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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**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

by

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The amendments concerning the status of the deputies and of the councillors are introducing, in different forms, the principle of the imperative mandate.

With regard to the deputies of the Verkhovna Rada of Crimea, the amendments allow 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 ", or " by voters and relevant political party (election bloc of political parties) by whose relevant organisation's list he/she was elected ".

- While it could be understandable (but cannot be approved) entrusting with such a power the relevant electoral party, it is apparently difficult to justify the role given to the voters. The interest of the electoral party could be justified by the fact that the initiative of the recall has to be taken by the same party by whose relevant election list the concerned deputy was elected, but in a constitutional system where the vote is secret, there is not any element which could support the legitimacy of the voters who take the initiative of the recall. Their previous electoral behaviour is not known.

- The grounds for the recall by the voters imply legal judgements which should be reserved to neutral and independent bodies whose membership requires a legal knowledge. As a matter of fact - in case of the recall initiated by the voters - the grounds shall be violations of the Constitution and of the laws, improper performance of the legal duties of the deputies, infringements of ethical and moral norms: all of them cannot be left to the evaluation of people who don't have legal experience.

- Instead, the recall can be initiated by the governing bodies of the political parties when the deputy fails to join the parliamentary faction of his/her electoral party, or transfers from one faction to another one, or leaves his/her electoral party or faction. In this case the judgement of depriving the deputy of the parliamentary status is entrusted to a body which is not a public authority and whose organization and functioning are not covered by the principle of the rule of law.

The same remarks can be made when the status of the members of the local councils is at stake in amendments which don't deserve special attention because they nearly repeat the choices we examined. The addition of a specific ground for recall which has to be set by the highest governing body of the political party only increases the reasons of criticism because it evidently conflicts with the principle of legality.

It is evident that the amendments adopted by the Ukrainian Parliament leave important decisions about the status of a member of the Verkhovna Rada to authorities (the governing bodies of the parties and the voters) which don't offer the necessary guarantees of independence and neutrality, whose members don't have the necessary legal knowledge and don't comply with the requirements of the principle of law. Nothing is said to provide a judicial review of the concerned decisions and, therefore, the rights and freedoms of deputies are not sufficiently guaranteed.

Moreover, the amendments concerning the recall by the political parties are in line with some provisions of the Ukrainian Constitution (art. 81) which were severely criticized by the Venice Commission (CDL-AD (2003) 19 and (2004) 19) because they introduced in the Ukrainian legal order the principle of the imperative mandate which is not in compliance with the traditional and generally accepted doctrine of the representative democracy. The principle of the imperative mandate implies solutions which allow the termination of the mandate of the members of the Parliament if and when they are in conflict with their voters or their political party. In this way the freedom of choice and movement of the deputies are seriously limited:

the parliamentary democracy cannot be rationalized restricting the flexibility of the political system which have to allow those changes of the policy which the political, social and economic developments can require. The amendments are justified by the exigency of binding the deputies to stick to the will of the voters, but, by freezing the correspondence of the parliamentary geography resulting on the basis of the elections, the principle of the imperative mandate does not allow the deputies to stay in touch with the electors and to the changes of the public opinion.

Political conflicts cannot be solved with such rigidities, the principle of the democracy imply that they have to be solved by free debate between the political parties and the public opinion, therefore in the Parliament and outside the Parliament. By forbidding the transition of a deputy from one political group to another, when such a transition is required by the political, social and economic developments inside the civil society, the amendments severely cut the relations between the civil society and the Parliament.

The grounds for the recall of the deputies by the voters are apparently different from those concerning the members of the local councils as far as the amendments don't entrust the political parties with the power of freely identifying the cases for recall, but it is easy to understand that both the reference to the legal or constitutional obligations of the deputies and the mention of the parliamentary ethical and moral norms could be easily used for politically motivated recalls. If the Ukrainian legislator wanted to provide for the termination of the parliamentary mandate in a legal way complying with the principle of the rule of law and for only legal (and not political reasons: violation of the obligations and duties of their office, long absence from the parliamentary meetings, criminal verdict and so on), it should leave the decision to the Verkhovna Rada under the control of judicial bodies (for instance, the Constitutional Court). It is well known that, when the constitutions provide for the early termination of the mandate of the members of a constitutional body, the legal grounds for the decision have to be clearly stated, the decision have to be entrusted to the concerned body and a judicial control has to be provided for. Look at constitutional rules dealing with the termination of the judges of Constitutional Courts or of the members of judicial bodies.