



Strasbourg, 3 June 2004

Opinion no. 297 / 2004

Restricted
CDL(2004)051
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW
ON THE CONCEPTION OF
THE STATE ETHNIC POLICY
OF UKRAINE**

By

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1. Preliminary observation

The following comments are based upon the unofficial English translation, provided to the Venice Commission. It may well be that some of the ambiguities or obscurities pointed at find their cause in the translation.

2. Legal status of the law

The proposed law is of a rather particular nature. Its legal status is not specified.

The law contains, according to its preamble, “contemporary views, principles and priorities in activity of public authorities and local governments in the sphere of interethnic relations” in order to establish “the strategic direction for public authorities and local government in resolving the problems of national development and regulation of interethnic relations, consolidation and development of the Ukrainian nation (...)”. As such, it resembles more a constitutional law than an ordinary law.

On the other hand, its preamble states that, in addition to the Constitution and universally recognised norms of international law, it is based on a number of Ukrainian laws, which seems to indicate that the proposed law is, at most, of the same rank as these laws.

Consequently, it is not clear what the precise rank of the proposed law within the legal system of Ukraine is, and in particular not whether (other) laws (such as those mentioned in the preamble), decrees and administrative decisions may be reviewed for their conformity with the principles and guidelines laid down in the present law. This is very important, since the draft law only sets out certain principles, aims and issues to be regulated, and requires for its implementation further legislative and administrative acts. This need of further implementation is recognized in section 4, under mechanism of realization of ethnic policy.

3. Terminology

The meaning and scope of the proposed law are especially difficult to grasp, due to the lack of clarity of some of the terms used. In particular, it is not clear which relationship exists between, on the one hand, “citizenship” and, on the other hand, “nationality”.

The preamble speaks of “citizens – representatives of different nationalities”, implying that a person who is a Ukrainian citizens does not necessarily have the Ukrainian nationality.

And in section 2 concerning the main aims and subjects of the State ethnic policy, the introductory statement speaks of “equal opportunities for all its citizens”, while the first of the aims listed there speaks of “development of the Ukrainian nation, historical consciousness and national dignity of Ukrainians, ethnic, cultural and linguistic originality of representatives of different nationalities”. This, too, creates the impression that “nationality” does not refer to citizenship but rather to national origin, as is the case with the concept of “national minority”.

It is highly desirable that the draft law should be clarified on this issue.

4. Restriction of the State ethnic policy to citizens

The issue of terminology is of importance because it determines whether the draft law establishes an ethnic policy for Ukraine that concerns only Ukrainian citizens (and persons of Ukrainian nationality abroad) or also persons on the Ukrainian territory who are not Ukrainian citizens but citizens of another State or stateless.

The text of the draft law seems to indicate that the drafters have opted for the first alternative. In the preamble, there is a reference to “equality of relations and close cooperation of citizens of all nationalities in Ukraine”. In section 2, under the main aims and subjects of the State ethnic policy, it is stated in the introductory paragraph that “The State ethnic policy of Ukraine provides equal opportunities for all its citizens ...”. And in section 3, under the provisions for development of the State ethnic policy, there is a reference to the constitutional guarantee of rights and freedoms of citizens. On the other hand, in the same section 2, the words “guaranteeing the rights of the Ukrainian nation and representatives of different nationalities” are ambiguous in this respect.

The assumption that the drafters intended to restrict the scope of the law to “citizens” finds also confirmation in the recent draft law on national minorities of Ukraine, where “citizenship” is an element of the definition of “national minority”.

Furthermore, an *a contrario* indication is to be found in section 2, where it is stated with respect to persons who have been deported from Ukraine on national ground, that they will be granted equal rights with Ukrainian citizens after their return. If all citizens of other countries or stateless persons who are residents of Ukraine, would be entitled to the same rights as Ukrainian citizens, the provision would be superfluous.

The Venice Commission refers, in the context of the requirement of citizenship, to its recent opinion, adopted at its 58th plenary session of 12 and 13 March 2004, on two draft laws amending the Law on National Minorities in Ukraine, where it was stated that, in the opinion of the Venice Commission, “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 the rights specifically reserved to citizens, such as political rights or access to civil service”.

In any case, in view of this issue it is all the more important that the draft makes it expressly clear that general human rights, as distinguished from political rights, shall be ensured to everyone under Ukrainian jurisdiction, irrespective of citizenship. In section 1 of the draft, under the principles of the State ethnic policy, the words “equality of human and citizen rights and freedoms” lack clarity, since by definition only citizens are entitled to citizen rights. And in the same section, prohibition of any form of restriction (read: discrimination) of the enjoyment of rights is restricted to “citizen rights”.

On the other hand, against the background of the distinction between “citizenship” and “nationality”, it is striking that in the above-mentioned provisions “national origin” is not mentioned among the grounds on the basis of which differential treatment is prohibited.

5. Self-government

The principles of self-government and proportional representation of national minorities are not mentioned among the principles of State ethnic policy.

In section 2 of the draft, under the main aims and subjects, there is a reference to “integration of efforts of all components of state power bodies and civil society, political and public figures, representatives of different nationalities for the purpose of achieving interethnic consent”, while in section 3, under the provisions for development of the ethnic policy, there is a reference to “active participation of representatives of different nationalities in the public and political life of the country”, but these references are not very clear and specific. The same holds good for the reference, in the same section 3, to “national and cultural associations of citizens” as an “important instrument of self-expression”. On the other hand, the reference in the same section to “advisory bodies that could be created under the bodies of executive power”, alludes to participation in government of national minorities in an advisory capacity.

In section 4 of the draft law, under mechanism of realization of ethnic policy, a reference is made to the State Committee of Ukraine for Nationalities and Migration, but no guarantee is formulated as to the representation of different national minorities in the Committee.

The composition of the Ukrainian Parliament and other elected bodies, and the proportional representation of national minorities therein, is not addressed in the draft law, nor is their representation in the executive bodies and in the judiciary.

6. External effect in relation to Ukrainians abroad

In its preamble, the draft law includes among the objects of the State ethnic policy of Ukraine “Ukrainians who live abroad”. This is elaborated upon in section 1, under principles of State ethnic policy, where the principle is included to “protect the rights and interests of Ukrainian citizens abroad, support of Ukrainians who live abroad, in the process of preserving and developing their native language, culture and national traditions, and strengthening their ties with the ethnic motherland, according to the norms of international law”. And in section 3, under provisions for the development of the state ethnic policy, the aim is mentioned “to provide cooperation with foreign Ukrainians legally (...) by executive bodies of Ukraine and public organizations of Ukrainians that have been created in the country and abroad”. A related object of the draft law is the promotion and facilitation of the return of Ukrainians who have been deported. That aim is mentioned both in sections 2 and 3.

Thus, the draft law is intended to have external effects in relation to persons who only in a very limited sense are under the Ukrainian jurisdiction. In section 2 of the draft, under the main aims and subjects, there is a reference to “establishing relations with countries which have related ethnic minorities” and to the “realization of (...) international agreements and intergovernmental mixed commissions regarding the rights of national minorities”, but these references are of a rather general character.

In this respect, the Venice Commission refers to its report, adopted at its 48th plenary meeting of 19 and 20 October 2001, “On the Preferential Treatment of National Minorities by their Kin State” and to the several conditions listed there for such external effect to be in conformity with European standards and with the norms and principles of international law.

7. Principles of EU law

In the last paragraph of the preamble reference is made to “ethnic needs taking into consideration (...) principles of EU law on the way of Ukraine to Europe”. In section 2, under the main aims and subjects of ethnic policy, “increase of the integration into the EU” is mentioned, while section 4, under mechanism of realization of ethnic policy, states that the legal regulation of interethnic communication should take into consideration Community law.

However, there are no indications in the provisions of the draft law, that in formulating, for instance, the principle of equality Community law has actually been taken into account.

8. Concluding observation

The draft law lacks clarity and specificity in many respects.

- Its legal status and scope are not expressly defined and are not clear from its wording.
- The draft law only contains principles, aims and issues to be addressed. It requires further legislative and administrative acts. It should, therefore, be clarified whether it serves as a standard for review of such acts.
- The restriction of the concept of the State ethnic policy to the promotion and protection of rights of Ukrainian citizens is implied in the draft, but is not clearly and consistently formulated. Moreover, from the point of view of the purpose of international standards concerning protection of national minorities, this restriction should be avoided.
- The extension of the principles and objects of the State ethnic policy to Ukrainians who live abroad requires international cooperation and multilateral or bilateral agreements with the States concerned. Reference to “the norms of international law” in that respect is not sufficiently specific.
- The principles of self-government and proportional representation deserve an express reference among the principles of ethnic policy.
- There are many repetitions and overlaps in the draft, *e.g.* concerning the equal protection of human rights and freedoms, the promotion and protection of the use of different national languages, and the promotion of the return of deported Ukrainians, which are mentioned both under the principles, under the aims of the ethnic policy and under the provisions for development of that policy. This makes it difficult to determine the exact meaning and scope of the provisions concerned, and their mutual relation.