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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PRELIMINARY OPINION

ON THE DRAFT LAW
ON THE PARLIAMENTARY OPPOSITION

IN UKRAINE

adopted by the Commission
at its 70th plenary session
(Venice, 16-17 March 2007)

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 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 present preliminary opinion on the basis of the discussions and in co-operation with Mr Angel Sanchez Navarro.

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; formalised and legally regulated procedures are only a part of these. The legal status of the opposition in a given national Parliament varies greatly from country to country. A specific law on the opposition is exceptional[1] 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.[2] In most cases Parliaments' rules of Procedure govern the status and functioning of the opposition. The Commission has doubts and reserves its position, at this stage, on whether it is appropriate to regulate all questions concerning the opposition in a single law and, if so, what procedural guarantees in favour of the opposition need to exist in respect of the adoption of such a law by the majority.

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[1] The only example seems to be a special law of 1998 governing the status of the opposition in Portugal.

[2] 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.

6. The Venice Commission will therefore, at this stage, only examine *the content* of the draft law, with a view to assessing whether certain rights should or should not be given to the opposition. The Commission's examination of the provisions of the draft law must however not be taken to imply the recognition by the Commission of the appropriateness of such a law. In addition, in the short time which it has been given to examine this matter, the Commission can only deliver its comments 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.

7. In view of the foregoing, the Venice Commission will limit its observations to issues of a general nature. Comments in relation to specific rights provided in 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 will 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]

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[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."

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, something which may raise problems when put into practice in a different context.

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 their legal consequences clearly indicate that rigidity has been preferred over flexibility for the formation of a majority and an opposition in Parliament, an option which may pose serious problems when facing a flexible and changing political life.

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.

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

Article 3

13. 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.

14. 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 emphasis on the “State’s recognition” of the oppositional activity. The emphasis should rather be that the opposition is an inherent component of any democratic political system.

Article 5

15. The law may not determine what should be regulated in the Constitution ((Article 5 § 3 refers to 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 and what principles should be followed. This provision otherwise entrenches important guarantees of the oppositional activity.

Article 6

16. 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.

17. The *obligation* of the opposition to publish its alternative program (Article 6 § 5) is unacceptable. The opposition should have such possibility if it so wishes; in such a case, the one-month deadline would be too short and obviously could not be sanctioned, even in a political sense.

Articles 8 and 9

18. 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)

19. The general aim of strengthening the position of the parliamentary opposition by granting it additional rights is to be welcomed. It is however difficult to distinguish between new rights and rights already existing in practice and/or guaranteed in other specific 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). It should be made clear that the newly acquired rights of the opposition must not replace the already existing rights of each individual MP belonging to the opposition.

20. 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.

21. 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.

22. Article 14 provides for the possibility of forming an oppositional government. This would be clearly replicate the British "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 peculiar solution however cannot be transplanted automatically into political systems with multiparty setting. It could even prove to be absolutely dysfunctional; in particular, granting the opposition new powers, completely alien to parliamentary systems, could provoke undesired effects, and especially confusion about the idea of political responsibility. 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. The opposition should not take over or share governmental responsibilities, as this would provoke a change in the dynamics of the political system. 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.

23. 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.

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

25. 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

26. The aim of strengthening the position of the parliamentary opposition by granting it additional rights is to be welcomed. 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.

27. The Commission however has doubts as to whether or not it is appropriate to regulate the status of the opposition in a specific law and therefore reserves its position on this matter. It stresses nevertheless that the adoption of a law intended to protect the rights of the opposition should be done with the substantial agreement of (at least the majority of) the opposition.

28. The provisions on the role of the opposition which are set out in the Draft Law must be put and interpreted in the wider constitutional, legal and political context of Ukraine so that consistency be ensured.

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.