Strasbourg, 27 September 2004

Restricted
CDL(2004)080

Opinion no. 303 / 2004

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON

THE DRAFT LAW ON THE STATUS OF THE INDIGENOUS PEOPLES OF UKRAINE

by

Mr Pieter van DIJK (Member, the Netherlands)

DRAFT LAW OF UKRAINE ON THE STATUS OF THE INDIGENOUS (AUTOCHTHONOUS) PEOPLES OF UKRAINE

Comments by Pieter van Dijk, Member, The Netherlands

1. Preliminary observation

The Venice Commission was provided with a very defective English translation of the text of the draft Law. Therefore, it may well be that several of the comments made are due to that translation.

2. Scope of the Law and definitions

The scope of the draft Law is not very clear, mainly due to lack of clarity of the meaning and scope of the concept of "indigenous people" as compared to that of "national minority", and lack of clarity of the relation between the concepts of "citizenship", "nationality" and "statehood".

The first paragraph of Article 1 of the draft Law speaks of "citizens of Ukraine of all nationalities", thus indicating that citizenship and nationality are two different concepts. This distinction requires a definition of "nationality" in Article 1 of the draft Law.

The same paragraph implies that the Ukrainian people consists exclusively of citizens of Ukraine, with the exclusion of persons who belong to national minorities and have retained the nationality of their kin-State, and of other "immigrants who kept the nationality of their home State, as well as of stateless persons, no matter how long they have been living on Ukrainian sol. Since non-citizens who are under the jurisdiction of Ukraine, and in particular non-citizens who have lived on Ukrainian territory for a long time, have rights and obligations under Ukrainian law, this concept of "Ukrainian people" would seem to be too restrictive.

The second paragraph uses the term "Ukrainians" in again a different, and in certain respects even more restrictive way, not referring to citizenship but to long time residency, which not only excludes immigrant and refugees who have not obtained Ukrainian citizenship, but even those who have become Ukrainian citizens.

While the first paragraph of Article 1 uses the term "indigenous peoples", the second paragraph speaks of "native people". The difference between the two concepts should be clarified or the use of two different terms be avoided.

The third paragraph of Article 1 gives an enumeration of "ethnographic groups". It is not clear whether these are the indigenous people to whom the Law is intended to apply, nor whether the enumeration is meant to be an exhaustive one.

The fourth paragraph of Article 1 mentions as one of the elements of the definition of "indigenous peoples" that they are numerically less than the rest of the population of the country. It is not clear why this criterion, that is common for defining "national minorities", is also relevant for defining "indigenous peoples". The criterion for "indigenous" is the historical link with the territory rather than the total number of the persons involved.

The fifth paragraph of Article 1 lists the different nationalities of which the indigenous peoples of Ukraine may consist. It is not clear, however, how persons of these nationalities can belong to the indigenous (autochthonous) peoples of Ukraine, since most of them must have immigrated into the Ukrainian territory at a certain moment. The same observation applies to Article 18 of the draft Law concerning the right of indigenous peoples to free contacts with their historical motherlands. If their motherland is not Ukraine, how can they be indigenous?

The sixth paragraph contains a definition of "national minorities". It mentions as one of the elements that persons belonging to a national minority are not Ukrainians by nationality. That raises the question of what precisely the difference is between "national minorities" and "indigenous peoples", since the latter may also be of different nationalities and must constitute a minority of the population of Ukraine. Moreover, the restriction in the definition of "national minorities" to "citizens" is not in conformity with modern tendencies in relation to the international standards for the protection of the rights of national minorities, as the Venice Commission has observed several times.[1]

The fact that the seventh paragraph of Article 1 stipulates that one and the same person cannot belong at the same time to an indigenous people and to a national minority makes the need of a clear definition of the two concepts even more pertinent.

3. International human rights treaties

The reference in Article 2 to international agreements "on the rights and personal liberty" is not very precise. The reference should be to international treaties concerning human rights and fundamental freedoms.

4. Participation and representation in public affairs

Article 3 of the draft Law refers in the first paragraph to the Committee on Human Rights, Inter-ethnic Relations, Indigenous Peoples and National Minorities. Unless regulated elsewhere, the Law should regulate the composition, functions and powers of the Commission, as well as the procedure of consultation.

The third paragraph of Article 3 of the draft Law provides that consultative bodies of the representatives of indigenous peoples *could* be created. This raises the question of the need of such a provision, unless the intention is that their creation should be allowed whenever an indigenous people takes the initiative for such a creation.

Article 3 does not specify on what matters and in what way the consultative bodies will have to be consulted by the local authorities. It follows from the third paragraph that the consultative bodies will only operate at the local level. Therefore, their relationship to the Committee referred to in the first paragraph should be defined.

The fourth paragraph of Article 3 refers to a special governmental body for the forming and realization of public policy in the sphere of indigenous peoples. The links between this body and, on the one hand, the Committee referred to in the first paragraph and, on the other hand, the consultative bodies referred to in the third paragraph, should be regulated.

[1] See its Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine, CDL-AD (2004)013, para 16-22.

5. The Assembly of Indigenous Peoples

Article 4 refers to the Assembly of Indigenous Peoples. The relationship between the Assembly and the Committee referred to in the first paragraph of Article 3 should be regulated, as well as the relationship with the consultative bodies referred to in the third paragraph of Article 3.

Article 5 of the draft Law, in paragraph 3, refers for the procedures of the Assembly to the Statute of the Assembly of Indigenous Peoples of Ukraine. It is not clear what the legal rank of the Statute is. If it concerns delegated or internal regulation, the main elements of the procedures should be regulated in the Law itself. The same holds good for the functions and powers of the Assembly, on which the draft Law is completely silent.

6. Restriction to "citizens"

Article 6, dealing with the obligations of indigenous peoples, only refers to "citizens", although it is obvious that the same obligations rest on members of indigenous peoples who are not citizens of Ukraine. Therefore, here too the restriction to citizens should be deleted.

The same holds good for Article 7 of the draft Law dealing with the right to equal legal protection and equality before the law. If and to the extent that citizenship is a relevant aspect for the application of a legal provision, that may constitute an objective and justified ground for different treatment, but is no reason for not extending the right of equal treatment to everybody under the jurisdiction of Ukraine. The second paragraph of Article 7, dealing with the protection of human rights, does not contain a restriction to citizens, but as a consequence of the definition of "indigenous peoples" in Article 1, such a restriction is implied. However, according to Article 1, in conjunction with Article 14, of the European Convention on Human Rights, human rights must be ensured in an equal way for everybody under the jurisdiction of Ukraine. The third paragraph of Article 7, dealing with restrictions of human rights and discrimination, does contain the restriction of citizenship. Here, again, it is evident that such a restriction is completely out of place.

Article 8 of the draft Law deals with the right of access to legislative, executive and judicial bodies, other public functions and enterprises, institutions and organisations. If the latter categories are not meant to be *public* enterprises, institutions and organisations, the restriction to citizens is obviously out of place. But for public functions and legislative bodies the restriction is also too general. There is a growing tendency in Europe to extend the right to vote for, and to be elected as a member of representative bodies at the local level to non-citizens who have had residence in the country for a certain period of time.

Article 9 concerning the right of members of indigenous people to preserve and develop their original features independently should also not be restricted to citizens.

The same holds good for Articles 11-17 of the draft Law concerning the right of members of indigenous peoples to use their names according to the traditions of their nationality, to participate in the cultural, religious, economic and public life, to teach in the mother tongue and use their language in the private and public sphere, to receive public support for the teaching of their language and for their associations and the assistance of specialists, to receive and disseminate information in their mother tongue in the mass media, and to establish cultural

centres and associations, national educational institutions, mass media, museums, theatres and film studios, respectively. As is the case for national minorities, all these rights should be extended to every member of indigenous peoples living in the country, unless the right concerned is of a typically political nature.

7. Use of the language of indigenous peoples by local authorities

The second paragraph of Article 14 deals with the use of the language of relevant indigenous peoples by local authorities in statute-established procedures, along with the state language. In the first place, according to the English translation, local authorities *could* use the language of the indigenous people but are not obliged to do so, which would mean that the provision does not offer any legal guarantee. In the second place, they are authorized to do so only if in the region concerned the indigenous peoples constitute the majority of the population. Compared to regulations concerning the use of the languages of national minorities in public life, the majority requirement would seem to be too severe.

8. Concluding observation

The text of the draft Law is still incomplete in many respects. Moreover, it lacks sufficient clarity, especially due to the very deficient and unclear definitions of Article 1.

From the point of view of democracy, the regulations concerning self-government, consultation, participation in public life and access to public functions of members of indigenous peoples are not sufficiently elaborated.

From the point of view of the protection of human rights and equal treatment, the restriction of the application of the Law to those members of indigenous peoples who are citizens of Ukraine is a very serious shortcoming that should urgently be remedied. The restriction is justified only in relation to those rights and freedoms that are of a clearly political character, as the Venice Commission has stressed again and again.[2]

[2] See note 1.