



Strasbourg, 22 September 2004

Opinion no. 303 / 2004

Restricted
CDL(2004)082
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

on the basis of comments by

Mr Pieter van DIJK (Member, the Netherlands)
Ms Mirjana LAZAROVA TRAJKOVSKA
(Member, “The Former Yugoslav Republic of Macedonia”)

I. Introduction

1. By a letter of 28 May 2004, the Ukrainian Government requested the Council of Europe to provide an expert assessment of the draft law on the “Status of indigenous (autochthonous) peoples of Ukraine”. The Venice Commission accepted to provide an opinion on this draft law.

2. Ms. Mirjana Lazarova Trajkovska and Mr. Pieter van Dijk were appointed to act as rapporteurs.

In the preparation of this opinion, the Venice Commission also co-operated with the Secretariat of the Framework Convention on National Minorities. The comments made by Mr Gudmundur Alfredsson, the rapporteur designated by the Secretariat of the Framework Convention on National Minorities were thus also taken into consideration.

3. The present opinion, which was drawn up on the basis of the three rapporteurs’ comments, was adopted by the Commission at itsPlenary Session (Venice,).

II. Preliminary comment

4. The following comments are based upon the English translation made by the Council of Europe of the text of the law provided to the Venice Commission by Ukrainian authorities. It may nevertheless be that some of the ambiguities pointed at find their cause in the translation.

III. Background information

5. The geographical location of Ukraine is specific in many respects. It lies on the bounds of Europe and Asia, being a crossroad of Western and Eastern Europe, and borders with seven neighbouring countries. All these factors have defined Ukraine's rather mixed national composition: the country accommodates a wide range of cultural, linguistic and religious diversity.

6. Besides Ukrainians – the title nation – the following main groups live in the country: Russians (the second major ethnic group), Jews, Byelorussians, Moldavians, Crimean Tatars, Bulgarians, Poles, Hungarians and Romanians (other major groups making less than 1% of population). Other groups living in the country are: Greeks, Volga (or Kazan) Tatars, Armenians and Germans. the Roma, Gaugauz, Georgians, Chuvash, Uzbek, Mordvin, Slovak, Czech, Bashkir, Latvian, Lithuanian and Estonian population. According to the Address to Citizens of Ukraine of All Nationalities (of 26 August 1991), there are more than 110 nationalities living on Ukrainian territory.¹

¹ Presidium of Verkhovna Rada of Ukraine Resolution On Address of the Presidium of Verkhovna Rada of Ukraine to Citizens of Ukraine of All Nationalities (Vidomosti Verkhovnoyi Rady (VVR) 1991, no. 42, p. 555). The Declaration on State Sovereignty of Ukraine (of 16 July 1990) as well as the Declaration of the Rights of Nationalities (of 1 November 1991) both defined the Ukrainian people as “*citizens of Ukraine of all nationalities*”. The same concept was reaffirmed by the Constitution in 1996 (Preamble). In this respect, it should also be noted that in Ukrainian language, there exists a difference between the terms “nationality” and “citizenship”. The term “nationality” is generally used in the sense of national identity (ethnicity) and has thus a different meaning from that prevailing in Western Europe, where it is synonymous with citizenship.

IV. The position of the draft law in the hierarchy of norms

7. According to Article 11 of the Ukrainian Constitution, “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 of Ukraine”.

8. Article 92 para. 3 of the Constitution stipulates that the rights of indigenous peoples are determined by the law of Ukraine exclusively.

9. The Constitution also establishes the principle of direct applicability of the provisions of the international treaties on human rights and freedoms. International treaties that are in force and approved as binding by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine (Article 9). They come after the Constitution and prevail over ordinary legislation of Ukraine.

10. Taking this into account, the question arises whether there are international instruments which oblige Ukraine to take specific legislative steps to protect the interest of, or to grant specific rights to, indigenous peoples.

11. At present, there are two International Labour Organisation Conventions (no. 107 and 169) concerning the working rights of Indigenous and Tribal Peoples (hereinafter: “ILO Convention no. 169”), but Ukraine is a party to neither. The UN Draft Declaration on the Rights of Indigenous Peoples (hereinafter: “Draft Declaration”), prepared by the UN Commission on Human Rights, is at present considered by the UN Open-ended inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples. Furthermore, a Permanent Forum on Indigenous Issues has been set up under ECOSOC and a Special Rapporteur with an investigative mandate under the Commission on Human Rights.

12. In this respect, the Commission invites the Ukrainian authorities to ratify the relevant international legal instruments, notably the ILO Convention no. 169.

13. The draft Law is a framework legislation. It will require the adoption of other legal instruments (legislation and delegated regulations, etc.) in order to facilitate an effective realisation of the rights of indigenous peoples guaranteed (e.g. in the field of education, public administration, media, communication with the government organs, etc.). In this regard, the importance of the legislation and regulations that will follow the implementation of this Law in maintaining its specific nature as a *lex specialis* in the hierarchy of norms needs to be stressed.

V. Scope of the draft Law and definitions

14. The draft Law is based on the complex definitional framework aimed at distinguishing the notion of indigenous peoples of Ukraine from other categories constituting the “Ukrainian nation”.

15. As a more general observation, the Commission notes that the definition of the notion “Ukrainian nation” seems to include exclusively “citizens” and thus to exclude all persons who belong to national minorities and who have retained only the citizenship of their kin-State, the immigrants who kept the citizenship of their home State and who have not (or not yet) acquired Ukrainian citizenship, as well as stateless persons, no matter how long they have been living on

Ukrainian territory. Yet, according to Article 26 of the Constitution of the Ukraine, foreigners and stateless persons who are legally staying in Ukraine enjoy the same rights and freedoms, and have the same duties as the citizens of the Ukraine, with the exceptions established by the Constitution, laws or international treaties ratified by Ukraine. Such definition of Ukrainian nation given by the draft Law thus seems too restrictive.

16. Regarding the definition of “indigenous peoples”, the effort made by Ukrainian authorities is worth welcoming since there is a lack of definition on this matter at the international level.² Indeed, the drafters have made an effort to develop a definition that will reflect the complex national structure of the Ukrainian society. However, the proposed draft definition remains unclear and does not seem to follow the general principles of international law existing in the field.

17. In defining the term “indigenous peoples”, the draft law combines two approaches: on the one hand, it provides for a general definition, based on a number of criteria, and on the other, it lists specific nationalities that are to be concerned as “indigenous peoples”. Both paragraphs raise a number of concerns.

18. First, the general definition is based, among other, on the condition of Ukrainian citizenship. Although there is no universal and unambiguous definition of “indigenous peoples”, there are a number of criteria by which indigenous peoples globally can be identified and from which each group can be characterised. The most widespread approaches are those proposed in the ILO Convention no. 169, and in the Martinez Cobo Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986). Neither of them mentions this criterion.³

19. Second, according to the definition proposed by the draft law, indigenous peoples are groups “numerically less than the rest of the population of the country”. This criterion, that is common for defining “national minorities”, is generally not relevant for defining “indigenous peoples”. In some cases, indigenous peoples even represent a majority of the population (such as Bolivia or Guatemala).⁴ Indeed, characterising feature of the definition is not the total number of the persons involved but the historical link with ancestral territory, the respect for the culture and the way of life (strongly related with the land on which the groups live) and the self-identification of the population concerned.

² There is indeed at present, an arduous discussion on this issue within the UN Open-ended inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples.

³ According to Article 1 para. 2 of the ILO Convention no. 169, “*Self-identification as indigenous /.../ shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply*”. Mr. Martinez Cobo defined indigenous peoples as: “*Indigenous communities, peoples and nations are those which, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from the other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems /.../*”. Furthermore, Article 32 of the Draft Declaration specifically provides for the “*right of indigenous individuals to obtain citizenship of the States in which they live*”.

⁴ Report on the UN Seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States, Geneva, 16-20 January 1989 (UN Doc. E/CN. 4/1989/22, p. 26.)

20. The Commission would thus favour omitting reference to citizenship and numerical criteria when defining the term “indigenous peoples”.

21. Furthermore, if the restriction to “citizens” is maintained by the draft law, the Commission would favour the inclusion of an explicit provision specifying that the definition of “indigenous peoples” given in Article 1 is a definition for the purposes of the present draft Law *only*. In other words, it should explicitly state that the restriction to “citizens” is not intended to, and cannot, restrict the definition of “indigenous peoples” in respect of the enjoyment of those rights under the Constitution, under the present draft law and other domestic regulations as well as under international law, in relation to which no requirement of citizenship has been made and to which everybody is entitled on an equal basis.

22. In addition to a general definition, Article 1 para. 5 lists the indigenous peoples of Ukraine: Byelorussian, Bulgarian, Armenian, Gagauz, Greek, Jewish, Karaite, Crimean Tatar, Krymchak, Moldavian, Polish, Russian, Romanian, Slovak, Hungarian and Czech people. Here again, the draft law does not seem to follow the international standards in the field. The time element is one of the essential criteria when it comes to the definitions of the term “indigenous peoples”: the latter are the *original inhabitants* of the land on which they have lived from time immemorial or at least from before the arrival of later settlers. Most of the persons belonging to national groups listed in the draft law must have immigrated into the Ukrainian territory at a more recent moment in the past, and as such could not be considered “indigenous peoples” according to the existing international law standards.

23. As to the definitions of other categories making the “Ukrainian nation” notably the “ethnographic groups” given by the draft law, they are unclear and may be misleading. The Commission therefore strongly recommends that the draft Law provide for a definition of “indigenous peoples” *only*.

VI. General remarks

a. Restriction to “citizens”

24. As is the case with the definition of indigenous peoples (and Ukrainian nation), a majority of the provisions of the draft law is restricted to “Ukrainian citizens”. Such restriction does not seem to be justified. This is the case notably with respect to the right to equal legal protection and equality before the law (Article 7). If and to the extent that citizenship is a relevant aspect for the application of a legal provision, it may constitute an objective and justified ground for different treatment, but cannot be a reason for not extending the right to equal treatment to everybody under the jurisdiction of Ukraine. Although Article 7 para. 2 dealing with the protection of human rights, does not contain a restriction to citizens, such restriction is implied as a consequence of the definition of “indigenous peoples” given in Article 1. Yet such restriction is not compatible with the European Convention on Human Rights and Freedoms (hereinafter: “the ECHR”), which Ukraine ratified in 1997. According to Article 1, in conjunction with Article 14 of the ECHR, the State Parties must secure the rights and freedoms guaranteed by the ECHR to “everyone within their jurisdiction”, thus including also non-citizens.

25. A number of other guaranteed rights such as the right to preserve and develop the originality (Article 9), as well as the right of members of indigenous peoples to use their names according to the traditions of their nationality (Article 11), the right to participate in the cultural, religious,

economic and public life (Article 12), the right to receive and disseminate information in their mother tongue in the mass media (Article 16), should be extended to *all* indigenous peoples living in Ukraine.

b. Substantive rights

26. The substantive provisions of the draft law are all about classical minority rights, with emphasis on equal rights and non-discrimination and on the freedom of association and information, political and cultural rights, including language and education.

27. However, in accordance with the international legal standards in the field, the indigenous rights include in particular, the property rights to their traditional lands and the right to use and manage their natural resources. Neither of these rights is mentioned in the draft law. Issues related to the latter rights may, however arise at a given moment and should be anticipated.

VII. Remarks with regard to specific articles

a. Participation and representation in public affairs

28. Pursuant to the draft law, a “specially authorised central executive authority” shall be set up with the aim to develop and implement the state policy in the field of indigenous peoples and national minorities. “Corresponding structures” shall also be established within the municipal executive bodies (Article 3).

29. The establishment of specialized bodies responsible for the implementation of the state policy in the field of indigenous peoples is to be welcomed. There is however no guarantee in the draft law as to the representation of indigenous peoples in the mentioned bodies.

30. Furthermore, the draft law is silent on the relations of the new central governmental body with the existing State Committee for Nationalities and Migration, which is the main state executive institution in the sphere of ethnic policy.⁵

b. The Assembly of Indigenous Peoples

31. Article 4 provides for the creation of the Assembly of Indigenous Peoples, as an advisory body to the central government in the field of protection of the rights and freedoms of the indigenous peoples and national minorities of Ukraine. This provision is to be welcomed. The existence of a body representing the interests of indigenous peoples of Ukraine is of particular importance for ensuring a channel of communication and co-ordination between the government and indigenous peoples, and between different indigenous peoples themselves. However, it is not clear why such an Assembly of Indigenous Peoples should also advise on issues related to national minorities, when a specialised body – the Council of Representatives of Civic Associations of National Minorities, attached to the State Committee on Nationalities and Migration - already exists.

32. The draft law should also clarify the relationship between the Assembly and the corresponding structures to be established at the local level (see *supra*, para. 28).

⁵ This role of the Committee was reconfirmed by the draft Law on the conception of the State ethnic policy of Ukraine.

c. Obligations of indigenous peoples

33. Article 6, dealing with the obligations of indigenous peoples, only refers to “citizens”. Here again, such restriction seems inappropriate insofar as it is obvious that the same obligations equally applies on members of indigenous peoples who do not hold citizenship of Ukraine, and should thus be removed (see also para. 15 *supra*, and Article 26 of the Constitution of Ukraine).

d. The right to be elected or designated to public positions

34. Article 8 of the draft Law provides for the right of access to legislative, executive and judicial bodies, other public functions and enterprises, institutions and organisations. It is the Commission’s understanding that the last three categories are meant to be *public* “enterprises, institutions and organisations”. At any rate, the Constitution of Ukraine guaranties the equal electoral (passive and active) rights to all its citizens (Article 38). From that perspective, if Article 8 is meant to reaffirm the above mentioned constitutional provisions it should be written in a non-restrictive manner.

35. In addition, the Venice Commission points out that there is today 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.

e. The right to participate in cultural, religious, public, economic and public life

36. Article 12 of the draft Law states that the State ensures the right of citizens who belong to indigenous peoples to participate in the cultural, religious, public, economic and state life, in particular in the solution of questions concerning the protection of their legal interest. This provision is very general and stipulates a right already guaranteed by the state to all its citizens. It is not clear though how the state will intervene in solving questions concerning the protection of the legal interest of indigenous peoples.

f. The right to education and instruction in the mother tongue, and the use of the language of indigenous peoples within the local authorities

37. The Commission welcomes the readiness of the Ukrainian authorities to ensure the right to education and instruction in the persons’ mother tongue, the right to use the language in private and public sphere in oral and written communication, the right to establish private educational institutions (Article 13), as well as to provide for the conditions for teaching and learning the language (Article 14).

38. However, it seems unclear who the "*relevant* indigenous people" mentioned in Article 14 para.1 are, and to whom the rights in Article 13 will apply. The text should be amended to indicate that no inappropriate distinction is meant here.

39. 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. Such use however, seems to be rather restrictive. In the first place, according to the draft law, local authorities *may* 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 municipality 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.

VIII. Conclusion

40. The Commission welcomes the initiative to adopt the law on protection of the rights and freedoms of indigenous peoples of Ukraine. However, in its present wording, the draft law remains incomplete in many respects and does not seem to respond to its objective. It also lacks clarity, especially with regard to a definition of “indigenous peoples” given in Article 1. In this respect, an essential issue arises as to which of the groups listed as indigenous peoples in Article 1 of the draft Law can be considered, according to the international legal standards, as the original, and thus “indigenous” peoples of the land on which they live.

41. As to the substantive rights, the draft law should include the right to land and to management of natural resources that are generally associated with indigenous rights in international instruments and case-law. It should also elaborate more on the provisions relating to self-government, participation of indigenous peoples in public life and access to public functions.

42. Finally, from the point of view of the protection of human rights and equal treatment, the restriction of the application of the law only to those members of indigenous peoples who are citizens of Ukraine represents a serious shortcoming that should urgently be remedied. As the Commission has already had the occasion to stress, such restriction is justified only in relation to those rights and freedoms that are of a clearly political nature.⁶

43. The Venice Commission remains at the disposal of the Ukrainian authorities for further co-operation in the field of this draft law.

⁶ See for instance, the Venice Commission’s Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine (CDL-AD (2004) 013, paras. 16-22).