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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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BACKGROUND

On January 12, 2007 the Verkhovna Rada adopted a law that amended a number of laws on the status of local deputies. The law essentially introduces imperative (binding) mandate for local deputies. 362 MPs voted for the law. On 5 February President Yuschenko signed the law because of the large number of lawmakers who supported it, despite his opinion that the law contradicts democratic norms.

In December 2003, the Venice Commission adopted its opinion on three submitted draft laws on amendments to the Constitution of Ukraine (CDL-AD (2003) 19). That opinion, whilst welcoming the efforts to reform the system of Ukraine's government to bring it closer to European democratic standards, nonetheless was critical of many aspects of each of the Draft Laws, among others regarding the mandate of the National Deputies.

In December 8, 2004 the parliament adopted amendments to the Constitution of Ukraine in a packet with the Law on the Presidential elections. The constitutional amendments included the introduction of an imperative-type mandate for deputies.

The Law on amendments to the Constitution that was adopted by the Verkhovna Rada had as its basis Draft Law no. 4180. Although the Law on amendments, as adopted, took into account many of the comments the Commission made in its previous opinion, some of the Commission's criticism retained its pertinence. Among others, the Venice Commission recommended to give attention particularly to the provisions on the National Deputies that

“should not link an individual deputy to membership of a parliamentary faction or bloc, thus infringing his or her free and independent mandate (a deputy must be free to leave or not join the parliamentary faction from which he or she was elected)” CDL-AD (2004)015.

The new law extends the imperative mandate for local deputies.

GENERAL REMARKS

The “recall of deputies” (more well-known under the terminology of “representative recall”) is not a wide-spread institution. Recall by voters provides an opportunity to the constituency to remove a representative elected by them from office before the end of his/her term. As such, recall is considered an instrument of direct democracy.¹

Historically, in Europe the Paris Commune (1871) introduced the institution that was later welcomed by Lenin who submitted a draft decree on the right of recall on 19 November, 1917. Thus Lenin laid down the ideological ground for the later Soviet and other Communist electoral systems that consequently adopted representative recall. He stated: “No elective institution or representative assembly can be regarded as being truly democratic and really representative of the people's will unless the electors' right to recall those elected is accepted and exercised.”²

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 <http://www.marxists.org/archive/lenin/works/1917/nov/19.htm>

However, this constitutionally declared right had been never exercised in the Soviet system.³ It is instituted in the United States of America where eighteen states allow the recall of state officials but successful recall is extremely rare. In Canada, British Columbia allows the recall of representatives.

Representative recall – namely that the constituency has the right to continuously control 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.

In European countries the free mandate theory of representatives is generally accepted. According to this theory, Members of Parliament are regarded as representatives of the whole people, responsible only to their conscience. As a consequence, they should abide only the laws, and no other orders or instructions are binding on them. Several constitutions ban the possibility of giving instructions to representatives (Belgium, France, Germany, Italy). Outside Europe, imperative mandate is practiced among others in China, India, Nigeria, South Africa, Cuba, Vietnam, North Korea.

The Venice Commission evaluated the free mandate system in its first opinion on Ukraine constitutional reform project, and this was repeated in the consecutive opinions:

„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 or 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.” CDL-INF (2001) 11, p.2.

³ The only known exception is the practice of the right of recall in Hungary in 1989, just before the collapse of the one-party system several initiatives for representative recall were launched, and one recall election was held (unsuccessfully). However, 18 challenged deputies resigned.

EXAMINATION OF THE PROVISIONS IN DETAILS

The Law distinguishes between two ways of recalling a deputy:

- recall by the voters on the ground of three different offences,
- recall by the relevant political party. The latest possibility is regulated similarly as in Articles 81 § 2 (6) and 81 § 6 of the Constitution of Ukraine with respect to the Verkhovna Rada.

Part II of the Law amends the Law of Ukraine “On the Status of Deputies of Local Councils”. It introduces the possibility of the recall of the local deputy by the political party (or election bloc) on whose election list the deputy was elected. The mandate of a local deputy may be terminated if he/she:

- 1) failed to join the deputies’ faction of the relevant local organization of the political party (bloc);
- 2) left such deputies’ faction by filing a personal request;
- 3) joined another deputies’ faction;
- 4) moreover, might be recalled on other grounds set by the highest governing body of the political party (bloc).

The first three reasons aim at to prevent deputies from deserting their political party or bloc in order to establish party discipline. They constitute the grounds for an imperative mandate, and are not acceptable under the former Venice Commission opinions.

The fourth case is even more dubious, as it gives a blank authorisation to the highest governing body of the political party to define whatever grounds for the recall. Such provision lacks any guarantee for removing the representatives elected by the people.

In all cases, the highest managing body of the political party (election bloc) decides upon to terminate the mandate of a deputy before the expiration of the term of office. No remedy is given for the recalled representative. The former Venice Commission opinion, however, underlined that *“judges should not be entrusted with the power of adopting decisions of a political nature that imply the use of political criteria of judgement.”*⁴ This did not want to say that no remedy would be necessary for such decisions.

As Part II of the law extends the imperative mandate system established for the national deputies, the critical opinion of the Venice Commission is upheld for this regulation as well.

Part I of the Law amends the Law of Ukraine “On the Verkhovna Rada of the Autonomous Republic of Crimea”. In this case the grounds for recall are wider and more vague. In addition to the ground for recall by the political party (that are the same as in the case of local deputies), deputies of the Verkhovna Rada of the Autonomous Republic of Crimea can be recalled also by voters on three grounds:

- 1) violation of the Constitution and Laws of Ukraine, other legislative acts of Ukraine, the Constitution and legal normative acts of the Autonomous Republic of Crimea by the MP;
- 2) improper performance of deputies’ duties, defined by this law and other laws of Ukraine;

⁴ CDL-AD(2003)019, p.21.

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

All the three grounds are very problematic, and not in accordance with European standards. The political and legal responsibility of elected representatives is a complex question that includes also the rules for immunity. Therefore the violation of any normative act essentially extends without limits the ground for recall. The deputies' duties might be defined by laws but the measure and content of "improper performance" of these respective duties is obscure. Without questioning the importance of imposing moral values on representatives, or on politicians in general, the moral standards as outlined in paragraph 3 are so vague that cannot form the ground for a legally regulated termination of a deputy's term. Such unclear concepts lead to arbitrary interpretations and clearly violate the principle of rule of law.

In Part V, the final provisions of the law regulate the entering into effect of the law:

"This law comes into force from the date of its publication and applies to local MPs (except for lawmakers of village councils) elected on March 26, 2006, as provided by the Law on Election of People's Deputies of the Autonomous Republic of Crimea, city councils and head of village councils."

The law does not exclude that those deputies who left the party after March 26, 2006 and before the entering into force of this law might be recalled, thus this regulation has a retroactive effect. This violates also Article 58 of the Constitution of Ukraine that stipulates:

"Laws and other legislative acts cannot be retrospective unless they extenuate or relieve a person of responsibility."

CONCLUSION

The introduction of representative recall and imperative mandate for local deputies – in line with former Venice Commission opinions on national deputies of Ukraine – are contrary to European standards, and in certain aspects also violate the Constitution of Ukraine. Therefore the Venice Commission recommends to take into consideration the withdrawal of the new regulation