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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE LAW ON AMENDMENTS TO THE LEGISLATION CONCERNING THE STATUS OF DEPUTIES OF THE VERKHOVNA RADA OF THE AUTONOMOUS REPUBLIC OF CRIMEA AND OF LOCAL COUNCILS

IN UKRAINE

On the basis of comments by

Mr Sergio BARTOLE (Substitute Member, Italy)
Mr Peter PACZOLAY (Member, Hungary)

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I. Introduction

1. By 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 Law on Amendments to Certain Laws concerning the Status of Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea and Local Councils of Ukraine (CDL 2007)003). This Law was adopted by the Verkhovna Rada of Ukraine on 12 January 2007.

2. Messrs Sergio Bartole and Peter Paczolay were appointed as rapporteurs. The present opinion, which was drawn up on the basis of their comments (CDL(2007)… and CDL(2007) …), was adopted by the Commission at its … Plenary session (Venice, …).

II. Historical and comparative analysis

3. The "recall of deputies" (or "representative recall") is a well-known institution, though not widespread. It provides the possibility for the constituency to remove from office an elected representative before the end of his/her term. As such, the recall is considered an instrument of direct democracy[1].

4. Historically, in Europe the Paris Commune (1871) introduced this institution, which was later used by Lenin who submitted a draft decree on the right of recall on 19 November 1917. Lenin laid down the ideological ground for Soviet and other Communist electoral systems, which later adopted the institution of the representative recall. This constitutional right has, however, been never exercised in the Soviet system.[2]

5. This institution also exists in the United States of America, where eighteen states allow the recall of state officials, although successful recalls are extremely rare. In Canada, British Columbia also allows the recall of representatives.

6. The institution of the representative recall, whereby the constituency has a right of continuous control over its elected representatives, is linked to the imperative mandate theory of representation. Under this theory, representatives are obliged and supposed to act in accordance with the mandate they received from their constituencies.

7. In European countries, on the other side, the theory of the free mandate of representatives is generally and widely accepted. According to this theory, members of Parliament are regarded as representatives of the whole people and are responsible only to their conscience. As a consequence, they should abide only by the rules and no other orders or instructions can be binding on them. Several constitutions even prohibit the possibility of giving instructions to deputies (Belgium, France, Germany, Italy, Switzerland). Outside Europe, the imperative mandate exists in countries like China, India, Nigeria, South Africa, Cuba, Vietnam or North Korea.

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[1] The Venice Commission's Report on electoral system stated: „Recall is a semi-direct democratic procedure whereby a public office holder who no longer gives satisfaction to the electorate may be dismissed…. It should be noted that that the procedure is a rarity in this day and age, since the regular holding of elections ensures greater effective control over elected representatives." CDL-AD(2004)003, p.85-86.

[2] The only known exception is the practice of the right of recall in Hungary in 1989, shortly before the collapse of the one-party system. Several initiatives for representative recall were launched at that time and one recall election was held (unsuccessfully). 18 deputies however resigned as a result of their being challenged by an attempt to recall them.

III. The situation in Ukraine

8. The Law under examination must be seen in the wider context of the evolving relations between the executive and the legislative branches of the state power in Ukraine. It has proven increasingly difficult to produce stable majorities in Ukrainian Parliament, especially after the last general elections. Furthermore, relations between the Presidency and the parliamentarian coalition from the majority have at times become tense, a state of affairs which may explain various attempts to change or adapt the current system with regard to the activity of the Verkhovna Rada and other representative bodies. The Law under examination and other legislation, such as the Draft Law on the Parliamentary Opposition on which the Venice Commission has also been requested to adopt an opinion (CDL(2007…), would bring significant changes to the current system by altering the relations between political parties and the status of deputies.

9. In the context of its earlier work on the Constitution of Ukraine, the Venice Commission has examined the possibility to decide on the termination of a deputy's mandate prior to the expiration of his/her term in office for his/her failure, as having been elected from a political party (an electoral bloc of political parties), to join the parliamentary faction representing the same political party (the same electoral bloc of political parties) or his/her withdrawal from such a faction. The Venice Commission clearly stated that such a possibility would be contrary to the principle of the free and independent mandate of the deputies and would raise issues of consistency with other provisions of the Ukrainian Constitution.[3] This critical assessment has subsequently been confirmed by the Venice Commission in relation to various attempts to redraft the relevant constitutional provisions providing for the early termination of a deputy's mandate.[4]

[3] See Consolidated Opinion on the Ukraine Constitutional Reform Project, adopted by the Venice Commission at its 47th plenary session on 6-7 July 2001, CDL-INF(2001)11 ad Point 1: « *In particular, the establishment of a constraining link between an elected national deputy (who belongs to the electoral list of a party or bloc of parties) and his or her parliamentary group or bloc has the effect that a breach of this link (withdrawal or exclusion of a deputy belonging to a particular parliamentary group or bloc from his or her parliamentary group of bloc) would therefore ipso facto put an end to the parliamentary mandate of the deputy concerned. This would be contrary to the principle of a free and independent mandate. Even if the question of belonging to a parliamentary group or bloc is distinct from the question of submission to the group or bloc's discipline in concrete situations, freedom of mandate implies the deputy's right to follow his or her convictions. The deputy can be expelled from the parliamentary group or bloc, or can leave it, but the expulsion or withdrawal from the group or bloc should not involve the loss of the deputy's mandate. Without underestimating the importance of parliamentary groups and their ability to promote stability and efficiency, membership of a parliamentary group or bloc does not have the same status as that of a deputy elected by the people. This distinction is decisive for a parliament representing the people where deputies comply with their convictions and oath. The distinction between membership of a parliamentary group or bloc and a parliamentary mandate as such is also decisive for internal democracy within the parliamentary groups or blocs, as they protect, as a last resort, the freedom of the deputy's mandate and minority groups against excessive pressure from the majority group or bloc and thus lessen the problems of possible breaches of a deputy with his group*".

[4] See Opinion on three Draft Laws Proposing Amendments to the Constitution of Ukraine, adopted by the Venice Commission at its 57th plenary session on 12-13 December 2003, CDL-AD(2003)19, ad §§ 19-22 ; Opinion on the Amendments to the Constitution of Ukraine adopted on 8.12.2004, adopted by the Venice Commission at its 63rd plenary session on 10-11 June 2005, CDL-AD(2005)015, ad §§ 10-13.

IV. Analysis of the Law

10. The Law distinguishes between two ways of recalling a deputy:

- the recall by the voters on the ground of three different offences;
- the recall by the relevant political party on four grounds.[5]

11. Part I of the Law amends the Law of Ukraine "On the Verkhovna Rada of the Autonomous Republic of Crimea". It introduces the possibility of the recall of a deputy by the political party (election bloc of political parties) by whose relevant organisation's election list he/she was elected. The mandate of a deputy therefore may be terminated:

1) If he/she failed to join the deputies' faction of the local organisation of the relevant political party (election bloc of political parties);

2) If he/she left such deputies' faction upon his/her personal request;

3) If he/she joined another deputies' faction;

4) On other grounds established by the highest managing body of the political party (election bloc of political party).

12. The first three grounds aim to prevent deputies from leaving their political party or bloc in order to establish party discipline. Hence they constitute the grounds for an imperative mandate and the Venice Commission recommends that they be removed from the Law, in accordance with its earlier opinions.[6]

13. The fourth ground is even more problematic as it gives a blanket authorisation to the highest governing body of the political party to define whatever grounds for the recall, which is clearly too wide a competence. These governing bodies do not present any guarantee of neutrality and independence. Moreover, no remedy is available to the recalled representative should he/she consider that the ground invoked was not valid. Such a ground should therefore also be removed.

14. In addition to the four grounds for the recall by the political party, the deputies of the Verkhovna Rada of the Autonomous Republic of Crimea can be recalled by voters on three grounds:

1) Violation by the deputy of the Constitution and Laws of Ukraine, other legislative acts of Ukraine, the Constitution and legal normative acts of the Autonomous Republic of Crimea;

2) Improper performance of deputy's duties, defined by this law and other laws of Ukraine;

3) Use of the deputy's mandate in personal and selfish ends, systematic infringement of ethical and moral norms.

15. The first difficulty with those grounds is that they imply legal judgments. Such judgments should rather be made by neutral and independent bodies, the membership of which should

[5] This possibility is regulated in a similar way as in Articles 81 § 2 (6) and 81 § 6 of the Constitution of Ukraine with respect to the Verkhovna Rada.

[6] See § 9 above.

require a corresponding legal expertise. It would therefore be quite unusual to entrust voters with the complex responsibility to evaluate the respect of constitutional and legal obligations by a deputy, as citizen's votes essentially remain the expression of a political choice.

16. The second problem is that the political and legal responsibility of elected representatives is a complex question, which also includes immunity's rules. To the extent that the violation of constitutional and legal provisions is at stake, it would be more appropriate to provide for the termination of the parliamentary mandate through a legal procedure, which would comply with the principle of the rule of law and avoid the use of vague concepts likely to result in arbitrary interpretations essentially motivated by political reasons. The mentioning of the violation of any normative act without further qualification is indeed dangerous because it extends without limits the ground for recall. Such decision on early termination of mandates should therefore preferably be left to the Verkhovna Rada itself, under the control of a judicial body, such as the Constitutional Court, but not to the voters.

17. Part II of the Law amends the Law of Ukraine "On the Status of Deputies of Local Councils". It does not provide for the recall of a deputy by voters, but introduces the possibility of the recall of the local deputy by the political party (election bloc of political parties) by whose relevant organisation's election list he/she was elected. Since the latter possibility is construed in a similar way as in the case of the Verkhovna Rada of Crimea, reference can simply be made, *mutatis mutandis*, to the corresponding comments above.[7]

18. Part V of the Law, which contains "Final Provisions", does not exclude that those deputies who left their party after 26 March 2006 but before the entering into force of this law might be recalled. Such a possibility is at variance with the prohibition of retroactivity, a generally recognised principle which is also explicitly enshrined in Article 58 of Constitution of Ukraine.

V. Conclusions

19. The Law under examination leaves important decisions on the status of deputies to the governing bodies of the parties and the voters, which both do not present the necessary guarantees of independence and neutrality, lack the necessary legal expertise and, as whole, cannot meet the requirements deriving from the rule of law. In the absence of a judicial review, the rights and freedoms of deputies are not sufficiently guaranteed.

20. The recall of deputies by the political parties echoes similar provisions in the Ukrainian Constitution, which have been severely criticized by the Venice Commission in the past on the ground that they violate the principle of the free and independent mandate of the deputies by introducing the imperative mandate, which is not compatible with the traditional and generally accepted doctrine of representative democracy as well as with the principle of democracy.

21. Although the amendments at stake are justified by the need to promote party discipline, they go too far since they do not allow the deputies to stay in touch with the electors and to respond to changes in public opinion. Political conflicts should not be solved by such rigid rules: democratic principles require that political conflicts be solved through free debates between political parties and the public in general. By prohibiting the transfer of a deputy from a political group to another, especially when such a transition is rendered necessary by the political, social and economic developments witnessed with society, the amendments severely cut the relations between civil society and Parliament.

[7] See §§ 11-13 above.

22. In view of the foregoing, the introduction of the representative recall by voters and/or by the relevant parties, both at the local level and in Crimea, are contrary to European standards, in particular in the area of democracy and the rule of law, and raise issues of consistency with the Constitution of Ukraine. The Venice Commission therefore strongly recommends their removal from the Ukrainian legal order.