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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

**ON TWO DRAFT LAWS
AMENDING THE LAW
ON NATIONAL MINORITIES
IN UKRAINE**

on the basis of comments by

**Mr Franz MATSCHER
(Member, Austria)**

I. Introduction

1. *By a letter of 3 November 2003, the Legislation Institute of the Verkhovna Rada and the State Committee on Nationalities and Migration of Ukraine requested the Council of Europe to provide expert assistance in respect of two draft laws “amending the law on national minorities in Ukraine” which have been prepared by the Cabinet of Ministers (“first draft law”) and by two People’s Deputies, Messrs. O.B. Feldman and I.F. Gaidosh (“second draft law”), respectively and submitted to the Verkhovna Rada.*
2. *The Venice Commission accepted to assist the Ukrainian authorities, together with the Directorate General of Human Rights of the Council of Europe. Mr Franz Matscher was appointed to act as rapporteur. His preliminary comments (CDL (2003)97) were presented to the Commission at its 57th Plenary Session (12-13 December 2003).*
3. *A working meeting took place in Strasbourg on 12 January 2004, at which Ukrainian representatives, including Messrs Feldman and Gaidosh and representatives of the Legislation Institute of the Verkhovna Rada, advisors to the Directorate General of Human Rights, members of the Office of the OSCE High Commissioner on National Minorities and Mr Franz Matscher discussed about the draft legislation under consideration.*
4. *The present opinion, which was prepared taking into account the information obtained at the latter meeting, was adopted by the Commission at its ... Plenary Session ().*

II. COMMENTS

a. The position of this legislation in the hierarchy of norms

5. The question of the position of the minority-protecting legislation in the Ukrainian hierarchy of norms, notably its relations with the Constitution and the numerous pieces of legislation which are under preparation and are relevant to minority protection, must be addressed. It is outlined in Article 2 of the first draft law and in Article 3 of the second draft law.
6. Ukraine fosters the development of the identity of national minorities. Article 11 of the Ukrainian Constitution in fact provides :

“The State promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine.”
7. Further, Ukraine ratified several international instruments relating to the protection of human rights and, more specifically, national minorities’ rights; these include the European Convention on Human Rights (ratified on 11 September 1997) and the Framework Convention for the Protection of National Minorities (26 January 1998)(hereinafter “the Framework Convention”). The Verkhovna Rada ratified the European Charter on Regional or Minority Languages on 15 May 2003 but the relevant instrument of ratification has not yet been deposited.
8. According to Article 9 of the Ukrainian Constitution,

“International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.

The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.”

9. International treaties therefore, as has been clarified at the meeting of 12 January 2004 (see para. 3 above), come immediately after the Constitution and prevail over ordinary laws. The “Law on amending the law on national minorities in Ukraine” will thus have to conform to them.

10. The law under consideration is not going to be a constitutional law: this was clarified in the course of the meeting of 12 January 2004. Accordingly, the question of its relations with ordinary legislation must be addressed.

11. There exist several laws which concern national minorities. The “Law on national minorities in Ukraine” (no. 2494-12) was adopted on 25 June 1992 and has been in force since then. It will cease to exist by operation of the law under consideration.

12. According to the information submitted by the Ukrainian representatives at the meeting of 12 January 2004, several other pieces of legislation which are of relevance to minority protection, are either in force or in preparation. These include the Acts on Education, on Information, on Local Self-government and on Printed matters. The Commission also recalls the “Law on the Concept of the State Ethnic and National Policy of Ukraine”, on which it has rendered an opinion (CDL (2001) 42 and 51).

13. The “law amending the law on national minorities” will be the reference text on minority protection and is therefore meant to constitute *lex specialis* as regards national minorities in Ukraine. It follows that all other pieces of legislation, insofar as relevant, will have to be interpreted or brought in conformity with this law.

14. This law is going to be a framework law. Secondary legislation (and indeed there are abundant references in both draft laws to secondary legislation to be enacted) will therefore have to conform with it.

15. In the Commission’s opinion, it would be useful if the law pointed out expressly its character of *lex specialis* and if it set out with some detail the guidelines which the secondary legislation will have to respect. It would also be useful if the law contained the enumeration of the applicable international instruments of minority protection (see point 4 of the explanatory memorandum to the second draft law).

b. The definition of “national minorities”

i. The element of citizenship

16. Both the first and the second drafts contain, in their article 1, a definition of the term “national minorities” in which reference is made to the notion of *citizenship*.

17. The Commission recalls that the traditional position in international law is to include citizenship among the objective elements of the definition of *national minorities* (see notably the definition provided by Francesco Capotorti in 1978, Article 2 § 1 of the Venice Commission’s

Proposal for a European Convention for the protection of national minorities, Article 1 of Recommendation 1201/1993 of the Council of Europe's Parliamentary Assembly and Article 1 of the European Charter for Regional and Minority languages).

18. However, a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition.

19. In the Commission's opinion, the choice of limiting the application *ratione personae* of specific minority protection to citizens only is, from the strictly legal point of view, defensible. States are nevertheless free, and encouraged, to extend it to other individuals, notably non-citizens.

20. This is true even though all individuals enjoy the general human rights protection, in particular the prohibition of discrimination, while specific categories such as migrant workers and refugees are the object of specific protection under international law.

21. The Commission has noted that at the meeting of 12 January 2004, the Ukrainian representatives have said not to be against abolishing the citizenship requirement.

22. In the light of the foregoing, the Commission considers that Ukraine should omit the reference to citizenship in the general definition of national minorities in the draft legislation under consideration, and add it in the specific clauses relating to rights specifically reserved to citizens, such as certain political rights or access to civil service.

ii. the notion of "historical presence in the country"

23. The second draft embodies the further element of historical presence in the country, in order to avoid the enlargement of specific minority protection to new immigrants. This requirement is not inconsistent with international minority law (arguably already for the second generation).

24. The notion of "historical presence" is, however, vague and, if maintained, should be clarified.

25. It must be noted in addition that immigrants may fall within the ambit of application of the law. In this respect, it must be recalled that the Parliamentary Assembly of the Council of Europe, in its recommendation 1492(2001), refers to immigrant population who are citizens of the State in which they reside as a "special category of minorities".

iii. the quantitative criterion

26. Both draft laws introduce a quantitative criterion, of "less than the number of Ukrainians" and "less than half the population of Ukraine" respectively.

27. The Commission recalls that the draft proposal of the Venice Commission on a European Convention for the protection of national minorities used, in its article 2, the words "smaller in number than the rest of the population of the State".

28. The choice of the more appropriate formula will depend on the demographic situation in Ukraine; furthermore, it has to be clarified to which territorial subdivision of the State this criterion should apply. This question is connected with the requirement that the minority group must not be “dominant” (see “CDL-AD (2002)1, Opinion on Possible Groups to persons to which the Framework Convention for the Protection of National Minorities would be applicable in Belgium).

c. Equality before the law

29. Both Article 3 of the first draft and Article 2 of the second draft law set out the entitlement of persons belonging to national minorities to equality before the law and equal protection under the law. They are in conformity with Articles 4 and 6 of the Framework Convention.

30. The prohibition of any discrimination is wider than article 14 of the European Convention on Human Rights and in conformity with Protocol No. 12 thereto.

d. Participation in political and social life

31. Article 4 of the first draft law and Article 7 of the second draft law concern the right of participation of persons belonging to national minorities to the political and social life. Generally, one can say that these rights already flow from the general principle of non-discrimination, but their special mention may be useful.

32. The wording of the two drafts is different; the second draft is more elaborated and has to be preferred. Nevertheless, some terms of the first one should be included in the second one.

e. Preservation of traditional environment and cultural heritage

33. The first draft law, in its Articles 5 and 17, sets out the entitlement of national minorities to the preservation of their traditional environment and cultural heritage. These articles have no direct correspondence in the second draft, although the same idea is partly expressed in its Articles 26 and 27 (“Historical and cultural monuments” and “Development of traditional national craft industries”).

34. In the Commission’s opinion, it is appropriate to state this principle in the new law, even if it is expressly set out in various international instruments applicable in Ukraine.

f. Names, Patronymics

35. The guarantees set out in Article 6 of the first draft law and Article 5 of the second draft law are equivalent and correspond to Article 1 § 1 of the Framework Convention.

g. Exercise of rights

36. Articles 7 of the first draft law and 6 of the second draft law need a clarification

h. Use of minority languages by the authorities

37. The right to use its own language in one’s dealings with the authorities is one of the core rights. The wording of Article 8 of the first draft law seems preferable to that of Article 16 of the

second draft law. Nevertheless, the provisions in question call for a clarification. At any rate, it should be made clear that the “authorities” in question include the judiciary.

38. However, the quantitative requirement (“where persons belonging to national minorities form *the larger part* of the population”) seems too restrictive. It is recalled in particular that recently the Parliamentary Assembly of the Council of Europe referred to the need to pay special attention to the “free use of national minorities’ languages in geographical areas *where they live in substantial numbers*” (see recommendation 1623(2003), point 11 v.). This question needs to be regulated in detail in the relevant secondary legislation, but a precise guideline needs to be given in this law.

i. International and cross-border minority contacts

39. This principle, which is set out in Article 9 of the first draft law and in Article 33 of the second draft law mirroring Article 17 of the Framework Convention, is important for the survival and further development of national minorities.

j. Learning of the mother language

40. As regards the learning of the minority language, Articles 10-11 of the first draft law are more elaborated than Articles 11-13 of the second draft law. Generally, they meet the requirements of minority protection. Indeed, Article 10 of the Framework Convention is more vague and more restrictive.

41. Specific secondary legislation, such as a special instruction or school legislation, is going to be necessary. It should already in this law be specified to what levels of education this provision is applicable. Appropriate reference should be made to the applicable UN and UNESCO Convention as well as to the European Charter on Regional and Minority Languages.

42. It has to be underlined that the rights set out in Articles 12 (Training of teaching staff) and 13 (Creating educational establishments) of the second draft law are typically group rights. So are the activities of “cultural associations” (articles 15 and 18 of the first draft law and “public associations” (article 7, para. 2 and article 16 of the first draft law; article 14 of the second draft law), and further the institution of “advisory or consultative bodies” (article 18 of the first draft; article 15 of the second draft law), as well as the terms “self organisation and self government”(article 14 of the first draft).

k. Toponymy

43. The issues relating to the toponymy are amongst the most sensitive in areas where there are living minorities and they should be regulated in a minority protection instrument. They are addressed in Article 17 of the second draft law, whereas the first draft law is silent about them. The provisions on toponymy should include the designation of the premises of public authorities.

44. The meaning of “areas of compact population of national minorities” should be clarified by specifying what percentage of population is required, taking into account the specific demographic situation in Ukraine. Due consideration must furthermore be given to this question in respect of “dispersed” minorities if there are any in Ukraine.

l. Cultural development of minorities

45. As far as the cultural development of minorities is concerned, there is a different approach in the first and in the second draft laws. The former introduces specifically the notion of cultural autonomy, which should be embodied in a minority protection instrument. The latter draft, instead, is more detailed – partly even too detailed – in describing the modalities of the cultural development of national minorities, in particular concerning the use of and access to the media.

46. A combination of the two approaches would be desirable.

m. Advisory and consultative bodies

47. The participation of persons belonging to national minorities in the legislative and the administrative fields concerning minority questions, in particular, at the regional and the local level, is very important. Here, Article 18 of the first draft law and Articles 15 and 28-30 of the second draft law follow different ways.

48. The powers of the consultative bodies referred to in Article 18 of the first draft are rather vague and must be duly co-ordinated with those of the “central executive body with special powers” referred to in the same provision.

49. The creation of a body of the kind of the “minority council” which – following a suggestion made by the Venice Commission – has been introduced in the Croatian constitutional law on the rights of national minorities, and which turned out to be a valuable instrument, could be envisaged.

n. Representation in parliament

50. A provision allowing for the proportional representation of national minorities in parliament should be included in the law; this would be in line notably with point 11 v. of the Council of Europe’s Parliamentary Assembly’s Recommendation 1623(2003). At the very least, a provision should set out the principle that active participation of national minorities will be ensured by secondary legislation to be enacted.

o. Funding of national minorities

51. The explanatory report specifies that “no additional funding is required” for the implementation of the law. It needs to be recalled in this respect that due implementation of the principles set out in this law will inevitably be costly.

III. CONCLUSION

52. The Commission considers that both draft laws are, generally speaking, in line with the applicable international standards. However, it must be noted that the “Law amending the law on national minorities in Ukraine” is a framework law. Accordingly, the extent of its adequacy in respect of the international standards may only be evaluated in the light of its concrete application.

53. The Commission has been informed that the final version of the law is going to be prepared on the basis of the two draft laws under examination. It hopes that these observations will assist the Ukrainian authorities in preparing this law. It stands ready to pursue the co-operation on this matter.