WESTMINSTER FOUNDATION FOR DEMOCRACY

AGENCY FOR LEGISLATIVE INITIATIVES

CONCEPT OF AMENDMENTS TO LEGISLATIVE ACTS OF UKRAINE TO IMPROVE THE FUNCTIONING OF THE VERKHOVNA RADA OF UKRAINE

(The "White Book" of Ukrainian Parliamentarism)

DEVELOPING RECOMMENDATIONS FOR THE IMPROVEMENT OF UKRAINIAN PARLIAMENTARISM

Joint Project of the Agency for Legislative Initiatives and The Westminster Foundation for Democracy

CONTENTS

In 2008, the Agency for Legislative Initiatives analyzed the key factors affecting the Parliament's performance of its law-making and controlling functions, weakening the links between the legislators with political parties, and isolating the Parliament from the needs and interests of society. The results of that analysis were used as the basis for the "Green Book" of Ukrainian parliamentarism, which came up with a list of key problems in the appropriate field. During 2009, the Agency for Legislative Initiatives worked out an array of recommendations outlining solution directions to these problems, which were set out in the "White Book" of Ukrainian parliamentarism. These recommendations have been discussed with individual legislators, researchers, representatives of the Administrative Department of the Verkhovna Rada of Ukraine, and regional experts. This document has been prepared on the basis of the earlier recommendations elaborated upon the results of expert discussions. It systematizes the key problems connected with the representative nature of the legislature, the Parliament's performance of its legislative and controlling functions, and status of members of parliament of Ukraine (MP). The authors of this document hope that the results of pubic discussion on this document will serve as the basis for the final version of the "White Book" of Ukrainian parliamentarism, which is expected to become a roadmap for the parliamentary reform in Ukraine, as well as a basis for legislative initiatives aimed at improving the performance of the Verkhovna Rada of Ukraine.

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Abridged Version

1. THE PARLIAMENT AS REPRESENTATIVE BODY

1.1. Connection of Legislators with Political Parties

On December 8, 2004, a number of amendments were made to the Constitution of Ukraine, one of which introduced the imperative mandate of a member of parliament. In particular, clause 6, part one, article 81 of the Constitution of Ukraine established as a reason for early termination of the powers of an MP elected on a party list of a specific political party (election bloc) his or her failure to join the parliamentarian faction of this political party (bloc) or his/her abandonment of such a faction. The given reason why this provision was added to the Fundamental Law was the need to strengthen the party discipline and reduce the number of migrations of MPs among factions in the Ukrainian Parliament.

At the same time, this solution to the said problem can hardly be regarded as justified. First, the introduction of the imperative mandate for members of representative bodies contradicts general European practice. Second, the introduced imperative mandate has failed to resolve most of the problems that the amendments to article 81 of the Constitution of Ukraine were expected to resolve: although the number of migrations of MPs among factions in the Ukrainian Parliament has been minimized, a faction member can still vote as he or she likes without losing his/her parliamentarian seat; and the level of discipline in certain factions of election blocs remains low. Third, the imperative mandate makes it possible to destabilize the Parliament and create preconditions for actual cancellation of the election results (if, for example, legislators acting on the initiative of their party leader decide to abandon their factions or their powers are terminated early and the Parliament is recognized as incompetent in accordance with article 82 of the Constitution of Ukraine). Fourth, the imperative mandate has not turned lawmakers into supporters of the ideology of the parties on whose lists they have been elected to the Parliament; the parties still retained their club-like nature and dependence on private money; in addition, the introduced imperative mandate has significantly strengthened the influence of party leaders and sponsors on the parties whereas the influence of common party members on internal party issues and nominations of candidates has substantially weakened. The reasons for the weak connections of MPs with the parties on whose lists they have been elected to the Parliament are rooted in the dependence of the parties on private funding, lack of clarity in the distribution of powers between the Head of State and the government in the executive branch, shortcomings of the election system that forms the Parliament, no effective mechanisms ensuring intra-party democracy and the practice of nominating to elective positions primarily members of the party's formal leadership and sponsors rather then party activists.

Recommendations:

1. The Constitution of Ukraine should be amended to remove the provision introducing the imperative mandate. It is advisable to introduce another mechanism instead to strengthen the ties between MPs and the political parties on whose lists they have been elected.

2. The Constitution of Ukraine should be amended to place broader lines of distinction between powers and responsibilities in the executive branch (the lack of such clear distinction results in political irresponsibility when the President can always place full responsibility on the government and the parliamentary majority, and the latter two – on the Head of State who forms his own political course). Specifically, it is necessary to better outline in the Constitution the powers granted to the President in the area of the nation's foreign policy, national security, and defense; revoke the Head of State's right to suspend acts of the Cabinet of Ministers; envisage countersigning of most acts of the Head of State by the government; provide a single government formation procedure (at present, part of government members are appointed by the Parliament on the submission of the President and another part on the submission of the Prime Minister, a factor undermining the integrity of the governmental team); and establish that the heads of local state administrations be appointed by the Cabinet of Ministers rather than the President.

3. The Law "On Political Parties in Ukraine" should be amended to lay down general principles of intra-party democracy, introduce direct state financing of political parties, restrict private financing of political parties, introduce an effective control over the amassment and use of party money, and ensure transparency in party financing and pro rata sanctions for violations.

4. The Law "On the Election of People's Deputies of Ukraine" should be amended to stimulate intra-party competition, specifically, by introducing a proportional election system with open lists.

1.2. Ties between MPs and Voters

Apart from the imperative mandate, there was yet another mechanism introduced at the legislative level to strengthen the role of political parties in the formation and implementation of state policy. That was a proportional election system with voting on closed party lists in a single nationwide election district. At the same time, individuals were forbidden to nominate themselves as candidates in elections. As a result, almost all political power in the country has concentrated in the hands a few parties and the connections of MPs with electors have actually been brought to nothing because the proportional election system with closed election lists and narrowed political competition actually deprives voters of any leverage over the formation of personal membership of the Parliament. Thus, a body intended to represent the interests of the entire specter of social groups, the Parliament has turned into a body that represents the interests of a few political parties, or, to be exact, the leaders and sponsors of those parties, rather than voters.

Recommendations:

To strengthen the ties between MPs and their voters, it is advisable to introduce for parliamentary elections a proportional election system with voting on open lists of candidates. And for the future, it makes sense to consider the possibility for individuals to nominate themselves as candidates for parliamentary elections.

2. GENERAL PRINCIPLES OF ORGANIZATION AND OPERATION OF THE PARLIAMENT

2.1. Status of the Parliamentary Majority, Minority, and Opposition

The Constitution of Ukraine requires that the parliamentary factions covering a majority of legislators create a parliamentary majority (coalition). Failure to create such a majority within a month after the moment when the powers of the newly elected parliamentarians came into effect, or

within a month after the day when the previous parliamentary majority ceased to operate results in early termination of the Parliament's powers (the decision dissolving the Parliament is a prerogative of the President). It should be noted in this connection that: 1) the constitutions of almost all European countries do not define the status of parliamentary majority and termination of its operation is not regarded as a reason for early termination of the Parliament's powers; 2) the fact that the Constitution of Ukraine contains the relevant provisions has not increased the level of support for the government on the part of the factions that have created the parliamentary coalition (as practice shows, a coalition can exist only on paper and individual parliamentarians or factions that have created the coalition do not necessarily support the government's initiatives).

Apart from the formation of a parliamentary coalition, the Rules of Procedure of the Verkhovna Rada also provide for the possibility to create an opposition in the Parliament to organize the factions that have officially declared opposition to the government. Among other things, the opposition has the right to form an "opposition government" to govern the opposition's activities. *In fact, the opposition has little difference from the parliamentary minority that actually means the factions and individual lawmakers that have joined neither the coalition not the opposition.* In fact, the opposition is an artificial formation within the legislature, created to secure leadership positions in committees (the heads of certain committees are appointed exclusively from among the opposition membership; and in the committees headed by majority representatives, the seats of first deputy head are reserved for opposition representatives), as well as additional funding from the State Budget (for the "opposition government"). Conversely, the Rules of Procedure do not grant any additional rights to the parliamentary minority.

Recommendations:

1. It is necessary to remove from the Constitution of Ukraine the provisions that: a) necessitate the formation of a parliamentary coalition in the Verkhovna Rada of Ukraine; b) allow early termination of the Parliament's powers if the Parliament fails to create a parliamentary coalition.
2. The Rules of Procedure of the Verkhovna Rada should be amended to: a) remove the provision dividing the parliamentary minority into a parliamentary minority as such and opposition; b) describe the rights of parliamentary minority (not the opposition), specifically, with regard to distributing seats in committees or debating agenda issues at parliamentary sessions.

2.2. Operational Transparency of the Parliament

Generally speaking, the Parliament's work is transparent: the web page of the Verkhovna Rada of Ukraine contains all registered draft laws and opinions on them given by the Main Research and Expert Board of the Administrative Division of the Verkhovna Rada, shorthand transcripts of plenary meetings, and the results of all votes held in the legislature. However, the web site of the Parliament fails to present for the public the budget of the Verkhovna Rada, the results of its fulfillment, as well as opinions on draft laws, given by the government, research institutions, and NGOs on request of dedicated parliamentary committees. The least transparent is the activity of parliamentary committees as only about half of them keep their own web pages; and yet those web pages do not have published minutes and shorthand transcripts of their meetings, the results of voting at such meetings, information about committee members present at (or absent from) such committee meetings, shorthand transcripts of committee hearings and other important information.

Recommendations

The Rules of Procedure of the Verkhovna Rada of Ukraine and the Law "On Committees of the Verkhovna Rada of Ukraine" should be amended to: a) bind all committees to create their own web pages on the web portal of the Verkhovna Rada of Ukraine; b) bind the committees to include the roll-call voting results in committee meeting minutes; c) bind the committees to publish on their web pages their work plans for every parliamentary session; schedules of work on draft laws and draft acts of the Parliament; dates, times, and venues of open committee meetings and hearings; annual operation reports of the committees; minutes of open meetings and the results of voting on the agenda of open meetings; materials and shorthand transcripts of committee hearings, as well as decisions made on the results of such hearings; d) require the publication of the budget of the Verkhovna Rada of Ukraine and the results of its fulfillment; e) require the publication of all opinions on draft laws, given in response to relevant decisions of the committees or requests of individual MPs (including opinions of ministries, research establishments, NGOs and so on).

3. LEGISLATIVE PROCESS

3.1. Initiation, Consideration, and Adoption of Laws by the the Verkhovna Rada of Ukraine

Since 2003, the Verkhovna Rada of Ukraine has been registering nearly a thousand of draft laws annually, 60-80 percent of which are amendments to already effective laws rather than new legislative solutions. Only 10-20 percent of registered draft laws become laws. Under such circumstances, the Administrative Department of the Verkhovna Rada and its dedicated committees are compelled to review and examine a great deal of drafts that stand no chance of being adopted. This activity disperses its potential in the legislative field. Approximately 76 percent of all registered draft laws and 56 percent of adopted laws are actually amendments to applicable legislation, not new legislative products. In other words, the Verkhovna Rada spends most of its working time on revising of its own legislative acts. The major legislative workload is currently on the Parliament, not on its committees, and decisions of the former are often different from decisions of the committees. Some laws adopted by the Parliament are of populist nature, being unfeasible due to a lack of the required funds in the State Budget. As a result, such adopted laws are not fulfilled. The legislative process in general is unpredictable. For example, the Law "On Value-Added Tax" has been revised 139 times since the day of its adoption, and the Law "On Enterprise Profit Taxation" – 126 times. It happens sometimes that the Parliament considers draft laws without the required debate a few days after their initiation and passes them at once in first reading and as laws in general. When considering draft laws, the Parliament often ignores the Constitution.

The said shortcomings stem from the following factors: 1) the right of legislative initiative of a legislator is effectively unlimited: MPs can put forward drafts offering amendments to the State Budget (which is untypical of common European practice); 2) the government's expert opinion on drafts, in particular, those that provide additional outlays from the State Budget, is not required and such drafts can be considered without the government's opinion; 3) there is no effective control over observance of the requirements of the Rules of Procedure for the form and submission of draft laws (as a result, the Parliament's agenda often includes technically and substantially defective drafts); 4) the legislator's right to replace his/her drafts put forward earlier with new ones is not limited, that is, an MP can put forward new drafts replacing drafts submitted earlier (the Administrative Department of the Verkhovna Rada is bound to give its opinion on such drafts, regardless of their adoption chances, which substantially increase the workload of the

Administrative Department); 5) all drafts must be passed exclusively by an absolute majority or supermajority of votes (in certain cases, this requirement makes the voting ineffective; only certain drafts (those amending the Constitution or concerning state symbols) require support of two thirds of the votes in parliament, according to the Constitution, which allows the parliamentary majority of 226 legislators to revise already adopted laws over and over again, often ignoring the interests of the minority); 6) the Rules of Procedure allows debating drafts under an abbreviate procedure (during such a debate, the floor is given only to 2 representatives of the factions supporting the draft and 2 representatives of the factions opposing it), the cases allowing the abbreviated procedure are not clearly determined (as a result, the abbreviated debating procedure, which is intended as an exception, has become the main procedure for considering drafts, which results in insufficient consideration of drafts and adoption of low quality laws); 7) the organizational structure of the Administrative Department has no special unit to plan the legislative process and scientific support to it, identify loopholes in the legal regulation and problems in the application of adopted laws; 8) the President's veto requires two thirds of MPs' votes to be overridden (which allows the Head of State to block any law undesirable for him).

Recommendations

1. The Constitution of Ukraine should be amended to grant the prerogative of putting forward certain categories of drafts (those concerning the State Budget, finances etc) to the government, not the legislators.

2. The Rules of Procedure should provide that the Parliament can consider draft laws only after their expert examination by the Cabinet of Ministers; if a draft affects the revenue or expenditure part of the State Budget and the government is against its adoption, the Parliament should abandon it.

3. The Rules of Procedure should be amended to introduce effective control over observance of the requirements for the form of drafts prepared for consideration; drafts prepared with violations of the said requirements should not be included in the Agenda.

4. The Rules of Procedure should be supplemented with provisions forbidding MPs to register drafts replacing their drafts submitted earlier.

5. The Constitution should be amended to provide: a) the possibility of passing draft laws by a simple majority of the votes of MPs present in the session hall; b) a list of cases in which the adoption of drafts requires an absolute majority of MPs' votes; c) a list of categories of drafts whose adoption requires support by a supermajority of votes (drafts concerning elections, referenda, status of ethnic minorities, status of certain highest bodies of state authority and so on).

6. The Rules of Procedure should provide an exhaustive list of cases allowing the abbreviate procedure to be used for debating drafts.

7. The organizational structure of the Administrative Department of the Verkhovna Rada should be expanded with a new unit (research service) to plan and provide scientific support to the legislative process.

8. The Constitution of Ukraine should be amended to make it possible for the Parliament to override the President's veto by the same number of votes that is required for the legislature to pass a law (not by a supermajority of votes).

9. Taking into account the fact that all registered drafts are published on the web site of the Verkhovna Rada of Ukraine, the Administrative Department of the Parliament should be released from the obligation to make copies of drafts and distribute them among lawmakers (this copy making task consumes 120 tonnes of high quality paper a year).

3.2. Participation of the Public (Public Interest Groups) in the Legislative Process

Unlike the constitutions of many countries of Europe, the Constitution of Ukraine does not grant the right of legislative initiative to electors. In Ukraine, the right to put forward draft laws for consideration in the Parliament is granted only to MPs, the President, and the Cabinet of Ministers. There are only two instruments of involving public interest groups (i.e. the groups whose rights or interests may be affected by a certain law, if passed by the Parliament) in the legislative process. These are a) inviting representatives of such groups to hearings in committees and to participation in work of consulting and advisory councils to the committees. However, the legal regulation of committee hearings is far from perfection (see clause 4.2), therefore, it cannot be regarded as an effective interment ensuring participation of public interest groups (stakeholders) in the legislative process. In addition, there are not so many parliamentary committees with consulting and advisory councils and the legal status of such councils is yet to be determined (committees interact with such councils under agreements with them; the status of the councils is determined by committees themselves).

Recommendations:

1. The Constitution of Ukraine should be amended to grant the right of legislative initiative to a certain number of electors (100,000 – 250,000 citizens).
2. The Rules of Procedure of the Verkhovna Rada of Ukraine should be amended to necessitate the inclusion of information about consultations on specific drafts with stakeholders in the explanatory letters to those drafts.
3. A dedicated law that needs to be adopted to regulate the procedure of involving stakeholders in the process of passing legislative and regulatory acts should provide for public councils to be created under every parliamentary committee to identify the most burning problems of legal regulation of social relations and provide information and analytical support for the committees; as well as establish general principles of forming such councils, their status, rights, principles of interaction with the committees, and mechanisms ensuring transparency in their work.
4. The Law "On Committees of the Verkhovna Rada of Ukraine" should be amended to improve the procedures of organizing and holding committee hearings (the approval and advance publication of annual (quarterly) plans of hearings should be obligatory, as well as publication of the date, time, and venue of hearings on the web sites of parliamentary committees, along with hearing agendas, accreditation procedure for stakeholders, and shorthand transcripts and recommendations of such hearings).

4. PARLIAMENTARY CONTROL

4.1. Parliamentary Control Exercised by Parliament Directly

The Constitution of Ukraine and the Rules of Procedure of the Verkhovna Rada of Ukraine (Parliament) provide for several control functions to be performed by the Parliament directly: 1) hearing reports and speeches of the Cabinet of Ministers (Article 228 of the Rules of Procedure), 2) holding "Q & A hours with the Government" (Article 229 of the Rules of Procedure); and 3) holding parliamentary hearings (Articles 233 – 236 of the Rules of Procedure). However, the legal regulation of the control functions of the Parliament as a state body has an array of shortcomings.

First, *the Constitution of Ukraine does not imperatively require that the Program of Action of the Cabinet of Ministers be approved before the Government enters office*. Therefore, the Government may operate without any Program of Action (which is actually a fact), and the Parliament has nothing to control in this case. This is very important as *the subject-matter of annual reports of the Cabinet of Ministers to the Parliament is namely fulfillment progress and the results of the Program of Action of the Government* (Article 228 of the Rules of Procedure).

Second, *the regulation of "Q&A hours with the Government" as a control form* is also far from perfection. Such "hours" are held only once a week on Fridays (twice a month) and have a clear set of topics to be discussed (a factor making it impossible to discuss a given topic for one hour). Furthermore, presenting in advance the questions to the Government to be answered during the "Q&A hour" is a right rather than obligation of the question initiators.

Third, *the regulation of parliamentary hearings is also imperfect*: a) applicable legislation does not dissociate subject-matters to be discussed at hearings in parliamentary committees and parliamentary hearings; b) the agenda and the circle of parliamentary hearing participants are too broad whereas the overall duration of a session of such hearings is rather short, nearing three hours; c) since there are no requirements for parliamentary hearing recommendations, such recommendations are of general nature; and d) there is no recommendation fulfillment monitoring.

Recommendations:

1. The Constitution of Ukraine should be amended to the effect that a) the Program of Action of the Cabinet of Ministers of Ukraine be imperatively required to be approved by the Parliament before the Government enters office, and namely for the entire duration of its incumbency; b) if the Program of Action of the Cabinet of Ministers fails to be approved, the Government members should not enter office and the Government should be regarded as failed to be formed (see also clause 4.6).
2. The Rules of Procedure of the Verkhovna Rada of Ukraine should be amended to improve the effectiveness of "Q&A hours with the Government," providing for: a) mandatory registration of all questions to the Government with the Administrative Department of the Verkhovna Rada to be completed by a specific deadline ahead of the "Q&A" day; b) the requirement to hold a "Q&A hour" every day; c) participation in the "Q&A hour" for only selected Government members (not the entire Cabinet as is the fact now); c) cancellation of the subject orientation of Q&A hours (the topics to be discussed during a given Q&A hour should depend on the questions to be asked; and providing d) a list of admissible questions (questions should be related to the issues falling within the purview of the Government or ministers and specific facts, imply clear answers and so on).
3. The Rules of Procedure should be amended to replace parliamentary hearings with hearings in parliamentary committees.

4.2. Parliamentary Control Exercised by the Committees and Ad Hoc Investigation Commissions

The control functions of the committees are impeded by two major factors: 1) no grounded committee creation criteria; 2) imperfect regulation of committee control powers.

In particular, some committees have less than 11 members (4 committees) whereas 8 committees have more members than allowed by the Verkhovna Rada (a committee can have up to 20 members, according to the limits set by the Parliament). The faction structure of some committees does not reflect the faction structure of the legislature. The distribution of purviews among the committees makes it possible to refer issues of similar nature to more than one

committee. Some committees have been made separate bodies unjustifiably (the confirmation is the number of their members and workload). In effect, they might as well operate as subcommittees under other committees. The result of this is diffused control powers of the committees, longer law-making process, and more difficult control over branch ministries.

The controlling activity of the committees is regulated is a framework manner as the legislation describes only their rights related to parliamentary control. Committee hearings are not as much an instrument of control over the Government as a mechanism for discussing specific problems of the legislation and its application practices. In addition, the hearing procedure regulation is plagued with the following shortcomings: a) notifications of the hearing date and venue, as well as the agenda, are sent only to hearing participants (rather than made public in advance); b) applicable law fails to set any general criteria for selecting hearing participants, as well as general requirements for the hearing agenda; c) applicable law does not provide for any prior mandatory distribution of hearing materials among hearing participants (except for parliament members), publication of hearings materials, shorthand transcriptions of participants' speeches and so on.

As to ad hoc investigation commissions, at preset they are effetely deprived of a due legal basis for their operation since the Constitutional Court has declared unconstitutional the Law "On Ad Hoc Special and Investigation Commissions."

Recommendations:

1. It is necessary to complete a functional examination of the system of committees, optimize their operation and distribution of functions among them, and implement mechanisms ensuring more or less accurate correspondence between the factional structure of the committees and the factional structure of the Parliament.
2. It is necessary to adopt a new Law "On Ad Hoc Special and Investigation Commissions of the Verkhovna Rada of Ukraine," which has to: a) clearly outline commission purviews, which may not exceed the limits of the Parliament's purview as is the fact now; the commissions should not be vested with administrative and executive powers appropriate to law enforcement agencies (i.e. the right to seize documents or summon persons involved in parliamentary investigations to commission meetings and so on); b) elaborate the procedure of review by commissions of issues falling within their purviews (list of procedure participants, their rights and obligations, parliamentary investigation stages and so on).

4.3. Parliamentary Control Exercised by Members of Parliament of Ukraine

Apart from the Parliament and its bodies, individual legislators can exercise control over bodies of public administration by sending requests and interpellations to appropriate executive bodies, companies, institutions, and organizations. Also, legislators have the right to prepare questions to government members to be answered during the "Q&A hour with the Government." The following problems exist in the field of regulation of control functions of parliamentarians: 1) applicable legislation does not clearly differentiate among subject-matters of requests, interpellations, and questions (in fact, the key differences among them lie only in the procedure of initiating them, as well as reviewing them by the addressee); 2) law does not set any admissibility requirement for interpellations, requests, and questions: in effect, a legislator can request any information from anybody (except for law enforcement agencies, which may not provide information concerning specific cases under their review); 3) the texts of requests and answers to them are not published, a factor impairing the effectiveness of this form of control.

Recommendations:

The Law "On the Status of People's Deputy of Ukraine" and the Rules of Procedure of the Verkhovna Rada of Ukraine should amended as follows: a) the difference between interpellations and written requests should be clearly described; b) content (admissibility) requirements for interpellations and written requests should be set; c) mandatory registration of all interpellations and written requests with the Administrative Department the Verkhovna Rada of Ukraine should be provided for; d) the full texts of interpellations, written requests, and answers to them should be published in the "Vidomosti of the Verkhovna Rada of Ukraine" (Newsletter of the Parliament of Ukraine), as well as on the Verkhovna Rada 's website.

4.4. Parliamentary Control over Human and Citizen Rights and Freedoms

The parliamentary control over the human and citizen rights and freedoms is exercised by the Human Rights Ombudsman of the Verkhovna Rada of Ukraine (further referred to as the Ombudsman). At present, the Ombudsman's performance is affected by the following factors. First, *applicable law does not limit the office term of the Ombudsman*. Second, articles 8 and 9 of the Law "On Human Rights Ombudsman of the Verkhovna Rada of Ukraine" provide to the effect that *the only authority that has the right to terminate the Ombudsman's incumbency early is the Parliament*. This fact makes it possible for the Ombudsman to violate the requirement that his/her office cannot be combined with other activities since if he or she violates this requirement, his or her powers may be terminated only with an appropriate decision by a parliamentary majority. There is already a precedent of such a violation by the Ombudsman, which took place in 2006 when the Ombudsman was a candidate for a seat in the Parliament, elected on the party list, and concurrently held his parliamentary mandate with the office of Ombudsman. Third, the law does not provide any *effective mechanism to ensure transparency in the work of the Ombudsman*. Fourth, *the law fails to clearly outline the purview of the Ombudsman* and, as a result he or she performs tasks that are far from his/her term of reference. For example, in 2006 the Ombudsman was engaged in defending the "interests of Ukraine and the rights of the crew of the Ukrainian ship "Perekopsky" held in the Republic of Argentina," in clearing the way for cargos from Pridnistrovia to Ukraine, and in untangling the problem of illegal crossing of Ukraine's border by a US navy ship under the NATO flag. Fifth, the *law fails to clearly state the conditions and criteria under which the Ombudsman reviews a complaint by himself/herself, or refers it to another authority, or refers himself to the Constitutional Court to recognize a specific legal act as unconstitutional.* Sixth, *the regulation of the internal activities of the Ombudsman is of a framework nature*. Applicable law does not provide effective mechanisms ensuring specializations of the Ombudsman's deputies (rights of the child, servicemen, ethnic minorities and so on) and preventing excessive concentration of powers in the hands of the Ombudsman at the level of central body of this institution. Seventh, applicable legislation *fails to clearly define the status of Ombudsman in the administrative and civil process*. In particular, pursuant to article 60 of the Administrative Code of Ukraine, *in the cases envisaged by applicable law*, the Ombudsman can refer to the administrative court with claims to protect the rights, freedoms, and interests of other persons and take part in the proceedings. Similar provisions are in Article 45 of the Civil Procedure Code of Ukraine. But applicable law fails to provide for such cases.

Recommendations:

1. Article 5 of the Law "On Human Rights Ombudsman of the Verkhovna Rada of Ukraine" (further referred to as the Law) should be amended to the effect that the same person is forbidden to hold the office of Ombudsman for more than two consecutive years.

2. Article 9 the Law should be amended to the effect that if the Ombudsman violates the requirement forbidding him/her to combine his/her office with other activities, the decision to terminate his/her powers early is made by the court (not the Verkhovna Rada of Ukraine).

3. The Law should be supplemented with provisions *increasing transparency in the activities of the Ombudsman* (he/she should be obligated to provide any information about his/her activities that does not concern the subject-matter of specific cases in response to information requests from any person; the web page of the Ombudsman should be regularly updated with all internal acts of the Ombudsman, his/her budget expense report, information about the structural units of the Secretariat and their functions and terms of reference, and should provide a clear and understandable description of the procedure of applying to the Ombudsman and the possibility to fill out the appropriate application form online and so on).

4. The Law should be amended to *provide a clearer outline of the Ombudsman's terms of reference*, ensuring, at the same time, that a) the controlling powers of the Ombudsman do not exceed the controlling powers of the Verkhovna Rada; b) the Ombudsman's acts are not of imperative nature; c) the Ombudsman work is beyond political expedience or state policy formation issues.

5. The Law should be amended to *concretize the procedure of proceedings in cases* falling within the purview of the Ombudsman. In particular, the Law should provide an exhaustive list of reasons for denying appeals of citizens, a list of grounds for referring appeals to other authorities, as well as a list of cases requiring the Ombudsman to refer to the Constitutional Court with a constitutional petition or appeal.

6. The Law should be supplemented with provisions *clarifying the principles of internal organization of the Ombudsman's work*. The said provisions should envisage the creation of the Ombudsman's representative offices in 27 regions; introduction of specializations for the Ombudsman deputies (rights of the child, servicemen, ethnic minorities, equal opportunities for men and women and so on); and the reasons for and procedure of appointing and discharging the Ombudsman's deputies.

7. The Laws should envisage cases in which the Ombudsman may apply to the court with civil or administrative claims to protect the rights, freedoms, and interests of other persons and take part in the proceedings.

4.5. Parliamentary Control in Public Finance

According to Article 98 of the Constitution, the revenues and expenditures of the State Budget of Ukraine are controlled by the Accounting Chamber on behalf of the Verkhovna Rada of Ukraine. The legal regulation of the status of the Accounting Chamber contains an array of shortcomings. First, *the Constitution and the Law "On the Accounting Chamber" fail to provide sufficient guarantees of operational, functional, and financial independence for the Accounting Chamber*, failing to meet the principle of independence of highest authorities of financial control (HAFC) declared in the Lima Declaration of Guidelines on Auditing Precepts. Specifically, Article 1 of the Law "On the Accounting Chamber" explicitly states that the Chamber reports to the Parliament and Article 32 of this law provides the right of the legislature to direct operations of the Chamber, thus conflicting with Article 8 of the Lima Declaration. The Chamber does not have a sufficient level of

operational independence as its operating plan is forced to include the obligation to process requests of at least 150 legislators. In addition, the Chamber is bound to carry out unscheduled control measures on official requests and resolutions of the Verkhovna Rada, as well as appeals of its committees, a fact contradicting Article 8 of the Lima Declaration. The grounds for early termination of the powers of the Chairman of the Accounting Chamber are not provided in the Constitution of Ukraine (in contradiction with Article 6 of the Lima Declaration), which leaves the issue of terminating the Accounting Chamber Chairman's powers to the discretion of the Parliament. Article 38 of the Law „On the Accounting Chamber" does not guarantee financing of the Accounting Chamber in full (it is worth pointing out in this context that Article 7 of the Lima Declaration recommends that HAFC be granted the right to apply directly to the Parliament for required financial resources). Second, *the volume of controlling powers of the Accounting Chamber is not in compliance with the Lima Declaration.* In particular, pursuant to Article 98 of the Constitution, the Chamber's mandate extends only to control over state revenues and expenditures. This means that the Chamber does not control the accumulation and use of public funds that are not reflected in the State Budget of Ukraine (the management of companies in state ownership and so on). Third, the *Law fails to define the term "audit" and determine the types of audit for the Accounting Chamber to focus on*. As a result, the operating focus of the Chamber is shifted towards auditing the legitimacy of using funds of the State Budget, as well as such non-audit functions as expert examinations and analyses. The core task of the Chamber should have been audits of proper use (attestation of managers of state budget funds and opinions on their financial reports) *and effectiveness* (examination of reliability of internal financial control systems). Fourth, the *Law "On the Accounting Chamber" (Article 21) fails to detail the principles of the Chamber's interaction with other financial control authorities at the audit planning and implementation stages.* Fifth, Article 28 of the Law "On the Accounting Chamber" provides for *the concentration of the Accounting Chamber's powers at the level of the Chamber Board, which places an excessive functional workload on the Board*. Sixth, the Accounting Chamber has eight territorial offices by now but *their status and principles of their interaction with the central office are not described in applicable law.*

Recommendations:

1. The Constitution of Ukraine should be amended as follows: a) the Accounting Chamber should have the official status of an *independent* body of finical audit of public funds (the Chamber's interactions with the Parliament should be reduced to appointing and discharging the Chamber Chairman, the Chamber's subordination and reporting to the Parliament); b) control over public finances in general should be added to the terms of reference of the Accounting Chamber (management of companies with state shares and so on).

2. The Law "On the Accounting Chamber" should be supplemented with provisions *increasing financial independence of the Accounting Chamber*. It should be provided in the Law that the Accounting Chamber prepares by itself, submits for approval to the Verkhovna Rada, and executes its budgets.

3. The Law "On the Accounting Chamber" should also be amended to *clarify the tasks set for the Accounting Chamber*. The key task of the Chamber should be audits of proper and effective management of public finances. For this reason, the Law should be supplemented with definitions of the appropriate types of audit.

4. The Law "On the Accounting Chamber" should be amended to *extend the list of entities subject to the Accounting Chamber's audits*. The entities to be included should be: a) all companies with a state share in their authorized capital; b) all entities funded from the State Budget.

5. The Law "On the Accounting Chamber" and other laws should clearly describe the mechanisms of interaction of the Accounting Chamber with other financial control bodies, specifically at the stages of control task planning and implementation.

6. The Law "On the Accounting Chamber" should be amended to delegate part of the powers assigned to the Chamber Board to the structural units and territorial offices of the Chamber and to determine the status of territorial offices of the Chamber.

7. The control procedures of the Accounting Chamber (including the rights and obligations of auditors and representatives of entities subject to control, the procedure of challenging decisions, actions, and inactivity during audits) should be described directly in the Law, not in bylaws of the Chamber. Recommendations of the Chamber should not be of imperative nature, but at the same time, the Law should make obligatory their review and reporting the review results to the Chamber.

4.6. Vote of Non-Confidence in the Government, Denial of Trust in the Government, and Dismissal of Government Members

The Parliament can exercise its controlling powers to initiate the dismissal of a government member or raise the issue of responsibility of the Cabinet of Ministers of Ukraine as a whole. In the former case, the result of the relevant initiative may be early termination of incumbency of the said government member, and in the latter case – a vote of non-confidence in the Cabinet of Ministers of Ukraine, resulting in the dismissal of all the Cabinet members. This area encounters the following problems. First, according to article 87 of the Constitution, *the issue of responsibility of the Cabinet of Ministers of Ukraine cannot be raised for one year after approving the Program of Action of the Cabinet of Ministers of Ukraine*. Thus, the Government is actually granted a year-long "immunity" against responsibility for failures in its work. Second, the Constitution *allows the consideration of the issue of responsibility of the Cabinet of Ministers on the day of this initiative* (the constitutions of many European countries explicitly state that the issue of responsibility of the government can be put on the agenda and considered after a certain period of time (2-3 days) after its initiation). Third, the Constitution *authorizes the Parliament to terminate the powers of any government member (including the Prime Minister)*. This right of the Parliament, if exercised, may entail an array of negative consequences such as broken integrity of the governmental team; possible erosion of the institution of political responsibility of government by dismissing its members each individually; paralyzed activity of the Cabinet of Ministers, for example, if half of government members are dismissed (since meetings of the Cabinet of Ministers are valid only if more than half of its membership are present).

In addition, the Constitution of Ukraine does not provide for the institution of vote of non-confidence in the Government. This allows the Government to act without any program, whose fulfillment could be controlled, and the Parliament to pass populist and technically and substantively defective laws and programs, which are unfeasible.

Recommendations:

1. Article 85 of the Constitution should be amended to make members of the Cabinet of Ministers dismissible exclusively on the initiative of the Prime Minister of Ukraine.

2. Article 87 of the Constitution should be amended to the following effect: a) the issue of responsibility of the Cabinet of Ministers of Ukraine may be put on the agenda only a certain period of time (at least 2-3 days) after putting a relevant motion on the agenda by 150 Ukrainian lawmakers; b) the President of Ukraine should not have the right to initiate the issue of responsibility of the Cabinet of Ministers (which in this case would be in compliance with the present role of the President in the system of highest bodies of state authority); c) the issue of

responsibility of the Cabinet of Ministers may be considered anytime after the approval of the Government's Program of Action; d) the issue of responsibility of the Government cannot be considered at extraordinary sessions of the Parliament .

3. The Constitution of Ukraine should be supplemented with provisions declaring: a) the obligation of the Verkhovna Rada to approve the Program of Action of the Cabinet of Ministers (approval of such a Program by the legislature should be the mandatory *precondition* for the government's entry into office and the legal consequences of the Program's failure to win the approval should be a failed attempt to form the government); b) the government's right to raise the issue of vote of non-confidence in the Cabinet of Ministers of Ukraine anytime.

4.7. Impeachment of the President

The President impeachment procedure is so complicated that it is virtually unfeasible. According to Article 111 of the Constitution, the impeachment issue needs to be initiated by a majority of the constitutional membership of the Parliament; to launch an investigation, the Verkhovna Rada must create an ad hoc investigation commission; the decision charging the President must be passed by two thirds of the Parliament; after this, the case must be examined by the Constitutional Court (to make sure that the investigation and consideration of the impeachment case is in compliance with the Constitution), as well as the Supreme Court (for signs of crime in the activity of the President); after that, the Verkhovna Rada must pass a decision impeaching the President by at least three fourth of its membership. Under this procedure, it is quite possible that the Supreme Court may find signs of crime in the activity of the President but the Parliament would fail to actually impeach the President because the vote on this issue falls short.

Recommendations:

Article 111 of the Constitution should be amended to the effect that if the Supreme Court finds signs of crime in the actions allegedly blamed on the President, his or her term in office is regarded as terminated early (with no need for an impeachment decision of the Parliament).

5. STATUS OF A MEMBER OF PARLIAMENT OF UKRAINE

5.1. Parliamentary Immunity

Pursuant to Article 80 of the Constitution of Ukraine, members of the Parliament of Ukraine cannot be brought to criminal responsibility, held or taken into custody without consent of the Verkhovna Rada of Ukraine. In fact, the parliamentary immunity in Ukraine is absolute, which contradicts Article 30 of the United Nations Convention against Corruption, as well as European practice, as in Europe members of parliament (MPs) have limited immunity.

Recommendations:

Article 80 of the Constitution should be amended to narrow the scope of parliamentary immunity: 1) this immunity should not extend to the cases when an MP is caught in flagrante delicto; 2) the immunity should not exclude investigative activity without restricting the freedom of movement for an given MP.

5.2. Parliamentary Privileges

The effective Law "On the Status of People's Deputy of Ukraine" establishes an array of privileges for MPs, in particular: 1) free-of-charge travel on all internal routes, on all types of municipal passenger transport, except taxi; free parking, free use of official conference halls; 2) free-of-charge medical services and free sanatorium and resort vouchers; 3) one-time monetary reimbursement for housing setup expenses within the limits of the cost of housing for a legislator and his/her family members, free residential accommodation provided for the term of his/her mandate or accommodation for permanent residence; 4) toll-free communication services. In most foreign countries, the public support for the activities of legislators is of quite a different nature – MPs are entitled to direct financing of the relevant expenses or are reimbursed for such expenses.

Recommendations:

1. It is necessary to analyze the privileges granted to Ukrainian MPs in accordance with the Law "On the Status of People's Deputy of Ukraine" and cancel those that most legislators do not actually use (for example, free travel in municipal public transport).
2. The system of privileges should be replaced with direct financing of the legislator's activity and/or reimbursements for expenses for the legislator's activity (reimbursement for transport expenses and expenses for renting (not buying) residential premises, recreation, and communication services (mobile communication, mail, fixed-line communication and so on).
3. It is necessary to increase in general transparency in the financial and material support for legislators and the Parliament as a whole. The Law "On the Status of People's Deputy of Ukraine" and the Rules of Procedure of the Verkhovna Rada of Ukraine should provide for annual publication of the budget of the Verkhovna Rada (which is currently a document of restricted access), as well as information about the financial and material support provided to each individual member of parliament during the reporting year.

5.3. Preventing Conflicts of Interest

In June 2009, the Parliament passed the Law "On Principles of Corruption Prevention and Counteraction," which, among other things, provided a definition of the term "conflict of interest" and bound everybody charged to perform public functions (including members of parliament) to refrain from any actions that may provoke a conflict of interest. At the same time, this law failed to provide mechanisms for preventing and settling conflicts of interests. Such mechanisms were expected in another law, which has not been adopted so far. The Parliament has under consideration the draft law "On Rules of Ethics in Public Service and Prevention of Conflicts of Interests" (reg. No 4420-1, dated May 14, 2009), however this draft does not take into account the specifics of the status of elected officials, including members of parliament of Ukraine. Thus, applicable legislation currently provides for one and only mechanism of preventing conflicts of interest in the activity of MPs, which is the ban on holding of an MP seat and engaging in other activities concurrently. Apparently, this ban is not enough to prevent and settle conflicts of interests in the activity of a legislator.

Recommendations:

It is necessary to adopt a separate law to lay down professional ethnics principles for public officials (including members of the Ukrainian parliament) and provide mechanism for preventing

and settling conflicts of interest. This law should require of every member of parliament to declare his/her personal interests; set requirements for the form, content, and procedure of submitting such declarations; require publication of such declaration on the web site of the Parliament; appoint an authority to control observance of the conflict of interest prevention requirement by MPs; provide mechanisms for settling conflicts of interest (forbid participation of certain MPs in the consideration of certain issues, transfer such MPs to other committees and so on); and provide for liability for breaching law as regards conflicts of interest. The requirements of the said law should also be reflected in the law "On the Status of People's Deputy of Ukraine" and the Rules of Procedure of the Verkhovna Rada of Ukraine.

5.4. Ethic Rules and Disciplinary Liability of MPs

Practice shows that MPs are far from being models of good behavior for common citizens. Some of them regularly block the rostrum in the Parliament hall, upset Parliament days, apply their physical force as an argument in political disputes, and resort to blatantly disruptive behavior (damage the electronic voting system, destroy or damage property that belongs to the Parliament). Among other reasons, this is a result of no rules of ethics and adequate sanctions for illegal behavior. It should be noted in this connection that: 1) applicable legislation declares only general rights and obligations of MPs, overlooking rules of their conduct; 2) some rules of conduct of MPs are provided in a scattered manner in the Rules of Procedure of the Verkhovna Rada but they only apply to behavior in the session hall (behavior of MPs in committees, outside the Parliament and so on are not regulated at all); 3) no disciplinary (or any other) liability is envisaged for many offences such as upsetting session days, preventing the Speaker from running daily sessions and so on; 4) even if punitive sanctions are provided, they are still not in line with the pro rata and prevention principles; 5) there is no legal act regulating the disciplinary proceedings.

Recommendations:

It appears necessary to adopt a dedicated act (Rules of Parliamentary Ethics, Code of Conduct for Members of Parliament) to: a) formulate parliamentary ethics principles and rules of conduct for MPs in the Parliament building and outside it; b) provide a procedure to control observance of the said rules; c) establish pro rata and preventive sanctions for legal offences, as well as a procedure of bridging parliamentarians to disciplinaryliability for such offences.