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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON THE PARLIAMENTARY OPPOSITION IN UKRAINE

Adopted by the Venice Commission
At its 71st Plenary Meeting,
Venice, 1-2 June 2007

On the basis of comments by

Mr Sergio BARTOLE (Substitute Member, Italy)
Mr Peter PACZOLAY (Member, Hungary)
Mr Angel SANCHEZ NAVARRO (Substitute Member, Spain)

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I. Introduction

1. By a letter of 17 January 2007, Mr Viktor Baloha requested, on behalf of the President of Ukraine, an expert opinion from the Venice Commission on the Draft Law on the Parliamentary Opposition of Ukraine (CDL 2007)006). This Law was adopted in first reading by the Verkhovna Rada of Ukraine on 12 January 2007.

2. Messrs Sergio Bartole and Peter Paczolay were appointed as rapporteurs and presented comments (CDL(2007)029 and 028 respectively). At its 70th Plenary session (Venice, 16-17 March 2007), the Commission examined the Draft Law and authorised the rapporteurs to finalise the text of the preliminary opinion (CDL-AD(2007)015) on the basis of the discussions and in co-operation with Mr Angel Sanchez Navarro. Given the importance and complexity of the matter, which is due, inter alia, to the fact that the status and position of the opposition is not only determined by the Draft Law but also by several other legislative provisions and a number of unwritten agreements and practices, the Commission decided to pursue its reflection with a view to preparing a more thorough opinion.

3. Against this background, the Commission resolved to examine in greater detail the relationship between the Draft Law and other important statutory provisions governing the status and powers of the members of the Verkhovna Rada. The Commission was assisted in this technical task by a Ukrainian independent legal expert, Ms Nataliya I. Petrova, who submitted an expertise providing information on the draft Law on Parliamentary Opposition and other legislation (CDL(2007)056).

4. Mr Angel Sanchez Navarro was appointed as rapporteur, together with Messrs Sergio Bartole and Peter Paczolay, who accepted to continue to act in the same capacity. Based on further reflection and additional information from various sources, including the aforementioned independent expertise, the present opinion was adopted by the Commission at its 71st Plenary session (Venice, 1-2June).

II. Institutionalising the notion of "parliamentary opposition": legal and political implications

A. Creation of new categories through rigid rules

5. Neither the term "Parliamentary Opposition" nor the concept of "Oppositional Activity" is currently used in the Ukrainian Constitution and legislation. Hence the scope of rights and immunities of MPs, which is defined by the Constitution, the Law on the Status of People's Deputies of Ukraine and the Rules of Procedure of the Verkhovna Rada of Ukraine, does not depend on their affiliation with any parliamentary faction.

6. By its specific nature as a general law and its bipolar character resulting from its definitions listed in Article 1, the Draft Law builds on a very strong division between ruling coalition and opposition. Approving a special status for the opposition and entrenching it in a special law can make sense when this is meant to reinforce the political and institutional position of the strongest opposition party, which may become tomorrow's majority. This may be the case in systems based on majority rule, where the opposition consists of the most important minority party in Parliament, which is ready to succeed the Government when it has resigned (Westminster model). The two main political parties usually alternate as Government and Opposition in a majority system, which is often bipolar.

7. The Ukrainian Parliament has so far been rather characterised by a plurality of political parties, blocs, factions and independent MPs. Political and institutional life change regularly, as do numerical majorities in the Verkhovna Rada as a result of MPs switching parties. Under such circumstances, the Venice Commission considers that it can be very difficult – and in some cases problematic from the non-discrimination viewpoint – to introduce rigid rules, especially when they tend to give specific powers to some political actors to the detriment of other, equally legitimate to speak as representatives of the citizens.

8. As the Commission already pointed out in its preliminary opinion,[1] the rigidity of the procedure chosen to establish and terminate the "Parliamentary Opposition" raises concerns since it can have adverse impacts on the freedom and independence of the mandate of the deputies which would result from such a cementing of parliamentary adhesion and loyalties of a majority group.

B. Possible infringement on existing rights

9. While recognising the merits of strengthening the position of those MPs and factions not in the ruling majority, the Commission would at the same time reiterate its warning against the risk of infringing upon the existing rights of independent MPs and factions which will neither join the majority nor the opposition.[2] These rights are currently guaranteed by several pieces of legislation, such as the Law On the Status of People's Deputies of Ukraine, the Rules of Procedure of the Verkhovna Rada of Ukraine and the Law On the Committees of the Verkhovna Rada of Ukraine. In the light of the innovations provided for in the Draft Law, some of these rights seem under more particular threat.

10. For example, Article 11 § 1 of the Draft Law gives the opposition the right to hold a number of posts such as the chairmanship of several parliamentary committees.[3] It is only when the opposition fails to exercise this right that the general nomination procedure is followed (Article 11 § 5). Under current legislation though, 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 silent on such a distinction. Article 11 of the Draft Law is therefore likely to result in an infringement on the right of those factions which do not belong to the opposition to take part in the formation and composition of these important committees.

11. The same problem arises with Article 11 § 7 of the Draft Law, which provides that the Verkhovna Rada dismisses any MP holding office under the provisions of the first paragraph of this article (i.e. the chair of a certain committee) from such office upon submission of the parliamentary opposition. Under current legislation, however, a different procedure for the dismissal of a committee chairperson is foreseen: according to Article 7 § 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 initiated by the Speaker or the relevant committee. A decision to initiate a motion to recall the chairperson of the committee

[1] See CDL-AD(2007)015, ad §§ 8-12.

[2] See CDL-AD(2007)015, ad § 26.

[3] These are the committees on : freedom of speech and information; legislative provision of law-enforcement activities; human rights, national minorities and inter-ethnic relations; budget; rules of procedure; functioning of the judiciary; oversight over protection of rights of industrialists, entrepreneurs and investors; oversight over adherence to social standards and ensuring proper citizens' living standards; activities of state monopolies; energy safety; agricultural policy and land affairs; health care, science and education.

is taken by a meeting of the committee. Article 7 § 11 of the Draft Law therefore substitutes the relevant committee and the Speaker by the opposition as regards the right to initiate a recall, a state of affairs which goes beyond a mere technical change and is likely to have significant political consequences.

12. It is not clear whether 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 those individual MPs or independent factions which would neither join the majority nor the opposition. Indeed the effect of these provisions on the corresponding articles of the Rules of Procedure[4] is not specified in the Draft Law. In the same vein, the Commission is not able to determine whether the conditions and procedure applicable to the constitution of parliamentary factions, which are currently regulated in Articles 57-58 of the Rules of Procedure, will be affected by the entry into force of the Draft Law. The main question in this respect is whether or not the right to create a coalition outside the bipolar affiliation (majority or opposition) will remain available. This freedom is essential and should be kept.

13. In the light of the foregoing, it seems that when the Draft Law grants certain new rights to the opposition, this entails the simultaneous risk of curtailing the existing rights of independent MPs and of those factions which will not join the opposition. It is at least a matter of controversy since the clause contained in Article 5 § 3 of the Draft Law, according to which "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", will not be sufficient to provide a clear rule of interpretation in such cases of conflicting norms.

III. Integration of the Draft Law into the Ukrainian legal order

14. Should the Ukrainian authorities stick to their idea of reinforcing the position of the parliamentary opposition through the enactment of a specific law, increased attention should be paid to the proper integration of this law into the Ukrainian legal order. It is indeed of the utmost importance to avoid the coexistence of insufficiently co-ordinated or even conflicting norms in this field, failure of which will inevitably result in legal uncertainties and confusion in the exercise of state power.

15. Bearing in mind this requirement, the Commission is of the opinion that the provisions of the Draft Law dealing with its entry into force, which are contained in Section VI entitled "Final and Transitional Provisions", are not sufficient to ensure the smooth introduction of the rules on the status of the opposition in the Ukrainian legal order.

16. Whereas item 1 of Section IV provides that the Law on the parliamentary Opposition shall enter into force on the day of its publication, it is not clear whether this means that conflicting rules entrenched in other legislation will automatically be abrogated and/or adapted. In principle this should be the case for the relevant provisions of the Budget code, the Law on the Accounting Chamber, the Law on the High Council of Justice, the Law on the National Bank, and the Law on the National Council for TV and Radio Broadcasting as the corresponding changes have been directly incorporated in the Final and Transitional Provisions. This solution is to be welcomed as it enables both the legislature and the public to know exactly which legislative changes will be brought to which laws.

[4] Articles 32-34 of the rules of Procedure.

17. Regarding the numerous changes which will be rendered necessary in the Rules of Procedure of the Verkhovna Rada of Ukraine, the Draft Law is much less clear since it merely states in item 4 of Section VI on Final and Transitional Provisions that "the Verkhovna Rada of Ukraine shall bring its Rules of Procedure in compliance with this Law within 30 days after the day of its enactment". [5] This means that a great deal of uncertainty will prevail until such changes are adopted. Furthermore, such a solution constitutes no guarantee whatsoever that the amendments to the Rules of Procedure will eventually be compatible with the Law on the Parliamentary Opposition since these amendments will have to be debated and enacted through the regular legislative procedure, with the risk of further delays and compromise solutions not necessarily in line with the Law on the Parliamentary Opposition.

18. The Draft Law also provides under Article 19 § 10 for the setting up and composition of a new executive body, namely the State Committee of Ukraine for Financial Monitoring. The effective functioning of this body would however require amendments to the Law on the Cabinet of Ministers but the Draft Law is silent about them, thus adding to the existing legal uncertainty. Due to its weaknesses in addressing the amendments to be passed in other pieces of legislation, the Draft Law therefore risks being ineffective.

19. As concerns the right to access to the mass media, (Article 20 of the Draft Law), the Commission considers that there is a risk of over-regulation in Ukraine since a number of legislative provisions deal in excessive detail with the obligation for the media to broadcast activities of the Parliament and its individual members. Instead of adding new norms, efforts could therefore be made to streamline existing regulations in this sphere, which would in the end strengthen freedom of the media in Ukraine.

IV. Conclusions

20. The Draft Law on the Parliamentary Opposition contains several positive steps intended to reinforce the role and position of the opposition. It entails, however, a real risk of curtailing the existing rights of independent MPs and factions which will neither join the majority nor the opposition. It is therefore essential that the new rights created for the benefit of the opposition should not infringe upon the basic rights of all political factions and MPs to participate in parliamentary proceedings. The bipolar affiliation (majority or opposition) introduced by the Draft Law through a set of rigid rules on the constitution and activity of the parliamentary opposition should be eased with a view to enabling other independent actors to continue to play a role in the political and institutional control of power. Care should be taken to try and settle in the Draft Law itself the numerous implications on other pieces of legislation with a view to avoiding uncertainties and subsequent contradictions. Ideally, a new status of the opposition should be widely supported by the main political forces in Ukraine so as to ensure that it does not meet the sole interest of the current majority.

[5] In this respect item 4 seems at odds with item 5 of Section VI on Final and Transitional Provisions, which states that « *The Cabinet of Ministers of Ukraine shall submit to the Verkhovna Rada within 30 days after the day of enactment of this Law proposals on bringing the Rules of Procedure of the Verkhovna Rada of Ukraine in compliance with the Constitution and this Law, including a draft law "On the Rules of Procedure of the Verkhovna Rada of Ukraine*".