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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON PARLIAMENTARY OPPOSITION

IN UKRAINE

by

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BACKGROUND

A draft was submitted on the parliamentary opposition by several People's Deputies of Ukraine and it was adopted by the Verkhovna Rada of Ukraine in the first reading on 12 January 2007.

The purpose of the Law – as is described in its Preamble – is to define principles and guarantees of oppositional activities. Oppositional activity is regarded by the drafters as one of the pillars of democracy that ensures accountability and responsibility of state authorities and their officials to the voters. All that is done by means that have not been so far provided for in other laws of Ukraine.

GENERAL REMARKS

In Ukraine the work of the legislative organ, the Verkhovna Rada, is regulated not only by the Constitution but by several laws as well. This laws control among others the committees, the status and the conduct of national deputies. A separate law on the opposition is unusual in international comparison. The undisturbed functioning of the opposition in a parliamentary democracy is of vital importance. The rights of the parliamentary minority should be protected and guaranteed in multiple ways of which formalized and legally regulated procedures form only a part. The legal status of the opposition in a given national parliament varies enormously from country to country. The concrete solutions are determined by the constitutional framework, the electoral system, and other historical, political, social and cultural factors. The degree of institutionalisation of the opposition in the various parliaments differs from conventional recognition to formal regulation in the Constitution. The most general solution is that Rules of Procedures of the parliament provide the rules for the status and functioning of the opposition. The idea of bringing all basic questions concerning the opposition in one single law is acceptable. For example, in Portugal a special law of 1998 governs the status of the opposition.

Even if it is difficult to standardize the different solutions of the democratic countries, there is a general requirement of giving fair procedural means and guarantees for the parliamentary opposition. This is the necessary condition that the opposition should fulfil its role in the democratic system. The main missions of the opposition are:

- articulate the interests of their constituents,
- to control and oversight the government,
- to offer political alternatives to government policies.[1]

As regards the broader political context in Ukraine, a few factors should be mentioned.

[1] Procedural guidelines on the rights and duties of the opposition in a democratic parliament.

Introductory memorandum prepared by Mr Van Overmeire (Belgium, NR), Rapporteur, COMMITTEE ON RULES OF PROCEDURE AND IMMUNITIES (AS/Pro (2006) 3 23 January 2006 (22h) ardoc03_2006)

In the early years after gaining the independence of the country, the efficiency of the Parliament's work was threatened among others by the lack of a clear structuring of the Verkhovna Rada. Quite a large number of political parties were represented in the legislative assembly, and several factions were formed by the parties and individual national deputies. Therefore, in the late 90s, proposals were elaborated in order to define the party structuring of the Verkhovna Rada. This proposals were reflected in the constitutional reform project, too. The proposals were aimed at to the formation of a party parliamentary majority that could make the work of the parliament and the government more effective. The partition of the parliament in a parliamentary majority and a "parliamentary minority" (opposition) facilitates to avoid the fragmentation and disintegration of the legislative body. The Venice Commission in its consolidated opinion on the Ukraine constitutional reform project criticised the concrete proposals of the draft:

"It is a reality of modern pluralist democracies that political parties play an important role in structuring, influencing and helping the activities of the parliament and communicate them to the public. Bearing this in mind, the status of deputy can enable him or her, at parliamentary level, to associate with other deputies to form a parliamentary group, bloc or majority. This helps the formulation, transparency and stability of public life. However, the cementing of parliamentary adhesion and loyalties of a majority group or bloc, however important they may be for politics, conflicts with the rule that the will of parliament is formed by deputies who in each specific case vote according to their convictions. This is a fundamental element of the status of deputies elected by the people.

Consequently, the obligation to form, in a constraining (and continuous?) way, a 'parliamentary majority responsible for the shaping of state policy by direct participation in the formation of the composition of the Cabinet of Ministers of Ukraine' raises the problem as to the deputy's status of freedom and independence. However, if the deputies' groups (according to the draft) are not understood as being almost an organic majority parliamentary body, and if this majority group does not threaten the constitutional freedom of individual votes, the objections indicated would lose most of their substance."[2]

In adjudicating the efforts to create two main political groups in the Verkhovna Rada, the electoral system should be taken into consideration, too.

In systems based on majority rule (in The First Past the Post assemblies), like the so-called "Westminster model" of parliamentary democracy, two major parties or party groupings dominate the parliament. In this case, the two main political parties alternate as government and opposition. The opposition consisting of the most important minority party (political group) in parliament continuously is proposing alternative solutions, and offers an alternative to the government ("shadow cabinet").

In a proportional representation system, the parliamentary opposition consists of those political parties or groups and individuals who are not part of the governmental majority. The common denomination of these political forces or individual deputies is that they are not part of the ruling majority, and officially they do not support the government, otherwise they can follow sharply diverging political programs. They may have minimal or no desire to form a united bloc opposed to the government.

[2] CDL-INF (2001)011 CONSOLIDATED OPINION ON THE UKRAINE CONSTITUTIONAL REFORM PROJECT, Point 2.

The mixed electoral system of Ukraine is not a majoritarian system, while the suggestion for party structuring in the constitutional reform project and in the Law on the opposition as well is coming very close to the Westminster-based parliamentary system. In addition, the constitutional reform reintroduced the so-called imperative mandate, which aims at to prevent deputies from leaving the parties on whose lists they were elected. Although this was an attempt to improve party discipline, by enforcing deputies to remain in the party faction even when they persistently dissent from the party line, may undermine the central role of political parties in the functioning of parliament.

In generally, latest legislative efforts in Ukraine are somehow double-faced; the introduction of imperative mandate strengthens the powers of the political parties against the elected individual representatives, while the present draft law poses the opposition as a special institution in a certain sense above the parties and deputy faction (even if it is a voluntary association of the deputy factions).

DETAILED REMARKS

Article 1.1.1. defines the oppositional activity correctly as aimed at the oversight over activities of the parliamentary majority and the government, criticism of their activities, proposing and implementing an alternative program of development of Ukraine.

Article 1.1. defines also the notion of parliamentary majority and its official policy. The definition of the parliamentary majority has in this law only a complementary function, and does not go into the technical details of its formation. Article 1.1.1.4. on the official policy is rather vague, but at least incomplete. In a sociological sense the official program cannot be limited to the Program Action of the Cabinet, and to normative legal acts of the parliament and the government. Lot of political decisions reflect the official policy of the government, and they cannot be reduced to legal norms. Article 1.1.1.3 defines parliamentary opposition as a deputy faction or a voluntary association of deputy factions. Reference to individual deputies is missing though it appears in Article 4.1.

Article 3 on the oppositional activity declares its objective development of sovereign and independent, democratic, social and governed by the rule of law state in Ukraine. Opposition acts in the interests of Ukrainian citizens and the state – this statement is rather a solemn declaration because deputies represent also specific interests of their constituents. If this language refers to the idea that deputies represent the whole people then this is not in conformity with the imperative-type mandate introduced to the Ukrainian constitutional system. The same view is repeated in Article 23 on the responsibilities of the opposition.

The principles of oppositional activity are well-formulated. Maybe the language of the first principle (at least in the English translation) gives too much emphasize to the “State’s recognition” of oppositional activity; the emphasize should be rather on the element that the opposition is an inherent component of the democratic political system.

In Article 5 is strange that a law determines what should be regulated in the Constitution (in this case the rights of parliamentary opposition). In fact the Constitution should declare what subjects can or should be regulated by law. However, this Article declares important guarantees of oppositional activity.

Article 6 regulates the procedure of establishing the parliamentary opposition. This is usually covered only by conventions or casual accords, and not regulated by law, but the latter solution is not against international standards. The decision of a faction or of an individual deputy is formalized in the form of an application, and the list of members of the opposition is officially published.

The obligation of the opposition to publish its alternative program is acceptable as this is one of the functions of the opposition, however it reflects very much the philosophy of the Westminster-type parliamentary system. The one-month deadline is very hard, and obviously cannot be sanctioned (not even in a political sense).

Articles 8 and 9 on changes in the membership and the termination of the parliamentary opposition reflect the very formalized view of the entire question, and it is unusual in most democracies.

Chapter Two on the rights of the parliamentary opposition is very important, and mostly welcomed. It amends several laws, and introduces positions that need to be filled in by members or nominees of the opposition. Thus it enlists twelve parliamentary committees that have to be chaired by members of the parliamentary opposition. In the other committees the opposition is entitled to the first deputy chair position, as to the post of the Deputy Speaker. Their election is guaranteed at the plenary sitting by an open roll-call vote.

Article 12 enlists the rights of the opposition in the oversight of the majority and the government that are those usually exercised in democratic countries.

Article 13 regulates the participation of the opposition in the budgetary process. Here the rights of the opposition in my view are very large and severe. The purpose is obviously to minimalize the possibility of uncontrolled expenditures and government corruption. However, certain doubts can be raised how can the budget fund administrators fulfil technically the demands of the opposition for example in reporting on all single payments from the budget (13.3). Anyway, it is very remarkable that these important issues related to the budget will be discussed in the parliament, serving the principle of openness and public control.

Article 14 provides for the possibility of forming an oppositional government. This would be clearly the transplant of the English Shadow Cabinet where every Government position is mirrored by a shadow minister or spokesperson. The shadow minister is responsible both for criticizing the government and promoting alternative policies. This solution cannot be transplanted automatically to political systems with multiparty setting. Taking note of this fact, however, a shadow cabinet can improve the effectiveness and level of parliamentary work. Two powers of the shadow cabinet seem to be exaggerated. The preparation of the State Budget is the responsibility of the government, and not of the opposition. Therefore the control over the preparation of the Budget interferes with the powers and role of a responsible government in a parliamentary system. On the other hand, opposition should not take over or share governmental responsibilities. It would be also unusual that the head of the shadow cabinet could take part in Cabinet meetings. The meetings of the Cabinet of Ministers are not public, often confidential debates take place, and decisions of the responsible government are taken. I suggest to remove these two provisions.

Article 17 introduces “Opposition Day”, also a tradition of the British House of Commons. There every eighth day is opposition day on which the opposition sets the agenda. This institution would give notable chance for the opposition. The number of the opposition days could be raised from one day per session to a higher number. According Article 83 of the Constitution two regular sessions are held every year that means two opposition days per year.

The right to co-report on issues enlisted in Article 18 is similarly very important for the proper role of the parliamentary opposition.

Article 19 – by amending several laws – provides for the right of the opposition to participate in the formation of membership of state authorities as Accounting Chamber of Ukraine, Board of National Bank of Ukraine, National Council for TV and Radio Broadcasting and the High Council of Justice of Ukraine. Moreover, Parliamentary opposition shall nominate the Verkhovna Rada Commissioner for Human Rights. This provision gives possibility of a fair and in most equal representation of nominees of the opposition in these important authorities. The only problem with this provision is that according to the final and transitional provisions (Section VI, paragraph 3) officials elected to this posts previously would lose their office on the day this Law comes into force. This would have for officials elected for determined time period a retroactive effect that is prohibited by the Constitution.

Article 22 invests the opposition with the power of accusing state officials of corruption offence. It is not clear how would this power fit into justice system. At first sight it infringes upon the monopoly of accusation of the prokuratura. It is not the opposition's task and responsibility to charge state officials with criminal offences.

CONCLUSION

The law is welcomed as it strengthens and assures the rights of the parliamentary opposition that are necessary for the functioning of a democracy. Several provisions are of great importance for that scope. The provisions of the Law should be put and interpreted in its wider constitutional and legal context. The approval of the Law by the Commission is made under the interpretation that it broadens the rights of individual national deputies and deputy faction not pertaining to the governmental majority, in a certain sense it adds further rights and guarantees not only to the opposition as an institution of its own but to it constituting parts, too. This idea is reflected in Article 5.3 ("The oppositional activity shall not be a ground for granting privileges or imposing restrictions on the parliamentary opposition or individual deputies that belong to it.")

However, the unreasonably formalised way of establishing and terminating a parliamentary opposition that factions and individual deputies who do not join nor the majority neither the opposition form a third – "independent" – group which can manoeuvre in much more flexible way. This undermines the efforts to have two stable parliamentary groups in the Verkhovna Rada – majority and opposition. If the rights of factions and deputies becomes infringed, or they are in other way discriminated, it is even worse.

Finally, we should note that parliamentary relations are in the most countries regulated by conventions. Even the best legal regulation remains ineffective if the government and opposition do not want to cooperate.