period from February 2022).

The burden of the social protection administration, which currently deals mostly with the problems of IDPs, their registration and assistance, and the involvement of charitable organizations and volunteers, has increased significantly. On the ground, separate queues are formed for IDPs and local residents of the community. At the same time, the number of employees of social security agencies has not increased.

It must be mentioned that many IDPs have lost their old jobs and have not found new ones in their new places of residence, therefore state social assistance may be the only source of livelihood for many of them. The largest number of appeals received by the Commissioner regard issues of social benefits, non-receipt of them despite the rules established by the above-mentioned Government resolution, or delays in the payment of cash assistance to IDPs.

In particular, since the beginning of 2022, the Commissioner received appeals reporting 2,087 violations of the rights of IDPs, namely: 852 rights to social protection,

214 to appeals, 70 to housing, 75 to freedom of movement, 64 to pension provision, 38 for education, 34 for child protection, 32 for renewal of documents, 32 for health care, and 564 other requests for help in exercising rights.

In the exercise of his primary function as a defender of the people, the Commissioner also holds certain executive and legal representation, and in some cases, public prosecuting powers. The Commissioner may not only recommend for the state authority to take up certain remedies regarding the aggrieved individual, but he is also entitled to initiate the imposition of administrative fines. In addition, the Commissioner plays a role in representing vulnerable members of society before the courts. As regards civil rights and freedoms, the right to judicial protection should be singled out separately, which includes the following areas of activity of the commissioner: monitoring of procedural rights in criminal proceedings; monitoring of procedural rights in civil and administrative proceedings; monitoring of the rights of persons in places of detention; monitoring the observance of the rights of Ukrainian citizens held in places of detention abroad and in temporarily occupied territories.

In accordance with the second part of Article 4 of the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine on Human Rights," the Commissioner's activities complement the existing means of protecting the constitutional rights and freedoms of a person and a citizen, do not cancel them and do not entail a review of the competence of state bodies that ensure the protection and restoration of violated rights and freedoms.

According to Articles 124, 126, 129 of the Constitution of Ukraine, justice in Ukraine is carried out exclusively by courts.-According to the fourth part of Article 17 of the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights," the Commissioner does not consider those appeals that are considered by the courts.

In addition to the abovementioned functions, the activity of the Commissioner for Human Rights in the field of personal rights and freedoms consists of protecting personal data, preventing and countering corruption, preventing and countering domestic violence, gender-based violence and human trafficking.

Regarding the protection of personal data in the conditions of martial law, it is necessary to analyse the limitations of human rights and the legal grounds for the processing of personal data by state bodies.

According to the first and second parts of Article 32 of the Constitution of Ukraine, no one can be subjected to interference in their personal and family life, except for the cases stipulated by the Constitution of Ukraine. It is not allowed to collect, store, use and distribute confidential information about a person without their consent, except in cases specified by law and only in the interests of national security, economic well-being, and human rights.

At the same time, Article 64 of the Constitution of Ukraine stipulates that in conditions of war or state of emergency, separate restrictions on rights and freedoms may be established, specifying the period of validity of these restrictions. According to paragraph 3 of the Decree on martial law, in connection with the introduction of martial law in Ukraine, the constitutional rights and freedoms of a person and a citizen, provided for by Article 32 of the Constitution of Ukraine, may be temporarily limited during the period of the legal regime of martial law.

This is consistent with the provisions of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which state authorities may not interfere with the exercise of the right to respect for private and family life, except when the interference is carried out in accordance with the law and is necessary in a democratic society in the interests of national and public security or economic well-being of the country, to prevent riots or crimes, to protect health or morals, or to protect the rights and freedoms of others. Also, in accordance with Article 15 of this Convention, in times of war or other public danger threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention, only to the extent required by the urgency of the situation, and provided that such measures are not inconsistent with its other obligations under international law.

Article 9 of the Convention on the Protection of Individuals in Connection with Automated Processing of Personal Data provides that deviations from the provisions of Articles 5 (Data quality), 6 (Special categories of data), and 8 (Additional guarantees for the data subject) of this Convention are allowed when such a deviation is provided for by the legislation of the Party and is a necessary measure in a democratic society aimed at:

a) protection of state and public security, financial interests of the state or the fight against criminal offenses;
b) protection of the data subject or the rights and freedoms of other people.

In connection with the introduction of amendments to the Law of Ukraine "On the Protection of Personal Data" of January 1, 2014, control over compliance with the legislation on the protection of personal data within the limits of the powers provided by law has been entrusted to the Commissioner for Human Rights.

The control consists in establishing compliance of the personal data processing with the requirements of the Constitution of Ukraine, the Law of Ukraine "On the Protection of Personal Data," the Standard Procedure for the Processing of Personal Data, as well as current international agreements of Ukraine in the field of personal data protection, whose binding consent has been granted by the Verkhovna Rada of Ukraine.

Control by the Commissioner in the field of personal data protection is carried out by conducting inspections of individuals, individual entrepreneurs, enterprises, institutions, and organizations of all forms of ownership, state authorities, and local self-government bodies that are owners and/or managers of personal data. Inspections can be scheduled, unscheduled, on-site, and non-visit.

The procedure for carrying out checks is established by the Procedure for the implementation by the Commissioner of control over compliance with the legislation on the protection of personal data, approved by the order of the Commissioner No. 1/02-14 dated January 8, 2014.

According to the results of the inspections, acts of verification of compliance with the requirements of the legislation on the protection of personal data are drawn up, based on which, in the event of violations, an order is drawn up to eliminate them, or a protocol on administrative proceedings is drawn up. The Law of Ukraine "On the Protection of Personal Data," which regulates legal relations in the area of the protection and processing of personal data, also contains provisions related to the limitation of its effect. Article 25 of this Law provides that the limitation of the effect of Articles 6 (General requirements for processing personal data), 7 (Special requirements for processing personal data), and 8 (Rights of the subject of personal data) of this Law may be carried out in cases provided for by law, to the extent necessary in a democratic society in the interests of national security, economic well-being or protection of the rights and freedoms of personal data subjects or other persons.

It is commonly known that the processing of personal data must be based on purpose and legal grounds.

The purpose of processing personal data must be formulated in laws, other normative legal acts, regulations, constituent or other documents that regulate the activities of the owner of personal data and comply with the legislation on the protection of personal data.

In accordance with Article 11 of the Law of Ukraine "On the Protection of Personal Data," the grounds for processing personal data are:

1) consent of the subject of personal data to the processing of his personal data;
2) permission to process personal data granted to the owner of personal data in accordance with the law exclusively for the exercise of his powers;
3) conclusion and execution of a transaction to which the subject of personal data is a party or which was concluded for the benefit of the subject of personal data or for the implementation of measures preceding the conclusion of the transaction at the request of the subject of personal data;
4) protection of vital interests of the subject of personal data;
5) the need to fulfill the obligation of the owner of personal data, which is provided by law;

6) the need to protect the legitimate interests of the owner of personal data or a third party to whom personal data is transferred, except in cases where the needs to protect the fundamental rights and freedoms of the subject of personal data in connection with the processing of his data prevail over such interests.

It must be mentioned that the consent of the subject of personal data is only one of the six legal grounds for the processing of personal data provided for in Article 11 of the Law of Ukraine "On the Protection of Personal Data." In the presence of the grounds specified in clauses 2-6 of the first part of Article 11 of this Law, processing of personal data is carried out without the consent of the subject of personal data.

According to the Law of Ukraine "On the Legal Regime of Martial Law," martial law provides for the granting to the relevant bodies of state power, military command, military administrations and local self-government bodies of the powers necessary to avert a threat, repulse armed aggression and ensure national security, eliminate threats to the state independence of Ukraine and its territorial integrity.

At the same time, in accordance with the second part of Article 19 of the Constitution of Ukraine, state authorities and local self-government bodies and their officials are obliged to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine.

In this case, the grounds for processing (collection, registration, accumulation, storage, adaptation, modification, renewal, use, dissemination, depersonalization, destruction, etc.) of personal data by relevant state bodies and local self-government bodies are points 2 and 5 of part one of Article 11 of the Law of Ukraine "On the protection of personal data," namely:

– permission to process personal data granted to the owner of personal data in accordance with the law exclusively for the exercise of his powers;
– the need to fulfill the obligation of the owner of personal data, which is provided by law.

In addition, Article 7 of the Law of Ukraine "On the Protection of Personal Data" prohibits the processing of personal data about racial or ethnic origin, political, religious or ideological beliefs, membership in political parties and trade unions, criminal convictions, as well as data relating to health, sexual life, biometric or genetic data. It does not apply if the processing of personal data, in particular, relates to court verdicts, the performance of tasks of operational-investigative or counter-intelligence activities, the fight against terrorism and is carried out by a state body within the limits of its powers defined by law.

Thus, in the conditions of martial law imposed in Ukraine, protection of personal data from accidental loss or destruction, illegal processing, including illegal destruction or access to personal data, protection of state information resources, IT systems of critical infrastructure objects, state registers, which contain personal

data, are extremely important. Processing of personal data must be carried out taking into account the above provisions of the legislation of Ukraine. Such processing must be proportionate and carried out for specific and legitimate purposes.

Among the legal grounds for the processing of personal data which are defined in the first part of Article 11 of the Law of Ukraine "On the Protection of Personal Data," in this case it is necessary to highlight: the consent of the subject of personal data to the processing of his personal data (clause 1); conclusion and execution of a transaction to which the subject of personal data is a party or which was concluded for the benefit of the subject of personal data or for the implementation of measures that precede the conclusion of the transaction at the request of the subject of personal data (clause 3); protection of the vital interests of the subject of personal data (clause 4).

In its essence, such a basis for the processing of personal data as the protection of the vital interests of the subject of personal data can be applied in exceptional cases, provided that the person is objectively unable to give their consent to the processing of personal data (for example, being unconscious) combined with the need to provide them with assistance to protect their vital interests. If the processing of personal data is necessary to protect the vital interests of the subject of personal data, it is possible to process personal data without their consent until the time when this consent becomes possible.

The consent of the subject of personal data is a voluntary expression of the will of a natural person (provided that they are informed) regarding the granting of permission for the processing of their personal data in accordance with the formulated purpose of their processing, expressed in writing or in a form that makes it possible to conclude that consent has been given. In the field of e-commerce, the consent of the subject of personal data can be given during registration in the information and communication system of the subject of e-commerce by marking the consent to the processing of their personal data in accordance with the formulated purpose of their processing, provided that such a system does not create opportunities for processing personal data until the moment of ticking.

Taking into account the above, the consent to the processing of personal data has voluntariness, which means the absence of direct or indirect coercion when providing it; awareness, which means that before giving consent, the subject must receive reliable information about by whom and for what purpose his personal data will be processed, to whom exactly the data will be transferred, and also about the rights defined by the Law; the consent can be given in any form, which means that the conditions of the consent to the processing of personal data can be set out in the form of a single written document made available to the subject personal data in the language signed by him personally or his the legal representative, in electronic form by

marking about giving consent, or even verbally. At the same time, the given consent should not raise doubts about its unequivocalness and the owner must be able to confirm its availability during the entire time of processing of their personal data.

At the same time, it is necessary to take into account the proportionality of the volume of personal data of the subject. Only those data whose processing is necessary to achieve the goal should be processed. If it is necessary to process personal data in order to provide targeted charitable assistance, much depends on the criteria by which material or other charitable/humanitarian aid is provided (category of the subject, state of health, financial support, family status, number of children, etc.). Therefore, it is worth responsibly approaching the issue of legal relations and ensuring the protection of personal data.

Separate attention should be paid to protecting personal data from cybercriminals. According to numerous reports in the mass media, citizens of Ukraine are constantly exposed to hacker attacks by hostile cybercriminals. E-mails and messages in messengers are supposedly sent from government bodies, banks, security services, etc., with recommendations to follow the specified links. After downloading the attached file, attackers can gain access to personal data contained on the user's electronic device (phone book contacts, personal computer files, etc.).

During the implementation of the parliamentary control of the Ombudsman on compliance with the legislation on the protection of personal data, facts of fraudulent actions under the guise of payment of financial aid to Ukrainians during martial law have been discovered.

Such a type of fraud as "phishing on the Internet," which consists in the theft of personal data with the help of fake websites, remains an urgent problem in the conditions of martial law. The essence of phishing is that the deceived person provides information about themselves voluntarily. At the same time, the attacker usurps the role of an authorized person of a state body or charitable foundation, etc.

Under the guise of providing government payments, criminals also extort money from citizens by sending messages. Citizens of Ukraine who are on the temporarily occupied territories should carefully secure their personal data. The Center for Countering Disinformation at the National Security and Defense Council of Ukraine reported on new insidious actions of the occupier which consist in the collection of personal data of citizens (under the pretext of a "population census" or during the distribution of "humanitarian aid") for their further persecution and intimidation. This primarily concerns military personnel and their families, as well as public activists, journalists, and cultural figures.

An important aspect of ensuring the observance of human and citizen rights and freedoms in the conditions of armed aggression is the coordination of the efforts of the relevant state authorities and the establishment of cooperation between the

state institutions that take care of issues of human rights protection and response to humanitarian challenges in wartime. Carefully monitoring the observance of human and citizen rights and promptly responding to cases of violations of national and international law, the Human Rights Commissioner of the Verkhovna Rada of Ukraine established appropriate interaction with state authorities, national security and law enforcement agencies for the victory of Ukraine with its unconditional component being the implementation of constitutional rights of citizens of Ukraine.

Taking into account the above, the employees of the Commissioner's Secretariat have the authority, in case of violations of citizens' rights, to make trips, in particular to the places of crimes, torture, places of illegal detention, etc. At the same time, the employees of the Commissioner's office provide methodical and practical recommendations, in particular of a legal and procedural nature, provide a "road map" of the course of action for the affected civilians, military personnel, police officers, rank-and-file and senior officers, and other categories of persons whose rights have been violated in the course of the armed aggression, in order to improve them. The information obtained during joint work on the discovered facts of violation of the rights of citizens by the aggressor state, within the limits of the powers defined by the Law, is also summarized for the further delivery to the relevant international institutions with the aim of forming an evidentiary base for bringing specific persons or organizations of the occupying country to justice.

Guided by Article 101 of the Constitution of Ukraine, Articles 13, 22 of the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights," in order to establish appropriate cooperation, the Ombudsman, proposed the organization of joint work in the interests of Ukrainian citizens and the acceleration of the process of restoring their rights in each region of Ukraine. The contact persons of the Secretariat of the Commissioner, determined for the organization of joint work, are: the Representative of the Commissioner for Human Rights in the system of bodies of the security and defense sector, a member of the Coordinating Staff for the Treatment of Prisoners of War, and the Director of the Department for Monitoring the Observance of Rights in the Defense Sector and the Rights of Veterans and Servicemen, Prisoners of War and their family members of the Commissioner's Secretariat.

In order to build the capacities of the Human Rights Commissioner of the Verkhovna Rada of Ukraine and ensure the possibility of helping people who daily face the negative impact of the armed aggression of the Russian Federation against Ukraine, the Department of Monitoring the Compliance with the Rights of Citizens Victims of Armed Aggression has been established in the Secretariat of the Human Rights Commissioner of the Verkhovna Rada of Ukraine. The main purpose of the activity of this Department is to review he violation of the rights of the following

categories of citizens: internally displaced persons and citizens who suffered as a result of the temporary occupation and armed aggression against Ukraine; citizens injured as a result of the armed aggression against Ukraine; forcibly deported persons and displaced persons outside the territory of Ukraine; citizens in the temporarily occupied territories.

VI. Accountability of the Commissioner

The duty to make an annual statement to the legislature on the activities of the office is, first of all, established by Article 85(17) of the Constitution. It is for the Verkhovna Rada of Ukraine to hear the Commissioner's annual reports on the current situation of the observance and protection of human rights and freedoms in Ukraine and adopt a resolution based on annual and special reports prepared by the Commissioner. The commissioner reports to the parliament under martial law are the annual reports and the Special Report on the armed aggression against Ukraine.

The time limit for the submission of annual report and its content are addressed in detail in the Law of the Commissioner. According to Article 18(1), the annual report shall be submitted during the first quarter of the following year. Under general rule, the Commissioner shall report on the situation regarding the observance and protection of human rights. The report shall encompass several aspects as determined by legal provisions set out in Article 18(1) and (2) of the Law, among others, information on human rights violations by state authorities, the shortcomings in the legislation, information what measures were taken by the Commissioner in regard to the determined breaches, results of inspections, conclusions, and recommendations.

As it is apparent from the Commissioner's annual reports, they, indeed, encompass a wide range of topics. The annual report covers all the activity areas and addresses every single sphere of the Commissioner's mandate individually. It also provides a certain compilation of statistics. Nevertheless, some take the view that single annual review per year is not enough to provide the society with adequate and up to date insights on general human rights situation in Ukraine, especially having regard to the peculiarities of the country.

In addition to the annual reports, the Commissioner may issue special reports. Whereas submitting annual report once per year is mandatory, special reports are published when necessary and focus on separate issues regarding the observance of human rights in Ukraine. To date, the Commissioner has published special reports on the implementation of the national preventive mechanism, monitoring places of captivity in Ukraine, application of the Criminal Procedure Code and other issues (v: http://www.ombudsman.gov.ua/ua/page/secretariat/docs/presentations/). Two

parallel problems can be seen in this context: the imperfection of legal norms themselves, which provide for such responsibility; informing about such responsibility on the part of state representatives.

According to the Office of the High Commissioner for Human Rights, from February 24 to October 30, 2022, this body recorded 16,295 casualties among the civilian population in the country, of which 6,430 were killed and 9,865 were wounded. Of them, 8,996 victims in the Donetsk and Luhansk regions (3,833 dead and 5,163 wounded), specifically, 7,103 victims (3,404 dead and 3,699 wounded) in the territory controlled by Ukraine; 1,893 victims (429 dead and 1,464 wounded) in the territory controlled by the armed formations of the Russian Federation and armed formations associated with them. In other regions of Ukraine, which were under the control of Ukraine at the time of the losses, there were 7,299 victims (2,597 dead and 4,702 wounded).

According to the Office of the Prosecutor General of Ukraine, as of October 24, 2022, these numbers increased. The crimes committed by the Russian Federation resulted in the death of 7,938 civilians (including 430 children) and the wounding of 10,897 civilians (including 820 children). Thus, more than 1,250 children have been injured in Ukraine since February 24, 2022. The most affected children are in Donetsk oblast (417), in Kharkiv oblast (259), Kyiv oblast (116), Mykolaiv oblast (77), Zaporizhia oblast (69), Chernihiv oblast (68), Luhansk oblast (64), Khersonska oblast (57), Dnipropetrovsk (31) as of October 21, 2022. As of October 13, 239 children are considered missing.

According to the Office of the Prosecutor General, since the beginning of the full-scale military aggression of the Russian Federation against Ukraine, the law enforcement agencies of Ukraine have registered 1,553 criminal violations under Article 438 of the Criminal Code, which include attacks on the life and health of persons committed by servicemen and/or representatives of other military forces formations of the Russian Federation. Keeping a separate state register of dead and wounded civilians is not provided for by any law. Therefore, according to the Commissioner, it is unnecessary to create such a register.

This accounting of victims will serve the purpose of compensating the victims of armed aggression against Ukraine, and will be necessary for international and national reparation mechanisms, as well as for establishing the truth within the framework of post-conflict transitional justice. In addition, since the collected data will reflect certain "patterns of harm" and, with access to a larger volume of information, "patterns of criminal behaviour," the collection of data and maintenance of the register will contribute to more productive work of law enforcement agencies.

Since the beginning of full-scale military operations of the Russian Federation against Ukraine, there has been a massive deployment of military equipment and

military units near civilian objects in densely populated areas. In any case, such actions are a violation of the obligation to apply passive precautions. However, if this arrangement is made deliberately to provide protection from an attack by the opposing side, such actions constitute a war crime: the use of civilians as "human shields."

VII. Apparatus of the Commissioner

Activities of the Commissioner are supported by the Secretariat (Article 10 of the Law of the Commissioner). The structure of the Secretariat, distribution of duties, and other aspects concerning organization of the Office are regulated by the Regulations approved by the Commissioner. These provisions ensure that the Commissioner has certain discretion and flexibly to decide on the organization of work of the Secretariat.

In addition, the Commissioner has a right to appoint Representatives. The organization of the activity and scope of authority of Representatives are also regulated by the Regulations approved by the Commissioner (Article 11 of the Law of the Commissioner).

The current legal regulation allows for a wide discretion of the Commissioner in establishing working patterns in internal organization. There is only a single mandatory requirement established in the Law of the Commissioner as organizational arrangements are concerned. Pursuant to Article 19-1(7), a separate structural unit for the prevention of torture and other cruel, inhuman, or degrading treatment or punishment shall be established in the Secretariat of the Commissioner.

In their work, the Commissioner's Office may also be assisted by a board of advisors, experts, and representatives of civil society (Article 10(3) of the Law). The board contributes to establishing strategical aims of the Commissioner's office and monitoring their implementation.

In this context, it should be mentioned that there is a very close cooperation (also described as 'synergy') between the Commissioner's Office and representatives of the NGO's. The Office of the Commissioner is open and proactive in terms of launching projects on human rights protection in collaboration with the NGO's. However, the status of the latter is not established in the legal regulation. In this regard, one can note possible concerns regarding the obligation not to divulge any private information or any document submitted to the Commissioner, in particular, sensitive data.

As to the powers given to the personnel of the Apparatus, one should note that the Law of the Commissioner does not lay down precise legal provisions regarding the officials and servants of the Commissioner's office who assists him. The legal regulation requires a certain "tuning" since legal provisions of the Law formally

establishes the powers to the Commissioner alone and technically disregards that in implementing these powers the Commissioner is assisted by personnel.

VIII. Mandate of the Commissioner in a Protection of Human Rights and Interest before Courts

As an independent constitutional body, which guarantees objectivity and confidentiality, the Office of the Commissioner is entitled to examine individual complaints, recommend redress, facilitate access to judicial redress, and suggest overall improvements on the general human rights situation. In cases where entrusted by the law, it also performs additional functions, e.g., initiates the imposition of administrative liability.

The Right to Challenge Normative Acts

The Commissioner's mandate regarding the relationship with the Constitutional Court is a wide one. It is manifested through the wording of several legal provisions prescribed by the Constitution itself, the Law on Constitutional Court, and the Law of the Commissioner. As already mentioned, most importantly, the Commissioner is granted a direct access to the Constitutional Court.

First, as provided for under Article 150(1)(1) of the Constitution and Articles 13(3) and 15 of the Law of the Commissioner, the Commissioner has the right to apply to the Constitutional Court with regard to conformity of the laws of Ukraine and other legal acts issued by the Verkhovna Rada of Ukraine, acts issued by the President of Ukraine, acts issued by the Cabinet of Ministers of Ukraine, and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea concerning human and citizens' rights and freedoms with the Constitution of Ukraine. The Law of the Commissioner establishes that, to this end, the Commissioner refers a constitutional submission.

Second, the Commissioner is entitled to apply to the Constitutional Court of Ukraine regarding the official interpretation of the Constitution of Ukraine and the laws of Ukraine (see Article 150(1)(2) and 150(2) of the Constitution).

Currently, this is the most used tool for human rights protection in a more generic and systemic way. The Commissioner is very active in employing this power: from 2000 to 2022 (data until 1 February) (Information provided by the Constitutional Court of Ukraine) the Commissioner applied to the Constitutional Court with 40 applications and requests (30 applications regarding the constitutionality

of the legal regulation and 10 requests for official interpretation of the Constitution); this activeness increased since 2014 (23 applications and requests provided). The subject matter of the applications ranged from the rights of people with disabilities to the rights related to good administration (e.g., publicity of managing of governmental affairs).

Around a half of all applications and requests were regarded inadmissible by the Constitutional Court (including 11 out of 23 submitted since 2014). However, the Constitutional Court adopted final decisions in 13 cases initiated by the Commissioner (10 on constitutionality of a legal regulation, 1 official interpretation of the Constitution, 2 on both constitutionality and interpretation of the Constitution), among them, the decisions of 2016 regarding the forcible hospitalisation of mentally disabled persons and the freedom of public religious assemblies, which can be regarded landmark cases concerning the application of European human rights standards in the respective spheres.

Due to a rather high proportion of the applications by the Commissioner to the Constitutional Court which are considered inadmissible by the latter, it is worth considering the introduction of measures that could ensure a better quality of applications.

It should be pointed out that the legal regulation does not lay down any general criteria for cases when the constitutional submission shall be made and the Commissioner in this regard enjoys a wide margin of discretion . There are also no legal provisions linking the legal remedy at issue with the procedures of monitoring of human rights protection or investigations based on individual complaints.

In addition, neither the Constitution, nor the Law on the Constitutional Court (including the draft Law implementing the recent amendments to the Constitution related to the Constitutional Court) provides any precise time limit for the settlement of the constitutional justice cases by the Constitutional Court. No order of priority for hearing the cases is established, either. That sometimes can impede the effective settlement of problematic human rights issues identified by the Commissioner. Considering recent practical experience acquired with the placing of constitutional submissions, it was also noted that the current legal framework lacks certainty with regard to time limits for consideration of constitutional submissions and, where unconstitutionality is found, revision of the existing legal regulation. It was strongly suggested that legal uncertainty in this sphere may render the referrals to the Constitutional Court inefficient.

Under this heading, it should also be mentioned that the Commissioner may also be asked, where necessary, to provide expert opinions concerning issues in the field of human rights by the Constitutional Court itself even in the cases which were not initiated by the Commissioner.

It is equally important to point out that the Law of the Commissioner is silent on the control of normative administrative acts, i.e., normative acts, which do not fall into the competence of the Constitutional Court. The Commissioner has the right to challenge these acts before administrative courts in accordance with the usual procedures laid down in the Code on Administrative Proceedings.

Right to Apply to Courts

Under law, the Commissioner is entrusted certain jurisdiction within the sphere of administration of justice. In this respect, the mandate of the Commissioner, as defined by the legal acts, is related not only to the monitoring of general situation regarding human rights protection but also to proactive intervention in cases of violations of human rights.

Currently, the Commissioner provides a significant contribution in situations where judicial proceedings against public authorities are too complicated for vulnerable people. It should be also noted that, under general rule, the Commissioner may not intervene in cases pending before courts. Concurrence between the investigation by the Commissioner and legal protection before the judiciary is clearly regulated by Article 4(2) and Article 17(4) of the Law. Essentially, these provisions prescribe that the Commissioner is only entitled to investigate prior to or after judicial proceedings.

In light of the abovementioned point, it is noteworthy that general rules precluding the Commissioner to start investigations which are parallel to judicial proceedings do not mean that the Commissioner is not allowed to get involved in judicial proceedings in general. On the contrary, the Law of the Commissioner provides for several ways to entertain his jurisdiction over the judicial activities.

First, as foreseen under Article 13(10)(1) of the Law and legal acts on judicial proceedings (Article 45(1) of the Civil Procedure Code and Article 60(1) of the Code on Administrative Proceedings), the Commissioner is entitled to apply to courts to protect human rights and freedoms of socially disadvantaged persons. In implementing this function, the Commissioner essentially acts as a legal representative. In this regard, it should be noted that in Ukraine, the government has implemented free legal aid reform to help more people get necessary legal assistance and support the most vulnerable. However, this reform has not had adequate impact on the activities of the Commissioner regarding the appeals to courts. As shown by the annual reports on the Activities of the Commissioner, issues regarding the administration of justice comprise one of the largest parts of the Commissioner's workload. It can be maintained that the Commissioner implements the power to apply to courts as a legal representative irrespective of his own investigation since the existing legal

framework does not formally link the Commissioner's power to submit petitions on behalf of disadvantaged individual with administrative procedure carried out by the Commissioner on the basis of individual complaints. Under current legal regulation the Commissioner exercises discretion to decide whether to make use of the appeal to courts power.

Second, in accordance with Article 13(10)(2) of the Law of the Commissioner, the Commissioner is also entitled to intervene into any judicial proceedings that are initiated by other persons at any stage of the proceedings. As the law currently stands, Commissioner's mandate is not limited to the supervision of judicial proceedings of undue delay or evident abuse of authority. Essentially, the Commissioner has jurisdiction over any human rights violations in judicial proceedings. At the same time, it should be noted that the acts on judicial proceedings may establish certain procedural limitations as to the right to apply to court. For example, as set out in Article 324 of the Civil Procedural Code, only the parties and other persons involved in the case, as well as those who did not participate in the case, but if the court decided the matter of their rights, freedoms or obligations have the right to appeal in cassation proceedings.

Third, according to Article 13(10)(3) of the Law of the Commissioner, the Commissioner has the right to initiate the reopening (review) of judicial decisions irrespective of his participation in the judicial proceedings. The latter power was introduced relatively recently, in 2014. The legal framework does not formally limit the implementation of this power to exceptional circumstances. There are no formal criteria for determining the type of judicial disputes that attract the Commissioner's attention. Under general rule, the Commissioner has the right to get involved in any litigation concerning human rights issues.

Fourth, in monitoring the human rights protection in the sphere of administration of justice, the Commissioner is entitled to attend court hearings at all instances, including court hearings that are not public, subject to the consent of the private person concerned (see Article 13(9) of the Law of the Commissioner). In this respect, the law does not limit the monitoring function to implementation of the right to fair procedure or administrative aspects of court proceedings but also it is generally possible for the Commissioner to observe any aspect of human rights protection (and, where necessary, as have been mentioned above, intervene in the cases that are before courts). Nevertheless, there is no methodology for choosing particular court hearings to attend and the choice is essentially made in a rather random and subjective manner.

Further, the monitoring function of the Commissioner is supplemented by the power to supervise the implementation of judicial decisions as foreseen under Article 13(12) of the Law of the Commissioner.

The fifth point regarding the Commissioner's mandate vis-à-vis courts concerns a horizontal role. The Commissioner has informal possibility to appear as *amicus curiae* in judicial proceedings involving human rights violations. The expert knowledge of the Commissioner is particularly relevant when cases concern the non-discrimination principle.

Lastly, the Commissioner's mandate extends to cover the judiciary itself since the law defines the Commissioner's role in disciplinary matters. As for holding judges accountable, according to the Constitution of Ukraine and the Law on the Judicial System and Status of Judges, only High Council of Justice of Ukraine and the High Qualification Commission of Judges of Ukraine are entitled to assess the actions of judges or their inaction. The High Qualifications Commission of Judges of Ukraine shall function in two chambers: the qualifications chamber, and the disciplinary chamber. According to Article 102(2)(4) of the Law on the Judicial System and Status of Judges,[3] the Commissioner appoints one member of the Disciplinary Chamber from among persons who are not judges. In this context, it should be pointed out that the right of the Commissioner to submit information for a disciplinary proceeding regarding the actions of judges of the Supreme Court of Ukraine and higher specialized courts has been recently excluded based on the Law № 192-VIII of February 12, 2015.[4]

IX. Mandate of the Commissioner Issuing Recommendations

The legal framework is quite ambiguous in terms of what exactly happens after the Commissioner has decided to open the case on human rights violations and, for instance, how it correlates with the Commissioner's right to apply to courts. Presumably, the decision to open a case on human rights violation, adopted under Article 17(3)(1) of the Law of the Commissioner, may predominantly lead to issuing acts of response, i.e., a constitutional submission or a regular submission. As provided for under Article 15(3), a submission is a document submitted to the state authority concerned and adopted for the purpose of taking, within a period of one-month, relevant measures aimed at the elimination of revealed acts of human rights violations. A submission is not formally binding and is understood as a 'proposal' to a particular state authority, as the wording of Article 22(1)(3) of the Law suggests. In other words, a submission is an authoritative opinion rendered by the Commis-

[3] http://zakon2.rada.gov.ua/laws/show/2453-17.

[4] http://zakon2.rada.gov.ua/laws/show/22/98-%D0%B2%D1%80.

sioner as to whether the state authority concerned acted in a fair, adequate manner and in accordance with the law.

Notably, even though the submission is not binding, it should be certainly authoritative. The Commissioner's ability to secure results, therefore, depends upon the quality of the arguments made, the moral authority inherent in his Office, and the implementation of so-called mediator's function. In addition, the Commissioner might be quite resourceful in approaching the press and spend considerable time and energy to make his opinions public.

It should also be borne in mind that the Commissioner may ensure that his opinions are authoritative by issuing recommendations aimed at improving the situation within a particular sphere of human rights protection in annual or special reports (in this regard, see Article 18 of the Law of the Commissioner). Recommendations of this kind are often related to amendments to the law or recommendations for changes in administrative practice and policy. Thus, where the Commissioner makes a recommendation, he shall aim at having a structural impact.

There is no legal regulation by statute regarding the possibility of appeal with the administrative court against administrative decisions to derogate from the Commissioner's submission. Nevertheless, as provided under Article 22(2) of the Law of the Commissioner, any refusal of state authorities to cooperate shall incur liability in accordance with effective legislation.

X. Mandate of the Commissioner Initiating Administrtive Liability

The current legal framework (specifically, legal provisions of the Administrative Code of Offences) establishes that the Commissioner's Office is entitled to draw up administrative protocols in which administrative offences are described. This concerns personal data protection and access to information breaches. The Commissioner can send administrative protocols to the court and then the court decides on the breaches in question.

In addition, the Administrative Code of Offences also provides grounds to issue administrative protocols where public authorities do not comply with the submissions of the Commissioner.

Such activities cannot normally be viewed as part of the Ombudsman duties as it is pointed out that drawing-up administrative protocols is incompatible with the purpose of the Commissioner prescribed by the Constitution and the Law of the Commissioner. In practice, the workload related to the initiation of administrative liability has grown disproportionately and, in some cases, paralysed, the work of the Office. Considering that the legal regulation on administrative offences seems to be

far from perfect, for example in terms of imperative content of administrative protocols[5], there is substantial room for improvement in the existing legal framework.

XI. Mandate of the Commissioner Implementing National Preventive Mechanism

Ukraine ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2006. Activities of the national prevention of torture are conducted by the Commissioner's office since 2012. To this end, Articles 13 and 19-1 of the Law of the Commissioner were amended.

According to the requirements of the Law of the Commissioner, a separate structural unit, the Department for Implementation of the National Preventive Mechanism, was established within the Secretariat of the Commissioner. Coordination functions are granted to the Representative of the Commissioner for Human Rights (the Authorized Human Rights Representative) and the Head of the Department. In this regard, the competence given to the Representative should be clarified in terms of delegated administrative powers, guarantees, and financial security.

Eventually, in light of the expertise provided by international and national specialists, it was decided to introduce the national preventive mechanism in the format "Ombudsman+," which means that in carrying out monitoring visits, employees of the Commissioner's Office act in cooperation with civil society activists. The model includes the following elements: the central office of the Commissioner (Authorized Human Rights Representative and Department of NPM) and the regional represent-

[5] The main difficulty which arises in using this judicial enforcement is that the person who does not follow the Commissioner's recommendation has to reveal their personal data necessary for drawing up a protocol. If they refuses to provide the requested data, the Commissioner cannot draw up the protocol). and time limits for imposing liability (Article 38 of the Code of Administrative Offences sets up time limits for the imposition of administrative penalty. If the administrative offence cases stipulated in the Code or other laws are triable by court (judge), a penalty may be imposed no later than within three months from the date of commitment of the offence, and where the offence is continuing, no later than within three months from the date of detection of the offence, apart from the cases on administrative offences stipulated by the Code. According to Article 17 of the Law on the Ukrainian Parliament Commissioner for Human Rights, appeals shall be submitted to the Commissioner within one year after disclosure of the act of violation of human rights and in case of exceptional circumstances, this period can be extended by the Commissioner, but should not exceed two years. Inconsistency of provisions of these two laws determines that the Commissioner is forced to consider appeals on violation of human rights despite expiry of time limits for the imposition of administrative penalty for this violation.

atives of the Commissioner from the "ombuds" side, and the council of experts, the representatives of NGO's and the observers from the other ("+") side. The activities of the latter are coordinated by the regional public relations coordinators. It should be mentioned that the jurisdiction of a regional public relations coordinator of the Commissioner extends not only to the region where he or she operates, but also to the neighbouring regions where there are no such coordinators.[6] In this context, it should be noted that the Law of the Commissioner does not provide any legal provisions regarding regional coordinators of Commissioner's Office and their assistance in the NPM implementation process. As mentioned, the number of the regional offices is considerably lower than the number of regions. There are 1–2 coordinators in the regions, who perform both certain NPM functions and other functions of the Commissioner's Office (e.g., control the observation of human rights to information, make appeals, prepare the proposals of the submissions, participate in courts proceedings, list the protocols of the administrative offences, etc.). These findings raise certain concerns regarding the structural organization of the Office. Thus, the division of responsibilities of the Office should be reconsidered and set in more precise terms.

When performing the functions of national preventive mechanism, the Commissioner is obliged by the Law of the Commissioner to cooperate with the Sub-Committee on Prevention of Torture, international organizations and relevant bodies of foreign states working in this area.

In performing the NPM functions, the Law of the Commissioner establishes wide competences to the Commissioner, including the right to visit the places where persons are forcibly held in (psychiatric institutions, childcare centres, social and rehabilitation centres), interview persons who stay in those places, etc. In this regard, no weaknesses in the legal regulation were found.

The Optional Protocol requires regular monitoring of places of detention (e.g., it is recommended to inspect places of detention once in three years on average). In the NPM implementation process, the Authorized Human Rights Representative comprehensively monitors observation of human rights in places of isolation from society, primarily using "on the spot visits," which are found to be a powerful tool. The Authorized Human Rights Representative also personally meets with prisoners and other persons.

Taking into consideration a particularly high number of places of detention in Ukraine and scarce resources allocated to the Commissioner's Office (The Law

[6] http://www.ombudsman.gov.ua/en/page/secretariat/regionalni-predstavnicztva-upovnovazhenogo/regionalni-koordinatori.html.

stipulates that expenditures on financing the national preventive mechanism shall be provided in the state budget of Ukraine (Article 19-1 (10)), the cooperation between the Commissioner and the community of observers and representatives of the NGO's is inevitably very close. With the support of donor and international organizations, a network of Regional public relations coordinators gathering local community activists has been established. This network significantly enhances the credibility of monitoring visits conducted by the Office (NPM unit). Observers from across Ukraine and the Commissioner's representatives gather in different regions of Ukraine and improve their skills while conducting group visits to different places of detention. The cluster meetings help to fix the identified violations as soon as possible and contribute to the prevention of torture. Besides, they help to solve the problem of unequal number of observers in different regions as well as expanding the scope of activities despite the limited financing from the state budget.

The Law of the Commissioner stipulates that every year the Commissioner prepares a special report on the situation related to prevention of torture and other cruel, inhuman, or degrading treatment or punishment. This report shall be published in the media and sent to the President of Ukraine, the Verkhovna Rada of Ukraine, and the Cabinet of Ministers of Ukraine in compliance with the legislation of Ukraine on information.

The reports of monitoring visits as well as annual and special (thematic) reports are published on the website of the Commissioner. The recommendations of the Commissioner are sent to the responsible authorities and are aimed at overall improvements, including administrative practice, policy, and laws.

XII. Mandate of the Commissioner in the Legislative Process

The participation of ombudspersons in the legislative process proves to be a valuable preventive measure and may provide collective benefit for the entire society or large part thereof. In Ukraine, the role of the Commissioner in the law-making procedure is manifested through the wording of Article 3(4) of the Law. It provides that the facilitation of the process of bringing legislation of Ukraine on human rights and freedoms with the Constitution of Ukraine and international standards is one of the purposes of the parliamentary control exercised by the Commissioner. In practice, this task is interpreted broadly, and the Commissioner is entitled to act in each main stage of the legislative process.

Initiating the Law-making Process

According to Article 9(1) of the Constitution of Ukraine, the right of legislative initiative in the Verkhovna Rada of Ukraine belongs to the President of Ukraine, the People's Deputies of Ukraine, and the Cabinet of Ministers of Ukraine. Even though the Commissioner is not formally entitled to institute a legislative procedure, Article 13(3-1) of the Law of the Commissioner provides that the Commissioner is entitled to make in due course proposals for improvement of legislation of Ukraine in the sphere of human rights protection. Currently, there is no legal framework of how exactly these legislative proposals shall be made. To this end, the Commissioner collaborates with ministries and certain committees of the parliament, even by submitting the draft laws prepared on their own motion. The examples derived from practice seem to suggest that the Commissioner is proactive in his capacity as draft law promoter and finds it as one of the most efficient ways to prompt the state authorities to address systemic problems at the most suitable level.[7] In promoting legislative initiatives, the Commissioner has generally found support of the committee of human rights and on several occasions successfully conducted initiatives that led to adoption of laws.

The Commissioner has also an indirect or informal impact on the law-making process. In this regard, one should note the authoritative nature of opinions and recommendations issued by the Commissioner since they are also capable of triggering certain legislative initiatives. The documents adopted by the Commissioner provide for the interpretation of a legal provision frequently in light of the European standards formulated by the European Court of Human Rights and other international institutions of human rights protection. This may alert law-making bodies and give rise to certain legislative procedures. It is even more so when the Commissioner urges the state authorities to establish a well-defined policy rule.

Monitoring the Law-making Process

It is not uncommon that the Ombudsmen are asked to participate in the law-making process or assess the legislative proposals. As foreseen in Article 13(2) and Article

[7] Examples include the constitutional submissions regarding restrictive sessions of the Cabinet of Ministers; legal provisions of the Criminal Code on the right vested to the Criminal Bureau to detain people without trial; legal provisions of the Criminal Code on the appeal right against continuation of detention; legal acts concerning the status of creative workers and related institutions.

13(5) of the Law, the Commissioner has access to documents from all bodies of state power and the right to attend sessions of the Verkhovna Rada and the Cabinet of Ministers. Nevertheless, in practice the Commissioner has a restricted possibility to participate in the sessions of the Cabinet of Ministers. The Commissioner may be invited to the sessions only if the discussions strictly and directly concern human rights matter. In addition, under legal acts there is no formal possibility for the Commissioner to participate in parliamentary debates.

Even though the Commissioner's role is of an advisory nature in this area and he does not hold a formal right to challenge draft acts, these activities do contribute to the quality of the law and in particular, its compliance with the standards provided by the European Convention on Human Rights, as interpreted in the case-law of the European Court of Human Rights, and other international standards.

Monitoring the Implementation of Legal Acts

During his activities, the Commissioner shall monitor that existing legislation or administrative regulations are consistent with, in particular, the Constitution and international standards developed in the sphere of human rights protection. The Law of the Commissioner provides for two types of response if he becomes aware of deficiencies in regulations laid down by the parliament or other state authorities. The Commissioner may make use of the general measure and notify the public authority concerned, e.g., particular committee of the parliament or relevant minister, about the legal regulation that allegedly is not in accordance with the standards of superior power. In addition, Article 150(1)(1) of the Constitution and Article 13(3) and Article 15 of the Law of the Commissioner provide the Commissioner with a direct access to the Constitutional Court concerning the matters of constitutionality of particular legal acts. In this context, one should note that information about shortcomings in the legal regulation regarding the protection of human rights which are discovered by the Commissioner is to be included into annual report (Article 18(1) of the Law of the Commissioner).

With the Special Report of the Commissioner of the Verkhovna Rada on Human Rights, the Commissioner recommended to the parliament: to speed up the review and adoption of the draft law of Ukraine "On Amendments to Some Laws of Ukraine Regarding Certain Features of the Organization of Enforcement of Court Decisions and Decisions of Other Bodies During Martial Law" (Register No. 8064 dated September 21, 2022); to adopt amendments to the Criminal Code for the implementation of criminal prosecution of guilty natural persons for crimes against humanity.

The Commissioner also recommends to the Cabinet of Ministers of Ukraine: to ensure regulatory and legal regulation, development and implementation of the Unified Register of Civilians who suffered from the armed aggression against Ukraine, as well as the division of data in the Register by categories of such persons, taking into account the criteria of vulnerability; to develop and submit to the Verkhovna Rada a draft law on the legal status of persons who suffered from the armed aggression against Ukraine and their social guarantees, defining the concept of "a person who suffered from the armed aggression against Ukraine" and the categorization of persons who suffered from the armed aggression of the Russian Federation, as well as the mechanism of compensation for the damage caused, including restitution, compensation, rehabilitation, and satisfaction. Law enforcement agencies must ensure an effective investigation of the death (injury) of every civilian in accordance with the requirements of the UN Human Rights Committee (General Comment No. 36 to Article 6 of the International Covenant on Civil and Political Rights) and the practice of the ECtHR.

Besides, the Commissioner recommends to the Prosecutor General's Office to carry out, with the participation of international and national experts, a categorization of violations of the laws and customs of war which are prosecuted under Article 438 of the Criminal Code.

In its turn, the Commissioner recommends to the Ministry of Reintegration, State Emergency Service: to strengthen work on search, mapping and removal of mines and explosive remnants of war; to develop a strategy for the current protection of the civilian population against mine danger; to develop a strategy (plan of measures) for the normalization of life activities of the population in the de-occupied territories.

The Commissioner's recommendations regarding the rights of persons who left abroad and persons forcibly deported from Ukraine were expressed separately.

As a supplementary measure in monitoring the compliance of the current legal regulation with the international human rights standards, one can also mention cooperation with international human rights organisations. According to Article 19 of the Law of the Commissioner, the Commissioner is entitled to participate in the preparation of reports on human rights submitted by Ukraine to international organizations in accordance with current international agreements ratified by the Verkhovna Rada of Ukraine. This right certainly extends Commissioner's possibilities to monitor the compliance by Ukraine with international legal obligations in the field of human rights and influences the process of bringing Ukraine national legislation with the norms and principles of international law.

Conclusions

Having regard to the constitutional purpose of the Commissioner's activities, the Commissioner provides a significant contribution to the development of democratic accountability of state authorities within the Ukrainian system for protection of human rights. Currently, the principal function of the Commissioner, which is essentially reflected in several legal provisions set out in the Law of the Commissioner, is responding to the violations of human rights in various spheres of public law. An equally important activity that is carried out by the Commissioner and his Office is a participation in the development of human rights policy. The existing legal framework requires the Commissioner to undertake both functions in a proactive manner. Nonetheless, to strengthen these activities, the legal framework can be improved in a way that would recognise the Commissioner's standing in ensuring the right to good administration. In this regard, there is room for consideration whether the Commissioner could benefit if awareness of the right to good administration were enhanced via the constitutional and subsequently other legal regulation.

Generally, the existing law is following European and international standards. The Law of the Commissioner provides for all major elements of the Ombudsman activities that are aimed at ensuring effectiveness, independence, and impartiality of the Office. However, the current legal regulation should be improved. It is not well-structured and, in certain cases, lacks legal certainty and systemic approach. It was established that the Law of the Commissioner on certain occasions was amended without considering other legal acts or was subsequently not revised in accordance with new legal acts.

The legal framework offers every formal requisite guarantee of independence to the Commissioner. His status is constitutionally defined and further strengthened by legal regulation that establishes that the Commissioner is separate and independent from state or other public authorities. Legal provisions regarding immunity for the Commissioner in carrying out his functions are also in place. In addition, the Commissioner is given necessary discretion in implementing his policy regarding the distribution of the human resources of his Office and creating efficient working patterns. Legal regulation in this regard might need only a minor "tuning."

Having said that, the current legal regulation on the status of the Commissioner deserves attention in terms of the following:

Appointment procedure. Notably, the legal regulation regarding the voting for the candidates who are nominated to the post of the Commissioner should provide stronger guarantees for the independence of the institution. Respectively, the legal framework related to the number of votes required in the parliament for a decision on appointment to be adopted should be revised.

Cessation of the duties. Legal grounds for termination and dismissal of the Commissioner lack precision and legal clarity. Moreover, there are no legal notions that would aim to regulate directly the situation where, save in the event of the dismissal, the Commissioner's mandate comes to an end but the new Commissioner has yet to be appointed. In this respect, consideration should be given to establishing legal provisions providing for a temporary appointment or to clarification of existing legal rules.

Re-election procedure. The current legal regulation lacks legal certainty since it does not directly establish the right of the ongoing Commissioner to be nominated for a new term. Even though it must be emphasised that there has never been any practical problem in this respect, it is desirable that these discrepancies are removed. In addition to this, further analysis shall be undertaken to look more closely at whether opting for a single but longer term of appointment could have beneficial effects for the Commissioner and his Office in carrying out the mandate assigned to it by the Constitution.

Strengthening professional and administrative capacity of the Office. Further steps should be made to guarantee efficiency of the work of the Commissioner and his Office. In order to enhance the capacity to perform Commissioner's competences, there should be adequate conditions and means for training and qualification. In addition, international cooperation should be strengthened. Ensuring adequate level of funding to the Commissioner's Office, by providing appropriate remuneration for the Commissioner (linked to the high-ranking officials) and personnel of the Office, should also be taken as a priority.

Regional set-up of the Office. Regional offices are not formally established under national law. Currently, their status is subject to the regulation by internal rules which are adopted by the Commissioner. It is not proposed to interfere with the Commissioner's discretion as to organisation of the regional functioning of the Office. Nevertheless, the activities of the regional offices could be strengthened if their status and operating principles were defined under the Law of the Commissioner.

Accountability and presenting activity statements. Having regard to the contents of annual reports, the methodology in presenting relevant information and materials should be improved. Even though annual reviews are quite extensive, they do not provide the statistics with sufficient details and adequate explanations. In addition, there is room for improvement by preparing a user-friendly version of activity statements that would be addressed to the members of the society. At the same time, this could enhance the awareness of the Commissioner's functions.

As regards the mandate of the Commissioner, currently, the Commissioner is charged with overall competence. Within the existing legal framework, in choosing the legal tools for protection of human rights the Commissioner has been given

flexibility and informality. Even though deciding for the most suitable model of the Commissioner's activities falls into the discretion of the parliament, several important issues should be further analysed and, where appropriate, improved:

Law-making process. The existing legal framework is not meant to provide for a sturdier legal ground and methodology as to how the Commissioner participates in the law-making process. The legal regulation should establish a mechanism for the Commissioner to provide active oversight of law-making process and its goals, support and implement policy of human rights protection, and thereby foster the quality of laws. This includes providing meaningful and more formalized opportunities for the Commissioner to contribute to the process of preparing draft law proposals and to the *ex ante* impact assessment. Thus, the evolved and strengthened role of the Commissioner should involve the development of a more structured relationship with the legislative bodies. Under current circumstances, this is of particular importance since the Commissioner is capable of promoting regulatory coherence in pursuit of greater harmonisation of supranational and national levels of human rights protection.

Monitoring the existing legal regulation and its implementation in practice. One of the effective instruments of the Commissioner to address the systemic human rights problems and to generate new legislative initiatives in this field is the constitutional entitlement to apply to the Constitutional Court on the issues of the constitutionality of the legislation or the official interpretation of the relevant constitutional provisions. The active use of this right by the Commissioner has been increasing in recent years and proved to be potent. Indeed, the right of the Commissioner to apply to the Constitutional Court regarding the constitutionality of the legislation or the official interpretation of the Constitution has proved to be an effective instrument in responding to the systemic human rights problems. However, a few measures can be considered to increase the effectiveness of this instrument even more: the introduction of measures that could ensure high quality of applications by the Commissioner, and legal provisions (preferably in the Law on the Constitutional Court) for the order of consideration of cases by the Constitutional Court, including the possibility to give priority to those cases where the systemic human rights problems are involved.

Protection of human rights before courts. Overall, currently the Commissioner provides a valuable contribution in facilitating access to available legal and judicial remedies for vulnerable people. Nevertheless, preliminary concerns are raised in connection to the Commissioner's right to apply to courts in terms of its necessity. Essentially, the Commissioner has jurisdiction over any human rights violations in judicial proceedings and takes up various roles in this regard, e.g., acts as a legal representative or public prosecutor. In light of the fact that the state legal aid scheme

is in place, there is no rationale for the Commissioner to act as a representative of the disadvantaged members of the society. Moreover, the Commissioner's mandate is not limited to monitoring of judicial administration but also allows for certain interventions in judicial proceedings. The right to initiate a review of final judicial decisions may be seen as unsubstantiated interference into the administration of justice if the law does not provide for appropriate and sufficient safeguards. In addition, it is not quite clear how the abovementioned function correlates with the legal provisions of the Law of the Commissioner, which in essence prohibit the interference in cases before courts. Having regard to this, deeper analysis shall be performed on the matter under consideration, preferably, in a comparative manner. At the same time, opportunities may by sought for strengthening the Commissioner's role as *amicus curiae* if the necessity to build up strong legal relationship of the Commissioner vis-à-vis courts is established.

Handling individual complaints. Given the fact that the Commissioner is easily accessible and free-of charge, capacity of the Commissioner to investigate and handle individual complaints should be strengthened. Essentially, this is inseparably linked to the revision of the relation between the Law of the Commissioner and the Law on Citizens' Appeals. A few points of criticism could be made in this regard. Interestingly enough, the Law of the Commissioner does not provide for any separate rules and principles related to the administrative procedure carried out by the Commissioner and refers to the Law of Citizens' Appeals. The improvement of the legal framework regarding the grounds of admissibility of the complaints, review criteria, grounds for adopting different kinds of acts is an urgent need. In addition, the legal framework is rather ambiguous in terms of what exactly happens after the Commissioner has decided to open the case on human rights violations and how it correlates with other powers of the Commissioner, e.g., the right to make a constitutional submission or legal request.

Initiation of liability. Further, the Commissioner's competence in initiation of administrative liability and especially drawing-up administrative protocols cannot be viewed as being in line with the constitutional purpose of the Commissioner or international standard of the Ombudsmen. It is evident that the Office of the Commissioner is not well equipped to carry out investigations to draw-up administrative protocols and lacks the necessary expertise in this sphere. Moreover, this creates a disproportionate workload and consequently obstructs the exercise of the principal functions of the Commissioner.

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