COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 8 March 2007

CDL(2007)033*

Opinion No. 422 / 2006

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT PRELIMINARY OPINION

ON THE DRAFT LAW ON THE PARLIAMENTARY OPPOSITION

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 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. The present preliminary 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. Scope of the current preliminary opinion

3. The Draft Law under examination was adopted in first reading on 12 January 2007 and is now pending before the Verkhovna Rada, which is due to examine it in final reading soon. The Venice Commission understands that the Draft Law under examination is an entirely new piece of legislation, which would specifically govern the status of the parliamentary opposition. In Ukraine, the work of the legislative organ, the Verkhovna Rada, is currently regulated by the Constitution and several laws. These provisions govern *inter alia* the competences and composition of parliamentary committees, as well as the status and the conduct of national deputies.

4. The undisturbed functioning of the opposition in a parliamentary democracy is of vital importance. The rights of the parliamentary minority should be protected and guaranteed in multiple ways, out of which formalised and legally regulated procedures form only a part. The legal status of the opposition in a given national Parliament varies greatly from country to country. A separate law on the opposition is unusual in international comparison. The concrete solutions are determined by the constitutional framework, the electoral system and other historical, political, social and cultural factors. Hence the degree of institutionalisation of the opposition differs from largely unwritten, conventional recognition to formal regulation entrenched in the Constitution.

5. Even if it is difficult to identify common European standards in the light of the different solutions prevailing in democratic countries, there is at least a general requirement to provide the parliamentary opposition with fair procedural means and guarantees. This is the condition sine qua non for the opposition to be able to fulfil its role in a democratic system.[1] In most cases Parliaments' rules of Procedure govern the status and functioning of the opposition. The idea of regulating all questions concerning the opposition in a single law is, however, also acceptable.[2]

6. The Venice Commission can only deliver its comments on the Draft Law on the Parliamentary Opposition in Ukraine in the form of a preliminary opinion. Indeed the Draft Law cannot be analysed on its own, as the current status of the opposition needs to be looked at in its globality. This current status is a complex reality, which is not only the result of a reading of the relevant constitutional and other relevant statutory provisions, but also the combination of practices, unwritten agreements and other conventions agreed upon between political parties and other institutional actors of the political life in Ukraine. Furthermore, since significant

[1] The main mission of the parliamentary opposition is to articulate the interests of their constituents, scrutinize the actions of the Government and offer political alternatives to government policies (see Procedural guidelines on the rights and duties of the opposition in a democratic parliament. Introductory memorandum prepared by Mr Van Overmeire (Belgium, NR), Rapporteur, Parliamentary Assembly of the Council of Europe, Committee on Rules of Procedure and immunities, AS/Pro(2006)3, ad § 9.

[2] For example, a special law of 1998 governs the status of the opposition in Portugal.

changes can be brought to the Draft Law before its final adoption, it may be more appropriate to adopt a preliminary opinion at this stage.

7. In view of the foregoing, the Venice Commission will limit its observations to issues of a general nature, including the integration of the Draft Law into the constitutional and legal framework of Ukraine. Comments in relation to specific Articles of the Draft Law will also be made, although not in an exhaustive way. The Venice Commission stands ready to continue its discussions with the Ukrainian authorities on the status of the opposition with a view to gaining a fuller picture of the constitutional, legal and political situation of the subject. Based on these renewed exchanges, the Venice Commission would therefore be in a position to adopt a more thorough opinion.

III. General remarks

8. As regards the broader political context in Ukraine, a few factors should be stressed at the outset. In the early years following the independence of the country, the efficiency of the parliamentary work was threatened *inter alia* by the lack of a clear structuring of the Verkhovna Rada. A very large number of political parties were represented in the legislative assembly and several factions were formed by parties and individual national deputies. In the late nineties, proposals were therefore made to improve party structuring in the Verkhovna Rada. These proposals were reflected in the constitutional reform project. They were aimed at the formation of a party parliamentary majority which could make the work of Parliament and Government more effective. A clear partition in Parliament between a parliamentary majority and a parliamentary minority (opposition) intended to help avoid an excessive fragmentation of the legislative organ. In its consolidated opinion on the Ukraine constitutional reform project, the Venice Commission considered that it could be acceptable to give stability to the form of the Cabinet, but simultaneously voiced criticism against the adverse impact on the free and independence of the mandate of the deputies which would result from such a cementing of parliamentary adhesion and loyalties of a majority group.[3]

9. The electoral system of Ukraine is not a system based on the majority rule (First Past the Post), where two major parties (or party groupings) alternatively exercise parliamentary domination with the major party in opposition proposing alternative solutions and offering an alternative to the Government. The proposal for party structuring both in the constitutional reform project and in the Draft Law under examination, however, resembles to a large extent to the Westminster-based parliamentary system.

10. The Draft Law starts by laying down a few basic definitions such as “oppositional activity”, “parliamentary majority”, “parliamentary opposition” and “official policy of the parliamentary majority and the Cabinet of Ministers of Ukraine” (Article 1). These formalised definitions and

[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 2: “*It is a reality of modern pluralist democracies that political parties play an important role in structuring, influencing and helping the activities of the parliament and communicate them to the public. Bearing this in mind, the status of deputy can enable him or her, at parliamentary level, to associate with other deputies to form a parliamentary group, bloc or majority. This helps the formulation, transparency and stability of public life. However, the cementing of parliamentary adhesion and loyalties of a majority group or bloc, however important they may be for politics, conflicts with the rule that the will of parliament is formed by deputies who in each specific case vote according to their convictions. This is a fundamental element of the status of deputies elected by the people.*
Consequently, the obligation to form, in a constraining (and continuous?) way, a ‘parliamentary majority responsible for the shaping of state policy by direct participation in the formation of the composition of the Cabinet of Ministers of Ukraine’ raises the problem as to the deputy’s status of freedom and independence. However, if the deputies’ groups (according to the draft) are not understood as being almost an organic majority parliamentary body, and if this majority group does not threaten the constitutional freedom of individual votes, the objections indicated would lose most of their substance.
If on the other hand a majority is not formed, it is nevertheless possible that in the interest of the country, a government based on one or another minority could be formed. The proposals made by the draft do not seem to foresee such a possibility.”

their legal consequences clearly indicate that rigidity has been preferred over flexibility for the formation of a majority and an opposition in Parliament.

11. The Draft Law thus envisages the opposition as a corporation which requires a formal affiliation from the deputies (or deputies' factions) interested to join it. These deputies must share the rejection of the official policy of the parliamentary majority (that is the entire political approaches of the majority as expressed in the programme of action of the Cabinet which is approved by Parliament, in normative legal acts adopted by the parliamentary majority and in normative acts of the Cabinet).

12. The constitutive elements characterising the opposition according to the Draft Law seem too numerous and demanding. It could be preferable to reduce the differentiating factor between opposition and majority into a single element, namely the behaviour of the deputies at the moment of the appointment of the Cabinet: those deputies (or deputies' factions) who vote against the Cabinet would be considered in the opposition. Their subsequent behaviour in the context of the adoption of parliamentary normative acts or of legal acts of the Cabinet would no longer be relevant: in the context of an ordinary parliamentary dialogue, even deputies who are members of the opposition may support draft laws submitted by the Cabinet. A correct functioning of Parliament even implies this possibility and it would be preferable to avoid freezing relations between the majority and the opposition in such a way that a deputy is identified as member of the opposition only if he/she always votes against the proposals from the Cabinet.

13. The Venice Commission is of the opinion that there is scope for improvement as concerns the overall integration of the Draft Law on the Parliamentary opposition into the Ukrainian constitutional and legal order. A better coordination seems in particular warranted with other provisions governing the status of deputies. For example, the draft Law rejects - at least implicitly - the principle of the imperative mandate by allowing a deputy to move from the majority to the opposition and allowing a deputy faction to move from the majority to the opposition and vice and versa (see Article 8).[4] Although the Venice Commission has repeatedly expressed criticism against the system of the imperative mandate, this solution seems to contradict earlier constitutional and legislative choices of Ukraine.[5]

IV. Specific comments on an article-by-article basis

Article 3

14. This provision proclaims in its paragraph 1 that the objective of the oppositional activity is to take part in the development of a sovereign and independent, democratic, social and governed by the rule of law state in Ukraine through the exercise of rights and the fulfilment of obligations defined by law and in the interests of Ukrainian citizens and the state. This statement is rather a solemn declaration since deputies represent also specific interests of their constituents. The same problem lies in Article 23, which deals with the responsibilities of the opposition.

15. The principles of the oppositional activity are well formulated in Article 3 §3. The language of the first principle (at least in the English translation) puts however too much of an emphasis on the "State's recognition" of the oppositional activity. The emphasis should rather be that the

[4] See also Article 3 §1 of the Draft Law, which seems to introduce the idea that deputies represent the whole people, a concept which is not in conformity with the theory of the imperative mandate.

[5] See Draft Opinion on the Law on Amendments to Legislation concerning the Status of Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea and of Local Councils in Ukraine, CDL(2007)026 and other references quoted in this document.

opposition is an inherent component of any democratic political system.

Article 5

16. It is very unusual that a law (Article 5 § 3) determines what should be regulated in the Constitution (in this case the rights of parliamentary opposition). It should be the other way round: the Constitution should declare what areas can or should be regulated by law. This provision otherwise entrenches important guarantees of the oppositional activity.

Article 6

17. Article 6 regulates the procedure of establishing the parliamentary opposition. This question is in principle mainly governed by largely unwritten conventions and/or ad hoc agreements and should therefore not be regulated by the law itself, although such a solution is not in violation of international standards.

18. The obligation of the opposition to publish its alternative program (Article 6 § 5) is acceptable as this is one of the functions of the opposition, although it reflects very much the philosophy of the Westminster-type parliamentary system. The one-month deadline is very short and obviously cannot be sanctioned, even in a political sense.

Articles 8 and 9

19. These provisions on changes in the membership and the termination of the parliamentary opposition reflect the very formalized view of the entire question, and they are unusual in most democracies.

Chapter II - Rights of the Parliamentary opposition (Articles 10-22)

20. This chapter is to be welcomed as it guarantees a long list of rights available to the parliamentary opposition. It is however difficult to distinguish between new rights and rights already existing in practice and/or guaranteed in other sectoral provisions. Also, some of the rights listed are typical of a group of deputies and could therefore probably not be exercised by individual deputies (Articles 10. 1 § 1, § 2 and § 4; Article 11; Article 12.1 § 1, § 2; § 3 and § 4). Other rights should not require the existence of a group to be exercised and should also be granted to individual deputies from the opposition (Articles 15 and 16). Cross-references to other sectoral provisions granting rights to deputies could be included in the Draft Law with a view to improving its accessibility.

21. Article 12 lists the rights of the opposition in the oversight of *inter alia* the parliamentary majority and the Government. These rights are those usually exercised in democratic countries.

22. Article 13 regulates the participation of the opposition in the budgetary process, which is commendable. The related rights of the opposition are nevertheless too extensive in some respects. The purpose is obviously to reduce the possibility of uncontrolled expenditures and government corruption. It is however doubtful that the State Treasury will be technically in a position to fulfil all the demands of the opposition, for example in reporting on every single payment from the budget (Article 13 § 3). The intention that these important issues related to the budget be discussed in Parliament is nevertheless to be welcomed as this will serve the principle of openness and public control.

23. Article 14 provides for the possibility of forming an oppositional government. This would be clearly the transplant of the English Shadow Cabinet, where every Government position is mirrored by a shadow minister or spokesperson. The shadow minister is responsible both for

criticizing the Government and promoting alternative policies. This solution cannot be transplanted automatically into political systems with multiparty setting. A shadow cabinet however could, under certain conditions, improve the effectiveness and the quality of parliamentary work. Certain powers of the shadow cabinet as provided for in the Draft Law go too far: the preparation of the State budget is the responsibility of the Government, not the opposition. The control over the preparation of the budget therefore interferes with the powers and role of a responsible government in a parliamentary system. Furthermore, the opposition should not take over or share governmental responsibilities. It would be unusual that the Head of the shadow cabinet could take part in Cabinet meetings. The meetings of the Cabinet of Ministers are not public, often confidential debates take place, and decisions of the responsible government are taken. It is thus recommended to amend the provisions concerned with a view to avoiding these interferences from the opposition.

24. Article 17 introduces an "Opposition Day", which is also a tradition of the British House of Commons. There, every eighth day is opposition day, during which the opposition is entitled to set the agenda. This institution enables the opposition to have an increased influence on the parliamentary work. The number of the opposition days could be raised from one day per session to a higher number.

25. The right to co-report on issues enlisted in Article 18 is similarly very important for the proper role of the parliamentary opposition.

26. Article19 provides for the right of the opposition to participate in the membership of several state authorities. This is an excellent provision and is to be welcomed insofar as it gives the possibility a fair and almost equal representation of nominees from the opposition in certain important authorities. Its exact relation with other sectoral provisions currently governing such nominations remains nevertheless somewhat obscure, and would need to be clarified. For example, it is problematic that according to the final and transitional provisions (Section VI.3), officials previously elected to these posts would lose their office on the day the Draft Law under examination comes into force. This would have for those elected official concerned a retroactive effect, which conflicts with a generally recognised principle (non-retroactivity) also explicitly enshrined in Article 58 of Constitution of Ukraine.

V. Conclusions

27. The Draft Law on the Parliamentary Opposition should be welcomed to the extent that it strengthens and ensures important rights of the parliamentary opposition which are necessary for the functioning of a democracy. The Commission stresses, in this respect, that the newly acquired rights of the opposition must not replace the already existing rights of each individual MP belonging to the opposition.

28. The provisions of the Draft Law must, however, be put and interpreted in the wider constitutional, legal and political context of Ukraine. In this respect, a number of shortcomings should be remedied in order to ensure the proper integration of the Draft Law into the constitutional and legal order of Ukraine. A better coordination is particularly needed in relation to the imperative mandate.

29. The unreasonably formalised way of establishing and terminating a parliamentary opposition may be difficult to reconcile with the rule that the will of Parliament is formed by deputies who in each specific case vote according to their convictions. It could also mean that factions and individual deputies who neither join the majority nor the opposition could form a third, "independent" group, which could manoeuvre in a much more flexible way. This could have the undesired effect to undermine efforts to move towards two stable parliamentary groups in the Verkhovna Rada – majority and opposition. Creating the conditions for more

political stability in Parliament should, at any rate, not result in infringing the rights of factions and individual deputies or discriminating them.

30. The Venice Commission stands ready to continue its co-operation with the Ukrainian authorities on this matter, including by preparing a more in-depth opinion following direct consultation with those concerned in order to gain a fuller picture of the constitutional, legal and political situation of this issue.