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(VENICE COMMISSION)

**INFORMATION
ON THE DRAFT LAW
ON PARLIAMENTARY OPPOSITION
AND OTHER LEGISLATION
IN UKRAINE**

provided by

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Introduction

Analysis and conclusions presented in this report are provided on the request of the Venice Commission, dated April 18, 2007, regarding the specific provisions of Draft Law *on the parliamentary opposition* and are based on the current Ukrainian legislation :

- The Constitution of Ukraine, as revised, in effect on 1 January 2006
- The Law *On the status of people's deputies of Ukraine*
- The Rules of Procedure of the Verkhovna Rada of Ukraine, in effect on 7 April 2007,
- The Law *On the Committees of the Verkhovna Rada of Ukraine*
- The Law *On the rules of media coverage of the activities of public authorities and bodies of local self-government in Ukraine*
- Law of Ukraine *On election of people's deputies of Ukraine*
- The Law *On Broadcasting*
- The Law *On Advertising*

Analysis

For your convenience this analysis is prepared in a question-answer format, answering your questions in the same sequence as they were addressed by you:

A) Does the notion of “parliamentary opposition” under the terms of the Draft Law affect the structure of parliamentary debate ? (that is: are there political parties which are not part of the majority, nor of the "Opposition" with a capital "O", or individual MPs, who can lose their powers to pose parliamentary questions, to participate in general or sectorial debates, etc. ?)

The notion of “parliamentary opposition” as defined in Art.1 of the Draft Law *On Parliamentary Opposition* does not appear to be capable of affecting the structure of parliamentary debate.

The Ukrainian legislation on the status of an MPs as an independent actor and an individual member of the parliament does not make the scope of his/her rights to participate in debates, make speeches, submit interpellations etc., conditional on their membership in the majority, any individual group of MPs or being cross-benchers.

Art. 11 para. 1 of the Draft Law vests in the Opposition the right to nominate candidates for chairs of certain committees; whereas para 5 of said article effectively gives it the priority in nominating such candidates. Where the opposition fails to exercise this right, then the standard nomination procedure is followed.

Under the legislation in effect candidates for chairs of parliamentary committees are nominated by parliamentary factions irrespective of whether they are part of the majority or the opposition, inasmuch as the legislation is altogether silent on such distinction.

The above proposition of the Draft Law thus impinges on the right of any factions that do not belong to the opposition to take part in the formation of composition of these important committees.

Art. 7 para. 11 of the Draft Law provides that Verkhovna Rada of Ukraine dismisses any MP holding an office under the provisions of the first paragraph of this article (i.e. the chair of a certain committee) from such office on the proposal of the parliamentary opposition.

The effective legislation, however, sets forth a different procedure for dismissal of a committee chairperson. Under art. 7 para. 4 of the Law of Ukraine *On the Committees of the Verkhovna Rada of Ukraine*, apart from his/her own letter of resignation, a chairperson of a committee may be recalled for inadequate performance or on other grounds which prevent his/her discharge of duties on a motion started by the Speaker or the relevant committee. A decision to start a motion to recall the committee chair is taken by a meeting of the committee.

Now, therefore, Art. 7 para. 11 of the Draft Law divest both such committee and the Speaker of their right to initiate a recall, which may affect the proper functioning of parliamentary committees.

In cases as above while the Draft Law vests certain rights in the opposition it abridges the rights of those factions that are not part of it. This approach clashes with the provisions of art. 5 para. 3 of the Draft Law under which engagement in opposition activities may not give grounds for establishing any privileges or limitations as respects the parliamentary opposition or individual MPs who are members thereof.

B) Does the Draft Law impose new duties on parliamentary opposition which are not currently required (for instance, the requirement to produce an "oppositional program" which would go further than the electoral program) ?

Opposition activities in the Verkhovna Rada of Ukraine, as defined in the Draft Law (art. 1), are **the activities of the parliamentary opposition in the Verkhovna Rada of Ukraine, which are aimed at-**

- monitoring the performance of the parliamentary majority and that of the Cabinet of Ministers of Ukraine,
- challenging such activities,
- offering and implementing a national development program of Ukraine, as well as ways of its implementation;
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The Draft Law does not operate the notion of an 'oppositional program'; the term 'alternative' is used instead.

Under art. 6 para. 5 of the Draft Law, the parliamentary opposition is expected, within one calendar month of the date of its creation, to publish its alternative national development program in the parliamentary daily, the *Holos Ukrainy*.

Art. 14 of the Draft Law recognizes the right of the opposition **to set up an opposition government and a number of auxiliary bodies. The opposition government, inter alia-**

- develops alternative proposals in regard of the Cabinet of Ministers' action program and acts of the Cabinet of Ministers of Ukraine, and submits them as appropriate to the Cabinet of Ministers of Ukraine for its consideration;
- develops a plan of its activities, which is to be subject to approval by the parliamentary opposition;

Art. 23 of the Draft Law requires that the opposition-act in conformity to the Constitution and other laws of Ukraine;

- take into account the interests of the citizens of Ukraine and of the State;
- suggest an alternative to the official political programme of the majority and the Cabinet of Ministers of Ukraine as well as the ways of putting such alternative political programme into reality.

Specific questions

1). What are the rules (including the minimum number of MPs) which lay down the necessary conditions for the constitution of a parliamentary group/faction ? Will these rules be affected by the Draft Law on the Parliamentary Opposition ?

In accordance with **Clause 57 of the Parliamentary Rules**, parliamentary factions must be constituted at the first session of a new Verkhovna Rada before the Speaker is elected and its bodies established.

A parliamentary faction is formed on the political party basis by MPs elected on a party ticket (or a ticket formed by a bloc of political parties).

A political party (or a bloc of political parties) may form only one parliamentary faction of the Verkhovna Rada.

A parliamentary faction must have at least fifteen MPs as its members to be constituted.

An MP may be a member of only one parliamentary faction, which is formed by the political party (bloc of political parties) on whose ticket s/he has been elected.

If an MP elected on a ticket of a political party (bloc of political parties) fails to join a parliamentary faction set up by such party (bloc of political parties) or leaves such faction his/her office is to be lawfully terminated early, subject to the decision of the supreme governing body of such political party (bloc of political parties), on the date of such decision.

An MP who is excluded from his/her parliamentary faction becomes an independent MP.

Once the number of MPs in a parliamentary faction is less than 15, such faction is dissolved and its members become cross-benchers (art. 60 para. 4 of the Parliamentary Rules).

Under art. 58 of the Parliamentary Rules parliamentary faction is formed on the political party basis by MPs elected on a party ticket (or a ticket formed by a bloc of political parties); a political party (or a bloc of political parties) may form only one parliamentary faction of the Verkhovna Rada; a parliamentary faction must have at least fifteen MPs as its members to be constituted; and an MP may be a member of only one parliamentary faction, which is formed by the political party (bloc of political parties) on whose ticket s/he has been elected.

Both art. 81 para. 6 (2) of the Constitution of Ukraine and art. 59 para. 3 of the Parliamentary Rules contain provisions related to early termination of an MP's office in the event of his/her failure to join the faction of the political party on whose ticket s/he has been elected to the Parliament or leaving such parliamentary faction.

The Draft Law provides that MPs who have left their factions as a result of their disagreement with the policy thereof.

Art. 13 para. 5 and 6 of the Law of Ukraine *On the status of people's deputies of Ukraine* entitle an MP to freely leaving a parliamentary faction or not joining any.

2) Which competencies are given to these political groups/factions but not to individuals MPs ?

Under art. 83 para. 6 of the Constitution of Ukraine, following the outcome of the election and upon reconciliation of political positions a coalition of parliamentary factions is formed, which comprises a majority of the constitutional number of seats in the Verkhovna Rada of Ukraine, in its formed composition. One parliamentary faction may also enjoy the status of a coalition, provided such faction comprises a constitutional majority.

The principal privilege of such coalition is its right to form the government, i.e. the Cabinet of Ministers of Ukraine, insofar as it is upon the coalition that the Constitution endows the powers to name the Prime Minister and ministers of the Cabinet, excepting those who are appointed in office upon nomination by the President.

Furthermore, according to the Parliamentary Rules, the committees and commissions of the Verkhovna Rada of Ukraine, although their members are elected from among MPs, are constituted in such a manner as to ensure the proportional representation of the factions. The quotas of chairpersons, senior deputies and deputies to the chairmen of committees, committee secretaries and members are set, as provided by the Verkhovna Rada of Ukraine, in proportion to the numerical composition of the parliamentary factions, adjusted for the factual number of seats in the parliament. The candidates to above offices are named by the factions. Proposals as to both the numerical and personal composition of ad hoc and fact-finding commissions are also submitted by parliamentary factions. An ad hoc commission must comprise at least one MP from each faction. At the same time, some limitations apply, e.g., members of the same faction may not act as the head, deputy heads and secretary of the same ad hoc commission or parliamentary committee.

On the other hand, candidates to the office of the Chairperson, First Deputy Chairperson and other deputies to the Chairperson of the Verkhovna Rada of Ukraine may be nominated not by the factions, but individual MPs as well.

Art. 34 of the Parliamentary Rules provides that every parliamentary faction may delegate one of its representatives to speak on each item of the business of a plenary session whilst an individual MP may be recognized to speak on the reasons only if s/he has made submitted a proposition or amendment in writing.

The pre-emption of parliamentary factions as opposed to MPs may also be seen in certain other procedures provided by the Constitution of Ukraine and the Rules of the Verkhovna Rada of Ukraine.

For instance, it takes the signatures of at least 45 MPs to introduce a question before the Constitutional Court of Ukraine. And a motion to put confidence in the Cabinet of Ministers of Ukraine to vote or to establish an ad hoc fact-finding commission or to introduce amendments to the Constitution of Ukraine etc., must be seconded by at least one third of the constitutional number of MPs to be introduced to the Verkhovna Rada of Ukraine; the majority of motions are decided by a majority of the constitutional composition of the parliament.

This is certainly not to say that independent MPs are discriminated against, but the factions are in a better position as a matter of fact to gather enough votes to pass a decision sought.

3) With reference to the rights of the Parliamentary opposition set out in Articles 10-22 of the Draft Law, what are those which are (at least partly) granted by other legislative provisions, in particular the Rules of Procedure of the Verkhovna Rada and the Law on the Status of the Deputies of the Verkhovna Rada ?

Since the institution of opposition has so far not been regulated by any of piece of the Ukrainian legislation, no law or regulation vests any rights or duties in the parliamentary opposition as such.

At the same time, a few of the Opposition's rights as they are provided in the Draft Law replicate the rights that MPs enjoy according to their status.

The majority of the rights mentioned in articles 10–22 of the Draft Law are already vested in the people's deputies and parliamentary factions by the Constitution of Ukraine, the Law *On the status of people's deputies of Ukraine*, the Law *On the rules of media coverage of the activities of public authorities and bodies of local self-government in Ukraine*, and the Parliamentary

Rules.

In particular, the legislation which is in effect guarantees the following rights:

- to take part in the constitution of the government;
- to be represented in the governance of the Verkhovna Rada of Ukraine and its organs;
- to constitute and participate in the proceedings of parliamentary committees and commissions;
- to exercise parliamentary oversight;
- to associate with others in parliamentary factions;
- to make inquiries before public authorities and their leadership;
- to shape the agenda of and speak at plenary sessions;
- to participate in the law-making process;
- to participate in the budget process;
- to have access to information;
- to have their activities covered in mass media, irrespective of the latter's structure of ownership;
- to address public authorities, seeking elimination of breaches of legality;
- to have their activities supported with finance, information and technologies.

4) Does the right to speak in plenary session on behalf of the opposition provided for in Articles 15 and 16 of the Draft Law imply any reduction/limitation of the (duration of the) right to speak available to individual MPs or independent factions which would neither join the majority nor the opposition ?

Under art. 32 and 33 of the Parliamentary Rules the time for a report and a supplementary report at a plenary session is not less than 10 and 5 minutes, respectively. Speakers are each allowed 3 minutes to make a contribution to a discussion, a statement or a message, and another 3 minutes is given for a closing speech.

Art. 34 of the Parliamentary Rules provides that every parliamentary faction may delegate one of its representatives to speak on each item of the business of a plenary session.

In addition, MPs may personally address the session on 'other business' for not less than 15 minutes during the specially appointed time (1 hour twice a month) (see art. 25 para. 3 of the Parliamentary Rules). A speech from the rostrum requires a prior signing-up. An MP may be recognized, at his insistence, for a speech 'from the floor' to give reasons for their propositions or amendments made in writing.

As one may conclude from the above, the Rules of the Verkhovna Rada of Ukraine provide MPs with quite a few opportunities to state their position irrespective of what parliamentary faction they belong to or whether they are members of the coalition. Authorized representatives of the opposition may exercise their right to speak both by taking the floor on behalf of their faction and by signing up for a speech or suggesting proposals and amendments.

In view of the above circumstances, allowing a representative of the opposition to make a speech as long as 5 minutes on each item of the business of a plenary session, as well as an opportunity to make a 30 minutes' statement once during a regular session (see art. 15 and 16 of the Draft Law), may potentially impinge on the rights of cross-benchers. In view of the fact that the effective legislation does discriminate against the Opposition MPs so far as their right to speak is concerned, retaining such provisions in the Draft Law seems superfluous.

5) With reference to the Right to Access to Mass Media (Article 20 of the Draft Law), is there currently an obligation arising from the media legislation to broadcast activities of the Parliament, including the opposition ? Is a specific right to have access to mass media already enshrined in other legislative provisions ?

The matter of covering the activities of the Verkhovna Rada of Ukraine and those of MPs in the media is regulated by the Laws of Ukraine *On the rules of media coverage of the activities of public authorities and bodies of local self-government in Ukraine* and *On the status of people's deputies of Ukraine*.

Under art. 49 para. 5 of the broadcasting law, the state-run broadcasters must provide air time and forms in their programming so as to allow MPs make statements regarding their activities.

MPs may appear in other programmes according to the general rules.

Also art. 18 para. 1 of the of Ukraine *On the status of people's deputies of Ukraine* provides *inter alia* that 'a people's deputy shall have the right to make a statement related to his/her parliamentary activities at least once a month in the printed press, and also appear live or have a pre-recorded statement broadcast on the radio (up to 10 minutes) and on television (up to 20 minutes), free of charge, if such a medium is founded (co-founded) by public authorities, organisations or establishments run at public cost fully or in part. At least once a month an editorial board of newspapers founded by a public authority must publish a matter submitted by a people's deputy, allocating to this end up to 1/16 of its total printable space'.

Art. 9 of the Law *On the rules of media coverage of the activities of public authorities and bodies of local self-government in Ukraine* reads:

'The procedure of financing the coverage provided for the activities of public authorities by the media founded or co-founded by such authorities shall be determined in the contracts between such authorities and the editorial boards of such media, and also in the byelaws of such editorial boards.

Non-public media shall cover activities of public authorities on such terms as the relevant agreements entered between such authorities and the editorial boards of such media shall provide. Where no such agreement is entered upon, the editorial board of a non-public mass media outlet shall be free in its covering, under the laws of Ukraine, of activities of public authorities and bodies of local self-government, having defined in its byelaws the sources for financing the relevant costs.

A public authority, within the limits of public funds allocated to this end, shall book media:

- to produce special reports and commentaries of important current events and developments and also of the activities of public authorities;
- to carry live TV and radio broadcasts of their activities;
- to make arrangements for regular (problem- or topic-oriented) television and sound broadcasts and pages (columns) in the printed press;
- to produce and disseminate explanatory information and copyrighted matter related to the activities of public authorities;
- to record and archive video and audio material covering the activities of public authorities.

The State Budget of Ukraine shall have a separate line to finance media activities covering activities of public authorities.

Public authorities shall budget the costs related to covering of their activities in the media'.

In addition, art. 9 of the above-cited Law defines provides that the procedure and forms of the mandatory coverage given to the activities of the Verkhovna Rada of Ukraine by the audiovisual media (execution of government order) shall be determined by the Verkhovna Rada of Ukraine for the entire term of its office in a separate resolution of the Verkhovna Rada of Ukraine. The Chairperson of the Verkhovna Rada of Ukraine shall follow the standard procedure when organising activities of the Staff of the Verkhovna Rada of Ukraine regarding the negotiation of agreements with broadcasters for the purpose of their covering the proceedings of the Verkhovna Rada of Ukraine. The opposition may claim its quota in such mandatory coverage, which must be proportionate to its numerical composition. (see Art. 20 para. 2 of the Draft Law). In the meantime, the Law *On the rules of media coverage of the activities of public authorities and bodies of local self-government in Ukraine* is itself not devoid of problems and, according to CoE experts should be repealed insofar as its requirements impose a burden for daily operations the state-run mass media.

The privileges that MPs are entitled to as respects access to media are therefore a substantial constraint on the freedom of the media.

Art. 23 of the Law *On the rules of media coverage of the activities of public authorities and bodies of local self-government in Ukraine* provides that the space allocated for the coverage of activities of public authorities and publication of speeches of MPs in the state-run printed media financed with the public funds may not exceed 20 % of the total of any given issue. In non-public printed media, information on the activities of public authorities and speeches of MPs may be published on the contractual basis as provided by the laws of Ukraine.

If no such contracts is in force, the editors may cover the activities of the public authorities and local self-government as appropriate and at their own cost.

It might be noted in this context that MPs in general and members of the Opposition in particular do not appear to have any problems with their access to the press and television/radio.

On the contrary, the national information space has become too politicised in view of the high profile developments. Private broadcasters invite politicians to appear in their nightly talk shows. The standards of the free press which have now improved make it possible to invite members of the Coalition, Opposition and cross-bench alike so that the audience could be exposed to a difference of opinion.

This seems to be in a striking contrast to the 'pre-Orange' period when the opposition would not find it easy to get access to television to state their position, the latter therefore would appear distorted while some *temniks* effectively banned images of some 'difficult' politicians from the air. As a result, back in September 2002, MP Yulia Tymoshenko and her company of other MPs resorted to force, trying to access to a TV studio on the *First national Channel* after a number of failed attempts to get air time.

Access of MPs to mass media is therefore regulated by the effective legislation in many a word and detail. In fact, article 20, para. 1, 2, and 4, of the Draft Law essentially draws on the effective legislative provisions on access to information, and emphasizes a separate coverage for the Opposition.

Under art. 13 para. 4 of the Law *On Advertising* it is prohibited to insert commercial breaks while broadcasting the proceedings of the Verkhovna Rada of Ukraine, Supreme Council of the Autonomous Republic of Crimea, official public events and ceremonies, addresses of the President of Ukraine, Chairperson of the Verkhovna Rada of Ukraine, Prime Minister of Ukraine, Chief Justice of the Constitutional Court of Ukraine, Chief Justice of the Supreme Court of Ukraine, MPs, Cabinet ministers, and also broadcasting religious service, children's and news programmes.

A similar rule is established in the Law of Ukraine *On election of people's deputies of Ukraine*, applicable also to election campaigns (art. 69 para. 5).

Thus, introducing a similar ban in relation to the programs covering activities of the Opposition, as is proposed in art. 20 para. 3 of the Draft Law, may be deemed discriminative against other agents of state authority; moreover, it would make no sense, as the description of programming provided in art. 13 para. 4 does encompass certain aspects of activities of the Opposition.

The ban on comments and criticism 20 minutes before and after a broadcast covering activities of the Opposition not only appears superfluous but may, on one hand, benefit the Opposition to the extent that their activities are covered by audiovisual media and, on the other hand, limit without justification the freedom of expression and media to the extent that it concerns freedom to initiate and support public discussion.

6) Is the term “parliamentary opposition” already used in the Rules of Procedure of the Verkhovna Rada and/or in the Law on the Status of the Deputies of the Verkhovna Rada ? In the affirmative, which rights and obligations are attached to the parliamentary opposition and what definition is used to determine who forms part of the parliamentary opposition?

The effective legislation of Ukraine does not operate the notion “opposition”. Nor is the term mentioned in the Parliamentary Rules.

Likewise, no special legal control applies to the rights and duties of those MPs who have not joined the parliamentary majority.

Under the Constitution of Ukraine, the Law *On the status of people's deputies of Ukraine* and the Parliamentary Rules, the scope of rights and immunities of MPs does not depend on their affiliation with any parliamentary faction.

The Parliamentary Rules use the terms ‘people's deputy’ and ‘parliamentary faction’. The Draft Law is the first to give a definition of ‘opposition activities’.

7) Do the Rules of Procedure of the Verkhovna Rada spell out a “Right to Participate in Formation of Membership of State Authorities” (see Article 19 of the Draft Law) ?

Art.85 of Constitution and Clauses 204 and 206 of the Parliamentary Rules do regulate the matters defined in art. 19 of the Draft Law.

Under the procedure now in effect, the Chairperson of the Verkhovna Rada of Ukraine names candidates to the Auditing Chamber, the Board of the National Bank of Ukraine, the National Broadcasting Council of Ukraine, the High Council of Justice of Ukraine, and the Commissioner of the Verkhovna Rada of Ukraine for Human Rights. On the instructions of the Chairperson of the Verkhovna Rada, those parliamentary committees that have command over the relevant matters present their opinion on such candidates. Representatives of parliamentary factions and individual MPs contribute to the discussion. The Verkhovna Rada of Ukraine votes for the members of the Auditing Chamber and the High Council of Justice and the candidates for the office of the Human Rights Commissioner by secret ballot.

Decisions as to the members of the Board of the National Bank of Ukraine and the National Broadcasting Council of Ukraine are taken in an open vote by a majority of the constitutional composition of the parliament.

The division of nominees between the Coalition and Opposition, as proposed in the Draft Law, is not enshrined in the effective legislation.

The quota that the Draft Law proposes to reserve for the Opposition so that they can contribute to the formation of membership of public authorities is doomed to remain a mere declaration, as there is no implementing mechanism and decisions in the parliament are taken in conformity with the clearly prescribed voting rules

Also, the Draft Law proposes to set up a new agency within the executive branch of government- the State Committee of Ukraine for Financial Monitoring, defines its status and the rules of personal membership. This would call for amending the law on the Cabinet of Ministers of Ukraine, let alone budget, but the Draft Law, however is silent about that.