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# FAIR, INDEPENDENT AND ACCOUNTABLE JUDICIARY IN UKRAINE

**ANALYSIS OF THE PRACTICE OF CUSTODIAL MEASURES  
ENFORCEMENT DURING THE “REVOLUTION OF DIGNITY” PERIOD**

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## I. CONTENT

From the end of 2013 till the end of February 2014 serious political and social changes took place in Ukraine, them being caused by the deviation of the country's political administration from the legislatively fixed course aimed at European integration and further resistance to that course. The events were labeled "the Revolution of Dignity". The name is really proper for it. The people who considered themselves worth a better standard of living and better attitude to them were fighting on the Maidan.

The European Court of Human Rights (hereinafter referred to as the ECHR) views human dignity as a value which is if not higher than the right to life, than at least the one equal to it. And this is well-grounded. The fact of biological existence alone is obviously not enough to talk about individuals, since plants and animals also exist in the physical sense. And it is dignity, realization of one's importance, moral equality with others that is the factor making a human being an individual.

The notion of dignity has often been used (and is still used) by politicians in different slogans, but most frequently one means freedom. Really, freedom and personal immunity constitute an integral part of dignity. For example, a famous representative of French Renaissance Jean-Jacques Rousseau made a link between the feeling of dignity and the problem of freedom, stating that: "To refuse from one's freedom means to reject one's human dignity, human rights, and even duties...".<sup>1</sup>

An important aspect of ensuring freedom of an individual is obeying legislative requirements relating to enforcement of measures of restraints. At the same time the fact of passing consciously illegitimate decisions by investigating judges on enforcement of measure of restraint on the participants of protests (primarily, detention and keeping in custody) during January-February 2014 points to the fact that the above European values were ignored by the law-enforcement officers, wrong trends were available in the enforcement of the current legislation in the issues ensuring the right to freedom and personal immunity.

Analysis of judicial practice (court decisions and records of criminal proceedings) of the above period (from December 21, 2013 to February 22,

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1 Citations of Jean-Jacques Rousseau. [Electronic resource]. – Access mode: [http://pro-status.com.ua/citaty/7/449\\_7.php](http://pro-status.com.ua/citaty/7/449_7.php).

2014) shows that violations made in the indicated sphere were caused not by deficiencies of legal regulation (since with adoption and enactment of the Criminal Procedure Code of Ukraine in 2012 the domestic criminal procedure legislation on the whole was brought into conformity with the European standards in terms of ensuring the right to freedom and personal immunity), but, primarily, by obvious abuse of power and manipulations with the provisions of the Criminal Procedure Code in force.

Besides, the reason for such violations committed by judges was not taking into account (sometimes because of unawareness) the precedent practice of the ECHR.

Over the above period investigating judges of Ukraine and courts of appeal passed several hundreds of decisions on enforcement of a measure of restraint in the form of keeping in custody in the cases on criminal offences against participants of the resistance movement to the Yanukovych regime were charged with. Mainly one could talk about trespasses envisaged by articles 294 “Mass riots”, 296 “Hooliganism”, 342 “Resistance to a representative of public authorities, law enforcement officer, a member of a community formation for the protection of public order, or a military servant, authorized representatives of the Natural Persons’ Deposits Ensurance Fund”, 348 “Trespass against life of a law enforcement officer, a member of a community formation for the protection of public order, or a military servant” of the Criminal Code of Ukraine<sup>2</sup>. Certainly, a part of criminal proceedings were related to actions not connected with revolutionary events. Also, in the cases of the above types some legitimate and motivated decisions were passed. However, in general it should be stated that a one-sided approach was applied and investigative prosecutors and judges were not impartial in quite a number of cases – the ones relating to enforcement of a measure of restraint in the form of keeping in custody in respect to persons brought to account due to involvement in public riot events.

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2 In the above period decisions on enforcement of a measure of restraint in the form of keeping in custody were passed in 87 proceedings under art.294 of the Criminal Code, in 351 – under art.296 of the Criminal Code, in 51 proceedings – under art.342 of the Criminal Code, and in 13 proceedings – under art.348 of the Criminal Code of Ukraine.

## II. TRESPASSES AGAINST PERSONAL FREEDOM OF THE REVOLUTION OF DIGNITY PARTICIPANTS BY INVESTIGATORS AND PROSECUTORS

Violations made in the course of enforcement of a measure of restraint primarily include the ones **committed by investigators and prosecutors** in pre-trial investigation while filing the corresponding motions. Absence of proper reaction of courts to such violations in the majority of cases:

- became a precondition for further illegitimate decisions consisting in restriction of freedom of the related participants of criminal proceedings;

- meant violation of citizens' rights and freedoms;

- pointed to availability of a certain "connection" between pre-trial investigation bodies and prosecutor's office on the one hand and courts on the other hand. Such bodies acted as the elements of the unified repression system which functioned in the period of the Revolution of Dignity and protected the ruling regime. And court did not perform its function as the body of justice and arbitrator in conflicts between citizens and state authorities.

The most typical and gross violation of the rights of participants of the Revolution of Dignity to freedom and personal immunity over the period from December 21, 2013 to February 22, 2014 was the fact that **the records which investigators used to justify the motion on enforcement of a measure of restraint was the evidence obtained by the prosecution contrary to the procedure envisaged by the Criminal Procedure Code of Ukraine. Hence, under articles 86, 87, 177 of the Criminal Procedure Code of Ukraine this "evidence" is inadmissible and the one** (under the ECHR practice, in particular, decision as of April 21, 2011 in the case "Nechyporuk and Yonkalo v. Ukraine" and decision in the case "Fox, Campbell and Hartley v. the United Kingdom" as of August 30, 1990, p. 32, Series A, No. 182 as well as provisions of part 2 of art.177 of the Criminal Procedure Code of Ukraine) **cannot prove the availability of a reasonable suspicion of criminal offence commission** (which, in its turn, constitutes the grounds for enforcement of a measure of restraint.

The most serious violations of the procedure of getting evidence and other procedural violations over the analyzed period excluding the possibility for stating a reasonable suspicion of criminal offence commission include the following ones:

**a) detention protocols of some suspects do not contain *the actual time and/or place of their detention*<sup>3</sup>.**

*For instance, under the detention protocol of S. V. Zahvozkin detention took place in the premises of Desniansky Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv on January 20, 2014 at 2:00 p.m. Along with that, the report of the militiaman-driver of armoured vehicle of the specialized designation company of special designation militia unit “Berkut” of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv O. Yu. Tsvihun shows that S. V. Zahvozkin was detained on January 20, 2014 at about 6 a.m. during public order maintenance in Hrushevskyy St. in the city of Kyiv. And the protocol of interrogation of O. Yu. Tsvihun as the victim shows that S. V. Zahvozkin was detained at 6:20 a.m. as the person grossly violating public order and taking active actions against militia men, throwing inflammable mixtures, urging the crowd to beat militia men, and*

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3 Records of criminal proceedings:

- No.1201410000000268, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine.;
- No.12014100030000714, recorded in the USRPТИ suggesting possible offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;
- No.1201410000000268, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;
- No.120140000000273, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;
- No.1201410000000262, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;
- No.12013110100017867, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 2 of art.296 of the Criminal Code of Ukraine *раїни*;
- No.1201410000000248, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;
- No.1201410000000183, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;
- No.1201410000000241, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;
- No.12013110060009084, recorded in the USRPТИ suggesting possible criminal offence envisaged by art.384 of the Criminal Code of Ukraine;
- No.12014040030000053, recorded in the USRPТИ suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine.

*due to that he was taken to Desnianskyy Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv*<sup>4</sup>.

*Or, under the detention protocol of O. S. Solonenko, detention took place in the premises of the Investigative Department of Shevchenkivskiy Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv on December 02, 2013 at 00:19 a.m. Along with that, the interrogation protocol of the victim as of December 01, 2013, viz. interrogation of the militia man-driver of specialized designation militia company “Berkut” of the city of Rivne, S. V. Potapchuk, and audio record of the court hearing show that O. S. Solonenko was detained on December 01, 2013 near the monument to Lenin*<sup>5</sup>.

Such violation contradicts the requirements of prescriptions of part 5 of art.208 of the Criminal Procedure Code of Ukraine and p.4 of the Letter of the High Specialized Court of Ukraine for Civil and Criminal Cases as of April 4, 2013 No.511-550/0/4-13.

Paragraph 125 of the decision of the European Court of Human Rights as of May 25, 1998 in the case “Kurt v. Turkey” envisages that non-recording of such data as the date, time and place of detention of a person, his/her name, grounds for detention and the name of the detaining person must be considered the fact that runs counter to the requirement of lawfulness and the very aim of art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In letter No. 511-550/0/4-13 the High Specialized Court of Ukraine for Civil and Criminal Cases pointed out that, while settling the issue of enforcement, extension, change or cancellation of a measure of restraint in considering such motions, the investigating judge, court shall each time, among other things, carefully check following of the requirements of articles 207 – 213 of the Criminal Procedure Code by the authorized bodies in cases when a person is detained without the ruling of the investigating judge, court.

Identification of the moment of detention is of crucial importance since it is since that moment, under the Criminal Procedure Code of Ukraine, that the course of a number of periods starts, in particular, the

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4 Records of criminal proceedings No.12014100030000714, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

5 Records of criminal proceedings: No.12013110100017867, recorded in the suggesting possible criminal offence envisaged by part 4 of art.296 of the Criminal Code of Ukraine)

period of keeping in custody (part 2 of art.197) and period of serving a written notice of suspicion (part 2 of art.278).

Absence of the indication of the accurate time of detention of suspects in the above records of the proceedings testifies to:

- it being impossible for the investigating judge to establish the date of expiry of the ruling on enforcement of a measure of restraint in the form of keeping in custody,

- non-fulfillment of the function of judicial control over observance of rights, freedoms and interests of persons by the investigating judge (since, under part 3 of art.278 of the Criminal Procedure Code of Ukraine, In case a person has not been served the notice of suspicion after 24 hours elapsed after the moment of his apprehension, such person is subject to immediate release).

**b) counter to provisions of p.2 of part 1 of art. 184 of the Criminal Procedure Code of Ukraine, **motions of some investigators on enforcement of a measure of restraint did not contain any legal qualifications of criminal offence with indication of the article (part of article) of the law of Ukraine on criminal liability**<sup>6</sup>;**

**c) sometimes as of the moment of interrogation the person who was a suspect had not been notified of the suspicion** (counter to art.6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which says that everyone accused of a criminal offence shall have the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him, and p.1 of part 3 of art.42 of the Criminal Procedure Code of Ukraine, which says that the suspect shall be entitled to know of which criminal offence he has been suspected, hence he could not know what actual actions he was charged with and thus, could not properly defend his rights)<sup>7</sup>.

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6 Records of criminal proceedings No.12013110060009084, recorded in the USRPTI suggesting possible criminal offence envisaged by art.348 of the Criminal Code of Ukraine)

7 Records of criminal proceedings:

- No.12013110100017867, recorded in the USRPTI suggesting possible criminal offence envisaged by part 4 of art.296 of the Criminal Code of Ukraine);

- No.1201400000000273, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

*For instance, O. S. Solonenko was interrogated as a suspect on December 02, 2013 at 3:30 p.m., while he was notified about the suspicion later – on December 02, 2013 at 5:50 p.m.<sup>8</sup>.*

**d) similar is the situation when other investigative actions are taken with the involvement of the person prior to assigning the status of suspect to him.**

*Thus, on January 22, 2014 at 8:45 till 9:00 p.m. the investigating officer of Obolonskyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv O. V. Matyusha conducted an examination of the place of event – the premises of office No. 418 of Obolonskyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv where M. D. Pasichnyk was staying, and seized from the latter a jacket, trousers, shirt and gauze bandage. It is indicated in the text of the protocol that it was compiled with the participation of suspect M. D. Pasichnyk, but it is clear from the materials in the case that M. D. Pasichnyk was informed about the suspicion no earlier than on January 23, 2014<sup>9</sup>;*

**e) some suspects – participants of the Revolution of Dignity events were not secured with the right to know what crime they were suspected of having committed.**

*For example, under the motion on the permission to detain a suspect, detention protocol and notice of suspicion, A. I. Dzyndzia is suspected of a crime envisaged by part 3 of art.289 of the Criminal Code of Ukraine, under the ruling on detention permission granting – part 2 of art.289 and art.348 of the Criminal Code of Ukraine. And in the ruling on enforcement of a measure of restraint judge V. V. Buhil indicated that the suspect is accessorial in a criminal offence envisaged by part 2 of art.289 of the Criminal Code of Ukraine. Thus, neither the prosecution, nor court ensured the right of A. I. Dzyndzia to know of what criminal offence he was suspected<sup>10</sup>.*

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8 Records of criminal proceedings:

- No.12013110100017867, recorded in the USRPDI suggesting possible criminal offence envisaged by part 4 of art.296 of the Criminal Code of Ukraine

9 Records of criminal proceedings No.1201410000000262, recorded in the USRPDI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

10 Records of criminal proceedings No.12013110060009084, recorded in the USRPDI suggesting possible criminal offence envisaged by art.348 of the Criminal Code of Ukraine)

The situation runs counter to:

- art.6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which shows that everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

- p.1 of part 3 of art.42 of the Criminal Procedure Code of Ukraine under which the suspect shall be entitled know of which criminal offence he has been suspected;

**f) doubt as to reliability of some evidence that constituted the grounds for enforcement of keeping in custody is also caused by the circumstance that free testimony of witnesses – law-enforcement officers to which some investigating judges referred are identical in their content and layout style<sup>11</sup>;**

**g) sometimes investigator’s motion was substantiated by the interrogation protocols of the suspect as a witness<sup>12</sup>.** Due to requirements of paragraphs 3, 6 of part 2 of art.87 of the Criminal Procedure Code of Ukraine and part 3 of art.62 of the Constitution of Ukraine, the data of interrogation protocols is considered to be an inadmissible evidence;

**h) sometimes (contrary to the requirements of part 1 of art.52 of the Criminal Procedure Code of Ukraine) in criminal proceedings in respect of crimes of especially severe gravity, in the absence of the defense counsel, persons were notified of the suspicion of crimes committed by them<sup>13</sup>; interrogations<sup>14</sup>; examination of the place of the event<sup>15</sup>;**

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11 Records of criminal proceedings:

- No.12014100030000714, recorded in the USRPTI on January 21, 2014 suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.12014100000000274, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.1201400000000273, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.12014040030000053, recorded in the USRPTI. suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine

12 Records of criminal proceedings No.759/919/14-к.

13 Records of criminal proceedings:

- No.12013110060009084, recorded in the USRPTI suggesting possible criminal offence envisaged by art.348 of the Criminal Code of Ukraine);

- No.12014100000000285, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine);

- No.12014100000000183, recorded in the USRPTI. suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

i) a typical violation of the requirements of criminal procedure law in relation to the participants of the Revolution of Dignity was also the fact that **materials used by investigating officers to justify the need to apply a measure of restraint was the data drawn up within several criminal proceedings, while records of judicial proceedings did not contain any evidence of consolidating (or segregation) of pre-trial investigation materials following art.217 of the Criminal Procedure Code of Ukraine)**<sup>16</sup>.

*For example, materials used by the investigating officer to justify the need to within criminal proceedings No. 12013110060009084 apply a measure of restraint in relation to suspect A. I. Dzyndzyna were the following:*

*1) report of senior criminal investigator for special cases of the Department for Organized Crime Control of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv and interrogation protocol*

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- No.12013110060009084, recorded in the USRPTI suggesting possible criminal offence envisaged by art.348 of the Criminal Code of Ukraine.

14 Records of criminal proceedings:

- No.12013110000001244, recorded in the USRPTI suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine);

-- No.12014100030000714, recorded in the USRPTI. suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.12014100000000183, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.12014040030000053, recorded in the USRPTI. suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine.

15 Records of criminal proceedings:

- No.12014100000000274, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.1201400000000273, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

16 Records of criminal proceedings:

- No.12013110060009084, recorded in the USRPTI suggesting possible criminal offence envisaged by art.348 of the Criminal Code of Ukraine;

- No.12013110000001233, recorded in the USRPTI suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine);

- No.12014100000000285, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.1201400000000273, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.12013110100017867, recorded in the USRPTI suggesting possible criminal offence envisaged by part 4 of art.296 of the Criminal Code of Ukraine;

- No.12013110060009084, recorded in the USRPTI suggesting possible criminal offence envisaged by art.384 of the Criminal Code of Ukraine;

- No.12014100000000262, recorded in the USRPTI. suggesting possible criminal offence envisaged part 2 of art.294 of the Criminal Code of Ukraine;

*of the witness which were drawn up within criminal proceedings No. 12013110000001244,*

*2) protocol of video record examination drawn up within criminal proceedings No. 12013110000001250.*

*However, records of court proceedings No. 761/32662/13-к do not contain any evidence of joining (or disjoining) of materials in pre-trial investigation No. 12013110060009084, No. 12013110000001244 and No. 12013110000001250<sup>17</sup>;*

**j) materials used by investigating officers to justify the need to apply a measure of restraint were suspect interrogation protocols. Such protocols sometimes show that the interrogation was held in night-time (between 10 p.m. and 6 a.m.), and the investigating officers did not substantiate in the decision on the given investigation action why have an exception in this specific situation from the general rule set by *part 4 of art.223 of the Criminal Procedure Code of Ukraine* <sup>18</sup>.**

It happened that other investigative actions, in particular, examination of the place of the incident was also held in night-time<sup>19</sup>.

It should be noted that the legislator does not require justification and special reflection of the fact of taking a specific investigative (detective) action in the period between 10 p.m. and 6 a.m. in the protocol. But that is inappropriate! Since absence of the corresponding regulation in the sphere may lead to the situation when not always some abuses of the representatives of law-enforcement bodies can be identified, and steps are not taken against those guilty of such violation.

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17 Records of criminal proceedings No.12013110060009084, recorded in the USRPDI suggesting possible criminal offence envisaged by art.348 of the Criminal Code of Ukraine

18 Records of criminal proceedings:

- No.12013110000001233, recorded in the USRPDI suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine;

- No.12013110000001244, recorded in the USRPDI suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine;

- No.12014100030000714, recorded in the USRPDI. suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.1201400000000273, recorded in the USRPDI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;

- No.12014100000000241, recorded in the USRPDI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

19 Records of criminal proceedings No.1201400000000273, recorded in the USRPDI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine)

**Due to this part 4 of art.223 of the Criminal Procedure Code of Ukraine should be supplemented with the following provision: “Substantiation of the exceptional nature of the situation causing conducting investigative (detective) actions in night-time shall be mandatory”.**

**In a number of cases the motion on enforcement of a measure of restraint in the form of keeping in custody was submitted by the unauthorized investigating officer and/or approved by the unauthorized prosecutor. That violates the rights of victims and runs counter to the requirements of p. 1 of part 2 of art.39, part 2 of art.86 of the Criminal Procedure Code of Ukraine, paragraphs 4.3 of section I of the Regulation on Keeping the Unified Register of Pre-Trial Investigations (approved by order of the Prosecutor General of Ukraine as of August 17, 2012 No. 69) due to the following:**

a) the above officials, under the extract from the Unified State Register of Pre-Trial Investigations were not the ones conducting pre-trial investigation (and, correspondingly, procedural management) within the criminal proceedings related to the action the suspect is charged with<sup>20</sup>.

*For example, a motion was filed with Sviatoshynskyi Rayon Court of the city of Kyiv by senior investigating officer of the Investigative Department of Sviatoshynskyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv V. V. Shevchenko, approved by senior prosecutor of the prosecutor's office in Sviatoshynskyi Rayon in the city of Kyiv O. I. Ladnyi and made within criminal proceedings No. 12014100030000714 as of January 21, 2014, on enforcement of a measure of restraint in the form of keeping in custody to the*

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20 Records of criminal proceedings:

- No.12013110000001244, recorded in the USRPTI suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine;  
- No.12014100000000285, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;  
- No.12014100000000268, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine;  
- No.12013110100017867, recorded in the USRPTI suggesting possible criminal offence envisaged by part 4 of art.296 of the Criminal Code of Ukraine;  
- No.12014040030000053, recorded in the USRPTI suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine;  
- No.12014100000000262, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

*person suspected of committing a crime envisaged in part 2 of art.294 of the Criminal Code of Ukraine.*

*Such motion was filed by unauthorized investigating officer V. V. Shevchenko and approved by unauthorized prosecutor I. O. Ladnyi, since those officials, under the extract from the Unified State Register of Pre-Trial Investigations, were not the ones conducting pre-trial investigation and procedural management within criminal proceedings No. 12014100030000714. The evidence of the investigating officer's motion was based on the protocols of investigative actions taken within other criminal proceedings – under numbers 12014100000000179 and 12013110030013443. Hence, such evidence should be considered not to be the object of criminal proceedings No. 12014100030000714 and is inadmissible due to requirements of part 1 of art.88 of the Criminal Procedure Code of Ukraine.*

*Besides, senior investigating officer of the Investigative Department of Sviatoshynskiyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv V. V. Shevchenko and senior prosecutor of the prosecutor's office in Sviatoshynskiyi Rayon in the city of Kyiv O. I. Ladnyi were not authorized to submit and approve motions on enforcement of keeping in custody, this being confirmed by the fact that, under the extract from the Unified State Register of Pre-Trial Investigations, pre-trial investigation in proceedings No. 12014100030000714 is conducted by Desnianskyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv, and not Sviatoshynskiyi one<sup>21</sup>;*

b) as the result of the fact that decision on the change of jurisdiction of the proceedings was passed by the unauthorized prosecutor, further procedural decisions in the given proceedings – pre-trial investigation and filing a motion with the investigating judge about enforcement of a measure of restraint are illegal.

*Thus, under the resolution of the prosecutor's office in the city of Kyiv on disjoining of materials into a separate proceedings as of January 21, 2014 pre-trial investigation No. 12014100000000183 was assigned to Desnianskyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv. The ruling of deputy prosecutor of Desnianskyi Rayon of the city of Kyiv S. A. Pohorilyi determined the*

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21      Records of criminal proceedings - No.12014100030000714, recorded in the USRPTI. suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

*jurisdiction of the given proceedings already as Shevchenkivskiyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv. Under part 5 of art.36 of the Criminal Procedure Code of Ukraine, the Prosecutor General of Ukraine, head of regional prosecutor's office, their first deputies and deputies with their reasoned ruling are entitled to assign pre-trial investigation in any criminal proceedings to another pre-trial investigation body. Thus, change of the jurisdiction under the Criminal Procedure Code of Ukraine can be made by the prosecutor who is holding the office not lower than head of regional prosecutor's office. Thus, determination of territorial jurisdiction of pre-trial investigation No. 12014100000000183 as Shevchenkivskiyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv by the prosecutor's office of Desnianskyi district of the city of Kyiv was illegal. Hence, motion about enforcement of measure of restraint in the form of keeping in custody in respect to Yu. H. Pakhar was submitted by the unauthorized investigating officer of the Investigative Department of Shevchenkivskiyi Rayon Department of the Main Administration of the Ministry of Interior of Ukraine in the city of Kyiv<sup>22</sup>.*

**Investigating judges did not always take into account the requirement of part 4 of art.176 of the Criminal Procedure Code of Ukraine that the investigating officer's motion about enforcement of a measure of restraint should necessarily be approved by the prosecutor<sup>23</sup>.**

### **III. ABUSES AND VIOLATIONS COMMITTED BY JUDGES DURING DETENTION OF THE REVOLUTION OF DIGNITY PARTICIPANTS**

As it has already been indicated, investigating judges considering motions on enforcement of a measure of restraint to participants of protest events in most cases – it can be said without any exaggeration that in majority of cases – did not react to poor quality of materials provided, contradictions within information available, a number of procedural violations, gross nature of violations of rights and legal interests of persons who were charged with the actions in question. Quite often rulings of

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22 Records of criminal proceedings No.12014100000000183, recorded in the USRPDI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

23 Records of criminal proceedings No.12014040030000053, recorded in the USRPDI suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine

investigating judges not only reproduced the arguments available in motions submitted by investigating officers by content but also coincided with them textually. Courts themselves committed violations and passed illegal, unreasoned decisions. Majority of violations were repeated in relation to different proceedings, were systemic, this pointing to prejudice of judges in passing decisions on enforcement of a measure of restraint in respect to participants of the Revolution of Dignity. Analysis of procedural documents made by investigating judges over the above period allows to point out the following most characteristic violations.

**In some rulings of investigating judges on enforcement of a measure of restraint no single proof is mentioned at all<sup>24</sup>.** That is a direct and gross violation of the requirements of p.4 of part 1 of art.196 of the Criminal Procedure Code of Ukraine (under which in the ruling on enforcement of a measure of restraint the investigating judge indicates reference to evidence which supports such circumstances) and p. 2 of part 1 of art.372 of the Criminal Procedure Code of Ukraine (which says that in the reasons for the ruling the circumstances with reference to evidence should be indicated).

Almost most large-scale and wide-spread violation of the requirements of both the valid Criminal Procedure Code and the ECHR practice in relation to suspects – participants of the Revolution of Dignity was that **while considering motions on enforcement of a measure of restraint in the form of keeping in custody some investigating judges did**

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24 Rulings of investigating judges of:

- Shevchenkivskiyi rayon court in the city of Kyiv *N. B. Volokitina* as of December 10, 2013 made in criminal proceedings No. 12013110000001233 (suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine);

- Desnianskyi rayon court in the city of Kyiv *O. V. Zhuravska* as of January 24, 2014 made in criminal proceedings No.12014100000000268 (suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine);

- Desnianskyi rayon court in the city of Kyiv *O. L. Kotovych* as of January 24, 2014 made in criminal proceedings No.12014100000000268 (suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine);

- Dniprovskiyi rayon court in the city of Kyiv *V. A. Martynkevych* as of January 25, 2014 made in criminal proceedings No.1201400000000273 (suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine);

- ruling of investigating judge of Shevchenkivskiyi rayon court in the city of Kyiv *N. V. Siromashenko* as of January 21, 2014; made in criminal proceedings No.12014100000000183 (suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine);

- Desnianskyi rayon court in the city of Kyiv *I. M. Tataurova* as of January 24, 2014 made in criminal proceedings No.12014100000000241 (suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine);

- Obolonskyi rayon court in the city of Kyiv *T. O. Lishchuk* as of January 24, 2014 made in criminal proceedings No.12014100000000262 (suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine);

**not establishi whether the evidence provided by the prosecution proves the circumstances that testify to insufficiency of enforcement of milder measure of restraint aimed at preventing the risk(s) indicated in the motion** (in particular, the strength of social contacts of the suspect, his/her health condition, availability of positive characteristics and permanent residence, stable income source, absence of convictions, proper procedural conduct in the conditions of absence of any measure of restraint, etc. were not taken into account), thus violating the requirements of paragraphs 2,3 of part 1 of art.194 of the Criminal Procedure Code of Ukraine.

Also, in this the ECHR practice was not taken into account, since according to it while considering motions on selection of enforcement of a measure of restraint in the form of keeping in custody there should necessarily be considered the possibility of enforcing other (alternative) measures of restraint” (p,80 of the ECHR decision as of February 10, 2011 in the case “Kharchenko v. Ukraine” and p.29 of the ECHR decision as of October 11, 2010 in the case “Khairedinov v. Ukraine”)<sup>25</sup>.

**Sometimes**, while considering the motion of the investigating officer on enforcement of keeping in custody in respect to the suspect, **judges indicated that settling the issue of the type of a measure of ensuring the criminal proceedings they took into account the “personality of the suspect who had committed an especially grave crime”<sup>26</sup>.**

Such (and similar) substantiation of reasons shows obvious disrespect for the principle of presumption of innocence since investigating judges, counter to the requirements of part 1 of art.62 of the Constitution of

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25 Rulings of investigating judges:

- Babushkinvskiyi rayon court in the city of Dnipropetrovsk *M. M. Bibik*. as of January 27, 2014 (materials No.200/1167/14-к, No.200/1186/14-к, No.200/1178/14-к, No.200/1180/14-к, No.200/1183/14-к, No.200/1173/14-к, No.200/1182/14-к, No.200/1185/14-к, No.200/1171/14-к);

- Obolonskiy rayon court in the city of Kyiv *T. O. Lishchuk* as of January 24, 2014 (materials No.756/1190/14-к);

- Desnianskiy rayon court in the city of Kyiv *O. V. Zhuravska* as of January 24, 2014 (case No.754/1228/14-к);

- Solomyanskiy rayon court in the city of Kyiv *S. V. Zinchenko* as of January 23, 2014 (case No.760/1377/14-к);

- Holosiyivskiy rayon court in the city of Kyiv *L. S. Kalinichenko* as of January 24, 2014 (materials No.752/1350/14-к);

- Shevchenkivskiy rayon court in the city of Kyiv *N. V. Siromashenko* as of January 21, 2014 (materials No.761/2134/14-к).

26 Ruling of investigating judge of Solomyanskiy rayon court in the city of Kyiv *S. V. Zinchenko* as of January 23, 2014 (case No.760/1377/14-к)

Ukraine, found the suspects guilty of the crime even prior to case consideration on the merits.

Analysis of decisions made in relation to the suspects who participated in the Revolution of Dignity shows that while considering the appeal against rulings of investigating judges on enforcement of a measure of restraint, quite often **judges left out the appearance of new circumstances testifying to reduction of the risks of undue procedural conduct envisaged by part 2 of art.177 Criminal Procedure Code of Ukraine**<sup>27</sup>.

It is possible that, due to a serious nature of threat of illegal actions to public order and their gravity as of the moment motions on selection of measure of restraint are considered, the investigating judge came to a correct conclusion about availability of risks of undue procedural conduct of the suspect. However, as the result of the fact that, for instance, pre-trial investigation body took quite a number of investigative and procedural actions in the criminal proceedings, the risk of preventing the suspects from establishing the truth in the criminal proceedings considerably went down.

This, in its turn (in proportion to the degree of danger, the risk of which was still available in the criminal proceedings, as well as the task the pre-trial investigation body has to accomplish), enables to apply a milder measure of restraint in relation to the suspect.

Following the legal standpoints of the ECHR, improper substantiation of rulings on acknowledgement of decisions passed before on enforcement of measures of restraint relating to limitation of freedom (in particular, for the reasons of possible dodging of the suspect, defendant law-enforcement bodies) as legal constitutes a systemic problem. Since quite often judges in their decisions point to the same grounds throughout the whole period the measure of restraint is enforced. At the same time, one should indicate additional motives while providing the reasons for the extension of such measure. The ECHR has pointed to this in its decision in the case “Tkachov v. Ukraine” as of December 13, 2007, in which it states that court decision on extension of the period of keeping the defendant in custody did not contain any reason for such extension. Due to this the ECHR could not assess whether the risks of dodging of the applicant existed as of

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27 Rulings of the court of appeals in the city of Kyiv:  
- as of December 11, 2013 (case No.11-cc/796/2162/2013);  
- as of February 07, 2014 (case No.11-cc/796/270/2014).

the date of selection of the measure of restraint and whether they continued to justify extension of the period of deprivation of the claimant's freedom during the period he was kept in custody. Therefore, the ECHR came to the conclusion that the grounds for enforcement of keeping in custody in respect to the claimant were 'not relevant and sufficient'<sup>28</sup>.

Thus, the requirement of availability of valid legal grounds for any deprivation of freedom (during detention or keeping in custody) shall be valid during the whole period of deprivation of freedom. Therefore, one should state violation of the right to freedom and personal immunity for the reason that, in spite of initial lawfulness, at a certain moment those grounds stopped being valid.

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Due to this, the above practice of the ECHR **art.422 of the Criminal Procedure Code of Ukraine** "**Procedure for examination of investigating judge's ruling**" should be supplemented with part 3 as follows: "*In consideration of an appellate complaint against the investigating judge's ruling on enforcement of a measure of restraint there must be proven availability of risks envisaged in part 2 of art.177 of the Code as of the date of its enforcement, and in substantiating the need for its extension – also as of the date of complaint consideration*".

A gross violation of the legitimacy over the analyzed period also was the fact that some investigating judges, while passing decisions on enforcement of keeping in custody, **pointed to the grounds of enforcement of a measure of restraint that are not enshrined in the domestic legislation.**

*In particular, ruling of the judge of Obolonskyi rayon court in the city of Kyiv Yu. O. Shvachach as of January 25, 2014 points as one of the grounds for enforcement of keeping in custody (repeating the arguments set out in the investigating officer's motion) the fact that the action the suspect is charged with has become a high-profile one, and, hence, that violation, as the result of its special gravity and response among the public to it, could lead to social riots, which, in the opinion of the investigating judge, justifies enforcement of the most serious measure of restraint<sup>29</sup>.*

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28 Decision of the ECHR "Tkachov v. Ukraine" as of December 13, 2007. [Electronic resource]. Access mode: <http://5fan.info/meratyatyujqasaty.html>.

29 Ruling of investigating judge of Obolonskyi rayon court in the city of Kyiv Yu. O. Shvachach as of January 25, 2014 (case No.756/1183/14-к).

It should be indicated that the ECHR operates such evaluative notions the Ukrainian criminal procedure law does not have as: "a threat to public order" and "the need to protect the defendant" caused by such a threat (that cannot be the grounds for keeping in custody). The ECHR has (in particular, in §104 of decision "I.A. v. France" No. 28213/95 as of September 23, 1998<sup>30</sup> and in §136 of decision "Aleksandr Makarov v. Russia" No.15217/07 as of March 12, 2009<sup>31</sup>) indicated many times that "...some crimes as the result ... of social response to them can become the grounds for such violations of public order that can justify pre-trial keeping in custody, at least for a period of time".

Correspondingly, under special circumstances (and, certainly, in case of availability of sufficient evidence) this element can be taken into account from the standpoint of the Convention, at least in cases where domestic law fixes the notion of public order violation as the result of offence (as, for example, art.144 of French Criminal Procedure Code).

Legitimacy of detention or keeping in custody mentioned in the Convention presupposes, primarily, the correspondence of limitations allowed by p.1(c) of art.5 to domestic law of the country-signatory of the Convention.

In the Ukrainian law of criminal procedure there is no such goal of enforcement of custodial measures. Since domestic and international law are based on presumption of freedom, law should contain (and it does) an exhaustive list of grounds (or goals) in case of availability of which it is possible to enforce keeping in custody.

Hence, in Ukraine the threat of appearance of mass riots and rallies caused by a crime does not constitute the grounds for keeping in custody. In case there is a threat to the life or health of the suspect or defendant due to enforcement of the Lynch justice to him, decision should be passed on selection of security measure, and not measure of restraint.

A serious flaw of the practice of selection of a measure of restraint in the form of keeping in custody over the analyzed period was the fact that

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30 Decision of the ECHR "I.A. v. France") No.28213/95 as of september 23, 1998) // McBride J. The European Human Rights Convention and Criminal Procedure / J. McBride. – K.: "K.I.C.", 2010 – p.102.

31 Decision of the ECHR "Aleksandr Marakov versus Russia" No. 15217/07 as of March 12, 2009. // McBride J. The European Human Rights Convention and Criminal Procedure / J. McBride. – K.: "K.I.C.", 2010 – p.103.

in the “lion’s” share of decisions of national authorities **in their substantiation the same generalized forms and cliché wordings were used** relating to taking into account the gravity of the crime committed, the fact that the person can dodge pre-trial investigation bodies or court, prevent establishing truth in the case, continue criminal activity, impede fulfillment of procedural decisions already passed. However, unfortunately, investigating judges quite often **do not give any specific evidence to confirm their conclusions**<sup>32</sup>.

The ECHR points to inadmissibility of such situations quite a number of times (in particular, in §3 of decision “Ferrari-Bravo versus Italy” as of March 14, 1984<sup>33</sup>, §55 of decision “Murrey versus United Kingdom” as of October 28, 1994<sup>34</sup>, §35 of decision “Fox, Campbell and Hartley versus United Kingdom” as of August 30, 1990<sup>35</sup>, §143, 145 of decision “Boychenko versus Moldova” as of July 11, 2006<sup>36</sup>, §80 of decision “Mamedova versus Russia” as of June 01, 2006<sup>37</sup>, §77 of decision “Husein Esen versus Turkey” as of August 08, 2006<sup>38</sup>, §65-67 of decision “Bykov versus Russia” as of March 10, 2009<sup>39</sup>, §134 of decision “Aleksandr

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32 Rulings of of investigating judges of:  
- Sviatoshynskiy rayon court in the city of Kyiv *A. V. Domaratska* as of January 21, 2014 (case No.759/919/14-к);  
- Shevchenkivskiy rayon court in the city of Kyiv *A. V. Trubnikov* as of December 06, 2013 (case No.761/32665/13 к);  
- Obolonskiy rayon court in the city of Kyiv *Yu. O. Shvachch* as of January 25, 2014 (case No.756/1183/14-к).  
- Solomyanskiy rayon court in the city of Kyiv *O. B. Kalinichenko* as of January 23, 2014 (court proceedings No.760/1375/14-к).

- Babushkinskiy rayon court in the city of Dnipropetrovsk *M. M. Bibik* as of January 27, 2014 (materials No.200/1167/14-к, No.200/1186/14-к, No.200/1178/14-к, No.200/1180/14-к, No.200/1183/14-к, No.200/1173/14-к, No.200/1182/14-к, No.200/1185/14-к, No.200/1171/14-к (rulings made in relation to specific suspects within unified criminal proceedings No.12014040030000053).

33 McBride J. *The European Human Rights Convention and Criminal Procedure* / J. McBride. – K.: “K.I.C.”, 2010 - p.55.

34 McBride J. *The European Human Rights Convention and Criminal Procedure* / J. McBride. – K.: “K.I.C.”, 2010 - p.55.

35 McBride J. *The European Human Rights Convention and Criminal Procedure* / J. McBride. – K.: “K.I.C.”, 2010 - p.56.

36 McBride J. *The European Human Rights Convention and Criminal Procedure* / J. McBride. – K.: “K.I.C.”, 2010 - p.87.

37 McBride J. *The European Human Rights Convention and Criminal Procedure* / J. McBride. – K.: “K.I.C.”, 2010 - p.89.

38 McBride J. *The European Human Rights Convention and Criminal Procedure* / J. McBride. – K.: “K.I.C.”, 2010 - p.87.

39 McBride J. *The European Human Rights Convention and Criminal Procedure* / J. McBride. – K.: “K.I.C.”, 2010 - p.88.

Makarov versus Russia” as of March 12, 2009<sup>40</sup>, §78 of decision “Vitold Litva versus Poland” as of April 04, 2000, § 46 of decision “Varbanov versus Bulgaria” as of October 05, 2000<sup>41</sup>, “Taran versus Ukraine”<sup>42</sup>, etc).

**In a number of rulings of investigating judges on enforcement of keeping in custody** violating the requirements of part 5 of art.115 of the Criminal Procedure Code of Ukraine (which says that when a time limit is calculated in days and months, the day from which time limit starts running is not taken into account, with the exception of time limits for keeping in custody) and part 2 of art.197 of the Criminal Procedure Code of Ukraine (according to which duration of custody shall be calculated from the date of having been committed to custody, and if commission to custody was preceded by apprehension of the suspect, accused, from the date of apprehension) **the date of expiry of the ruling on selection of the measure of restraint was calculated in a wrong way**<sup>43</sup>.

Under p.18 of part 1 of art.3 of the Criminal Procedure Code of Ukraine, the mandate of the investigating judge includes exercising judicial control over observance of rights, freedoms and interests of persons in criminal proceedings. In p.1 of the Letter of the High Specialized Court of Ukraine for Civil and Criminal Cases as of April 04, 2013 No.511-550/0/4-13 “On Some Issues of the Procedure of Enforcing Measures of Restraint during Pre-Trial Investigation and Court Proceedings under the Criminal Procedure Code of Ukraine” the following is indicated: “the investigating

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40 McBride J. The European Human Rights Convention and Criminal Procedure / J. McBride. – K.: “K.I.C.”, 2010 - p.102.

41 Merdock Jim. European Convention on Human Rights and Public Order Protection (manual for police and law-enforcement officers) / Jim Merdock, Rosh Ralysh - K: “CENTRE” - p.57

42 Decision of the ECHR “Taran versus Ukraine” as of October 17, 2013. [Electronic resource]. Access mode: [http://search.ligazakon.ua/l\\_doc2.nsf/link1/SOO00603.html](http://search.ligazakon.ua/l_doc2.nsf/link1/SOO00603.html).

43 Rulings of investigating judge of:

- Shevchenkivskiy rayon court in the city of Kyiv *N. B. Volokitina*.as of December 10, 2013 (case No.761/32898/13-к);

- Dniprovskiy rayon court in the city of Kyiv *V. A. Martsynkevych* as of January 25, 2014 (case No.755/2432/14-к);

- Shevchenkivskiy rayon court in the city of Kyiv *V. M. Malinovska* as of December 03, 2013 (case No.761/32343/13-к);

- Holosiyivskiy rayon court in the city of Kyiv *L. S. Kalinichenko* as of January 27, 2014 (case No.752/1463/14-к);

- Babushkivskiy rayon court in the city of Dnipropetrovsk *M. M. Bibik* as of January 27, 2014 (materials No.200/1167/14-к, No.200/1186/14-к, No.200/1178/14-к, No.200/1180/14-к, No.200/1183/14-к, No.200/1173/14-к, No.200/1182/14-к, No.200/1185/14-к, No.200/1171/14-к (rulings made in relation to specific suspects within unified criminal proceedings No.12014040030000053).

judge shall diligently fulfill the duties of general protection of human rights following article 206 of the Criminal Procedure Code of Ukraine”.

Part 6 of art.206 of the Criminal Procedure Code of Ukraine states that if during any court hearing a person claims that violence has been applied to him/her during detention, the investigating judge should record the statement or accept a written statement from the person as well as ensure immediate forensic examination of the person, entrust the corresponding pre-trial investigation body to examine the facts set out in the person’s statement, take the necessary steps to ensure security of the person in line with the legislation. The investigating judge shall act following the procedure of part 6 of art.206 of the Criminal Procedure Code of Ukraine regardless of the availability of the person’s statement in case the circumstances the investigating judges knows of give the grounds for the substantiated suspicion of violation of the legislative requirements during detention.

**At the same time some investigating judges ignored the requirements on exercising judicial control over following of the rights, freedoms and interests of persons in criminal proceedings, in particular, did not take any actions in response to direct statements of suspects (and their defense counsels) claiming about violation in the course of detention or investigative actions.**

*Thus, suspect M. M. Havryliv in a court hearing (the fact being proven by the audio record) stated that during detention the law-enforcement officers beat him on the face, tore off his clothes, hit the camera he was taking pictures with, then forcefully took him to the car. Also, the suspect’s defense counsel O. M. Skazko in a court hearing stated that M. M. Havryliv is in a very grave physical condition and asked the judge to pay attention to the appearances of the suspect.*

*Besides, the suspect was brought to the court hearing on January 24, 2014 from Kyiv City Clinical Emergency Hospital. Judge T. O. Lishchuk was aware of the circumstance. Also, in the interrogation protocol of the suspect as of January 23, 2014 M. M. Havryliv told about his bad condition, militia lieutenant K. M. Koltsov in his report, interrogation protocols as of January 22 and 23, 2014 told about enforcement of physical violence to the suspect.*

*In spite of this, investigating judge T. O. Lishchuk did not take actions envisaged by part 6 of art.206 of the Criminal Procedure Code of Ukraine<sup>44</sup>.*

Similar violations were made not only by other investigating judges<sup>45</sup>, but by panels of judges of the appellate instance.

*Thus, the materials in court cases No. 761/32662/13-к, No. 760/1318/14-к, No. 752/1350/14-к, No. 761/32343/13-к contained the data about illegal violence in respect to the suspects during detention. In hearings in the appellate court in the city of Kyiv in cases No.760/1375/14-к, No.760/1318/14-к, No.760/1377/14-к, No.761/32665/13-к enforcement of violence against the suspects during detention was mentioned. In spite of that, the panels of judges did not take actions envisaged by part 6 of art.206 of the Criminal Procedure Code of Ukraine.*

Besides that, some investigating judges **did not perform their duty** set by part 6 and 7 of art.206 of the Criminal Procedure Code of Ukraine relating to **examination of following by the authorized bodies of the requirements of art.art.207 - 213 of the Criminal Procedure Code of Ukraine in detention of the person**, which fact is stressed in p.1 of the Letter of the High Specialized Court of Ukraine for Civil and Criminal Cases as of April 04, 2013 No. 511-550/0/4-13 “On Some Issues of the Procedure of Enforcing Measures of Restraint during Pre-Trial Investigation and Court Proceedings under the Criminal Procedure Code of Ukraine”.

*In particular, in relation to materials No. 200/1182/14-к, No. 200/1167/14-к, No. 200/1180/14-к investigating judge M. M. Bibik did not take actions envisaged by the law in response to the fact that in the detention protocol of the suspect there was no data on notification of close relatives or family members about the detention.*

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44 *Records of criminal proceedings* No.12014100000000262, recorded in the USRPTI suggesting possible criminal offence envisaged by part 2 of art.294 of the Criminal Code of Ukraine

45 *Records of criminal proceedings:*

- No.12014040030000053, recorded in the USRPTI. suggesting possible criminal offence envisaged by ч.1 ст.294 Criminal Code of Ukraine ;

- No.12013110060009084, recorded in the USRPTI suggesting possible criminal offence envisaged by ст.348 Criminal Code of Ukraine);

- No.1201410000000079, recorded in the USRPTI suggesting possible criminal offence envisaged by ч.2 ст.294 Criminal Code of Ukraine;

- No.12013110100017867, recorded in the USRPTI suggesting possible criminal offence envisaged by ч.4 ст.296 Criminal Code of Ukraine

**Violation of the precedent practice of the Strasbourg Court was appellate review of rulings on keeping in custody of the participants of the Revolution of Dignity in the absence of suspects.**

*The ECHR's decision in the case "Korneykova v. Ukraine" as of January 19, 2012 stated violation of p. 4 of art.5 of the Convention for the Protection of Human Rights and Fundamental Freedoms due to the fact that the appellate court was considering the complaint of the claimant against the ruling on selection of a measure of restraint in the form of keeping in custody in her absence (while the participation of the claimant's defense counsel was ensured for such consideration!). Under part 5 of art.9 of the Criminal Procedure Code of Ukraine criminal procedure legislation of Ukraine is applied with due account of the ECHR practice. Art.17 of the Law of Ukraine "On Fulfillment of Decisions and Enforcement of the Practice of the European Court of Human Rights" envisages that courts apply the ECHR practice as a source of law in case hearing.*

*Therefore, by conducting appellate review of rulings on keeping in custody in cases No.760/1375/14-к, No.756/1183/14-к, No.761/32898/13-к in the absence of suspects, judges of the appellate court of the city of Kyiv violated the above requirements of the Ukrainian legislation.*

The valid Criminal Procedure Code of Ukraine (part 1 of art.193) directly requires participation of the suspect only in case a motion on enforcement of a measure of restraint is considered (including the most serious one). And part 6 of art.193 of the Criminal Procedure Code of Ukraine states that the investigating judge, court may consider the motion on selection of a measure of restraint in the form of keeping in custody and select such measure of restraint in the absence of the suspect, defendant only in case the prosecutor proves that the suspect, defendant has been put on the international wanted list.

As far as obligatory presence of the person in consideration of his complaint against the investigating judge's ruling on selection of a measure of restraint in the form of keeping in custody for him by the appellate instance is concerned, the 2012 Criminal Procedure Code does not contain such a condition. Part 6 of art.405 of the Code says that default of the parties or other participants of criminal proceedings to be presented at the hearing does not prevent from conducting the consideration if such persons have been duly notified of the date, time and venue of the appellate consideration and have not informed about valid reasons for their default. And in case the

participants of the criminal proceedings whose participation is obligatory following the requirements of the Criminal Procedure Code (in this case it was not) or under the decision of the appellate court (court can possibly not pass such decision) do not arrive at a court hearing, the appellate consideration is adjourned.

**With due account of it, part 4 of art.405 of the Criminal Procedure Code of Ukraine should be supplemented (after the first sentence) with the following provision: “Participation of the suspect in consideration of a complaint against the ruling on keeping in custody is mandatory”.**

**Ignoring of the requirements of the law in relation to suspects – participants of the events in Ukraine over the period from November 21, 2013 to February 22, 2014 was also manifested in the fact that records of criminal proceedings were examined by some investigating judges<sup>46</sup> and judges of the appellate court without them being provided to the defense for familiarization purposes.**

*Thus, the panels of judges of the appellate court in the city of Kyiv, while reviewing rulings on keeping in custody (in cases No. 752/1350/14-к, No. 754/1228/14-к, No. 754/1229/14-к, No. 754/1232/14-к, No. 755/2432/14-к, No. 756/1183/14-к, No. 759/919/14-к, No. 759/1044/14-к, No. 760/1318/14-к, No. 760/1375/14-к, No. 760/1377/14-к, No. 761/32343/13-к, No. 761/32347/13-к, No. 761/32662/13-к, No. 761/32665/13-к, No.761/32898/13-к, No. 761/2134/14-к), along with demanding materials in court cases from local courts, demanded from the prosecution the materials in criminal proceedings within which the investigating officer filed motions on enforcement of a measure of restraint. Those records of criminal proceedings were examined by judges of appellate court and were not provided to the defense for familiarization purposes.*

The right of the defense to access the materials in criminal proceedings is closely related to the right to being notified about the accusation (since it is in the materials of the proceedings that there is the evidence substantiating the accusation). The ECHR has admitted it to be a violation of the right to fair trial, when one party in the proceedings is not

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46 *Records of criminal proceedings* - No.12014040030000053, recorded in the USRPTI. suggesting possible criminal offence envisaged by part 1 of art.294 Criminal Code of Ukraine

provided access to the corresponding documents (“McMichael v. United Kingdom”, “Foucher v. France”).

Under p.2 of part 3 of art.129 of the Constitution of Ukraine, equality of all the trial participants to law and court constitutes one of the main principles of justice administration. P.2 of the resolution of the Plenum of the Supreme Court of Ukraine No. 9 as of November 01, 1996 indicates that since the Constitution of Ukraine, as it is mentioned in its article 8, has the highest legal force, and its norms constitutes the norms of direct effect, courts, while considering specific cases, have to apply the Constitution as the act of direct effect whenever necessary.

P.3 of part 1 of art.7 of the Criminal Procedure Code of Ukraine states that equality to law and court constitutes one of the general principles of criminal procedure.

Under p.3 of part 3 of art.184 of the Criminal Procedure Code of Ukraine, the investigating officer’s motion on enforcement of a measure of restraint is accompanied by the confirmation of the fact that the suspect has been provided with copies of the motion and materials substantiating the need to apply the measure of restraint.

Under p.5 of the Letter of the High Specialized Court of Ukraine for Civil and Criminal Cases as of April 04, 2013 No.511-550/0/4-13, the investigating judge, court have to carefully check timeliness of provision of the suspect, defendant with copies of the motion and materials substantiating the need to apply a measure of restraint (at least three hours before the commencement of motion consideration); in case the investigating officer, prosecutor does not follow the requirements of art. 184 of the Criminal Procedure Code, the investigating judge considers the corresponding motion and does not satisfy it.

Hence, investigating judges and judges of the appellate court in the city of Kyiv, while reviewing rulings of investigating judges, took into account the evidence available in the materials of criminal proceeding with which the defense was not acquainted, while the prosecution was acquainted with them. Thus, such judges violated prescriptions of p.2 of part 3 of art.129 of the Constitution of Ukraine and p.3 of part 1 of art.7 of the Criminal Procedure Code of Ukraine.

**Besides, judges of appellate instance, while reviewing rulings on keeping in custody (in cases No. 752/1350/14-к, No. 754/1228/14-к, No. 754/1229/14-к, No. 754/1232/14-к, No. 755/2432/14-к, No. 756/1183/14-к, No. 759/919/14-к, No. 759/1044/14-к, No. 760/1318/14-к, No. 760/1375/14-к, No. 760/1377/14-к, No. 761/32343/13-к, No. 761/32347/13-к, No. 761/32662/13-к, No. 761/32665/13-к, No.761/32898/13-к, No. 761/2134/14-к), in spite of the fact that records of criminal proceedings were not the object of examination of trial court judges, on getting them, did not study them in the court hearings during appellate review. However, here (as it can be seen from the rulings of the appellate court) records of criminal proceeding still were taken by them into consideration.**

This testifies to the following:

- violation of the principle of direct examination of evidence, objects and documents envisaged by p. 16 of part 1 of art. 7 of the Criminal Procedure Code of Ukraine by judges of the appellate court in the city of Kyiv,

- the court of the appellate instance, while reviewing the case, went beyond the frame of review as envisaged by art.404 of the Criminal Procedure Code of Ukraine.

**Some court hearings relating to consideration of investigating officer's motions on selection of a measure of restraint were held in non-working hours set by the Internal Rules of Conduct, including in night-time.**

*In particular, consideration of the motion on enforcement of keeping in custody by investigating judge M. M. Bibik in relation to suspect V. M. Harkusha took place at 03:31 a.m., in relation to E. V. Shevchenko – at 04:25 a.m. On January 27, 2014, in relation to O. A. Bereza – at 6:46 a.m., etc.<sup>47</sup>.*

This limited the right of the suspect to defense since the defense did not have an opportunity to fully enjoy his right to collection and submission of objects, documents, other evidence to court.

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<sup>47</sup> *Records of criminal proceedings* No.12014040030000053, recorded in the USRPTI. suggesting possible criminal offence envisaged by part 1 of art.294 of the Criminal Code of Ukraine.

Besides, advocating the interests in the conditions of the defense being tired cannot be considered effective. The ECHR (§39-40 of decision of the ECHR “Makhfi v. France” No.59335/09 as of October 19, 2004) stresses that in court hearing of the case the defendants need to mobilize all their resources for the sake of their protection, but if tiredness causes the state when moral and physical resistance gets weakened at that important moment, such conditions cannot be adequate for exercising the rights to protection and adversarity.

The ECHR also stresses that the situation when the judges themselves are in the condition of reduced physical and mental stability is inadmissible; vice versa, the latter should be able to focus on case discussion and passing a well-grounded decision (§70 of the decision of the ECHR “Barbera, Messeque and Jabardo v. Spain” No.10590/83 as of December 6, 1988).

At the same time, Ukrainian legislation does not contain a norm prohibiting case hearing by the investigating judge, court in night-time. The above regulation of the situation in our state seems to be inadequate. Since if we justly regard excessive duration of procedural actions (in particular, interrogation) as a way of exerting physical (and sometimes – mental) pressure on the trial participant, then, certainly, we can assess in the same way the situation in which a trial participant will be forced to participate in case hearing by the judge or investigating judge in night-time.

Excessive scope of work (including work in night-time) often causes such mental conditions as indifference, absent-mindedness, nervousness, etc. In the conditions of high load (causing fatigue, absent-mindedness and irritability) the judge (investigating judge) often hasten to consider the cases accepted for proceedings to the damage of completeness and comprehensiveness of the examination of circumstances, and that may lead to inadequate procedural decisions, have a negative impact on the quality of justice. According to specialists, 20 to 30% of mistakes in important decisions are caused by deterioration in judges' health caused by fatigue<sup>48</sup>.

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<sup>48</sup> Sumarokov I.S. Court stress / I.S. Sumarokov // Rossijskaya justitsiya. – 2003. – No. 12. – P.60-63; Leonova A.B. A comprehensive professional stress strategy: from diagnostics to prevention and correction / A.B. Leonova // Psikhologicheskij jurnal. – 2004. – No. 2. – P.86-92; Markov I.I. Systemic approach to psychological judicial activity accompaniment / I.I. Markov, I.M. Cherevko // Rossijskoye pravosudiye. – 2008. – No. 1. – P.99; Sokolova L. To “burn” at work / L. Sokolova // Dzerkalo tyzhnia. – December 1, 2012. – No. 44 (92). – P.15.

Attention should also be paid to the fact that provisions of part 2 of art.367 of the 2012 Criminal Procedure Code of Ukraine (under which court shall be entitled [but not shall be bound!] to interrupt the meeting for having some rest when the night-time comes”), which actually allows judges to work for an indefinite time period (until they themselves decide to adjourn the meeting), contradict to a number of provisions of Section IV of the Code of Labour which set the norms of working hours duration (which cannot exceed a certain number of hours per day and week, including cases when a person is ready to work more!).

The legislator limits the time of uninterrupted work, primarily, to provide the employee with the possibility to regain the energy lost. Another reason for such limitation seems to be related to realization of the fact that physical and mental overload weakens the body which, in its turn, can lead to accidents, emergencies, other defects in work. Maybe, taking into account that fact, Traffic Regulations do not allow the driver either to drive a vehicle in the tired condition, and to hand over the wheel to other persons staying in the same condition (subparagraphs “b” and “d” of p.29 of the above Regulations)<sup>49</sup>

Due to the ECHR precedent practice and the above arguments **it is worth:**

**1) setting out the first sentence of part 2 of art.367 of the Criminal Procedure Code of Ukraine 2012 in the *imperative* form: “For the sake of having rest in cases envisaged by labour legislation court *shall interrupt* the meeting”;**

**2) part 2 of art.318 of the Criminal Procedure Code of Ukraine should be supplemented with the following provision: “Court hearing is conducted in day-time”.**

It so happened that **motions of the investigating officer on enforcement of a measure of restraint in the form of keeping in custody** contrary to the requirement of part 2 of art.27 of the Criminal Procedure Code of Ukraine and art.11 of the Code of Judicial Ethics **were considered in closed court sittings.**

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<sup>49</sup> Resolution of the Cabinet of Ministers of Ukraine “On Traffic Regulations” as of October 10, 2001 No.1306 (with further amendments and addenda). [Electronic resource]. Access mode: <http://zakon3.rada.gov.ua/laws/show/1306-2001-п>.

*Thus, as it can be seen from audio record of the hearing in proceedings No. 200/1167/14-к, judge M. M. Bibik did not allow the person who introduced himself as a free listener to the courtroom motivating it by the availability of documents with the label “For official use only” in the materials in the case.*

#### **IV. CONCLUSIONS**

Analysis of the practice of investigators and prosecutors as well as judges on the basis of publicly available materials relating to enforcement of measures of restraint in the form of keeping in custody within the criminal proceedings in respect to participants of public protests in the period from November 21, 2013 to February 22, 2014 shows that:

- pre-trial investigation bodies and prosecution bodies used the provisions of the Criminal Procedure Code of Ukraine on the possibility of enforcing a measure of restraint in the form of keeping in custody as a means of repressions. And often the requirements of the law were ignored as far as legal grounds of keeping in custody and the procedure of enforcement of such measure of restraint are concerned;

- motions compiled by investigating officers and approved by prosecutors relating to enforcement of a measure of restraint in the form of keeping in custody, in spite of gross legal faults available in them, information showing obvious manipulations and abuses, violation of the rights of suspects were in most cases taken by court unconditionally;

- courts typically did not refuse to apply a measure of restraint on the basis of the prosecutor’s motions, in spite of absence of any grounds envisaged by the law, as well as did not point to any legal “flaws” in the submitted materials;

- courts themselves have taken such actions and passed such procedural decisions that give grounds to conclude that they did not act as bodies of justice; did not ensure adversarity in settlement of the issue in question. An obvious prosecution approach can be traced, an attempt to by all means accomplish the wish of “law-enforcement” (in fact – repressive) bodies relating to isolation of certain people from the society in spite of

absence of grounds envisaged by the law for that and with violation of the procedure set;

- the reason for violations made and open abuses generally are not deficiencies of the current law regulating keeping in custody. The 2012 Criminal Procedure Code of Ukraine provides sufficient legal tools to pass well-grounded, objective and fair decisions in this category of criminal proceedings. One may speak about wide-spread cases when judges consciously made illegal decisions which constitute a form of abuse of power and responsibility for which comes regardless of the motives for taking such actions. Pressure of the then-power on the judges, interests of their service wrongly perceived and assessed by them, the fear of being fired or of other measures being taken against them for refusal to pass legal decisions are not the circumstances that acquit them in their violation of the law in enforcement of keeping in custody;

- violation of the requirements of the Constitution of Ukraine, provisions of international legal norms ratified by Ukraine, practice of the ECHR as well as directly and unambiguously formulated norms of the Criminal Procedure Code of Ukraine in settlement of the issue of keeping in custody has different manifestations. All in all, about thirty of such violations have been traced. In some criminal proceedings there is accumulation of violations. The majority of such violations, according to the materials of practice accessible in public, were made by courts of the cities of Kyiv, Odesa, Zaporizhzhia;

- the above violations resulted in groundless keeping in custody of the participants of public riot events in the course of pre-trial investigations in also groundlessly opened criminal proceedings as well as in the violation of their right to personal freedom;

- in spite of the generally positive assessment of the condition of Ukrainian legislation in this respect, for the sake of preventing future abuses in detention of individuals and enforcement of keeping in custody to them, separate recommendations are suggested *de lege ferenda* (in this material they are outlined in “colour”).

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