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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

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

by

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I. INTRODUCTION

1. For the preparation of this provisional opinion I had at my disposal (apart from some pieces of correspondence) the following documents:

- Analysis of the draft law on amending the law on national minorities of Ukraine. Based on comments by Mr Ole Espersen and Mr Geoff Gilbert, dated 11 April 2002, with an Appendix of a law submitted by the Ministry of Justice of Ukraine (D1);
- Draft prepared by the Ukrainian State Committee on Nationalities and Migration, with a small explanatory note (probably of 2003), (D2);
- Draft submitted by Ukraine People's Deputies O.B. Feldman and I.F. Gaidosh, with an explanatory memorandum (probably of 2003), (D3).

2. The following points have to be mentioned:

a. On the one hand, the analysis and the draft (D1) as well as the drafts (D2) and (D) are related to the Law of Ukraine "on national minorities" of 1992. The author of the present comments does not dispose of the text of the Law of 1992 which should be amended. On the other hand, an exhaustive opinion on the drafts would presuppose the acquaintance with the basic Law of 1992.

b. As regards the first draft (D1), there is a sound analysis by Council of Europe experts, to which I can largely subscribe. Furthermore, to a certain extent the drafts D2 and D3 seem having taken into account the suggestions of D1. Therefore, I will concentrate on the drafts D2 and D3.

c. The following comments will be conducted mainly in the light of the Framework Convention for the Protection of National Minorities of 1995 (FC) and of the other principles of modern minorities law, even if it must be conceded that each minority situation has its particular features which require a specific response.

d. It may be that some difference in the language of D2 and D3 are due to the translation from the Ukrainian to the English language.

II. COMMENTS

Article, 1 D2, and article 1, D3

3. These provisions give a definition of the term "national minorities" which embodies the notion of citizenship. This element is largely comprised by international instruments (see e.g. article 2 of the Draft of the Venice Commission, article 1 of Rec 1201/1993) of the Parliamentary Assembly, whereas the FC is ambiguous in this respect. Even if it is true that there are tendencies in international minority law to abandon the criterium of citizenship, one cannot say that the solution proposed by the drafts would be contrary to the existing laws or international instruments. Of course, all persons independently of their status as members of a minority, have to enjoy the general human rights, in particular the protection against discrimination, there are specific minority rights – and not only those of a political character – which may legitimately be reserved to citizen. Furthermore, I do not oversee that international treaty law, for instance the EC-law, may call for different solutions.

4. D3 embodies the further element of historical presence in the country, in order to avoid the enlargement of specific minority protection to new immigrants. This too is consistent with international minority law. On the other hand, also immigrants may become minorities within the meaning of the law (it is disputed whether that would be the case already for the second generation). It is recalled that Rec 1492/2001 of the Parliamentary Assembly, article 11, called them a "special category of minorities". Of course, what has been stated above about the enjoyment of all general human rights is also true for the last mentioned group of persons.

5. D2 and D3 introduce the criterium of "less than the number of Ukrainians" resp "less than half the population of Ukraine; the draft proposal of the Venice Commission on a European Convention for the protection of national minorities uses, in article 2, the words "smaller in number than the rest of the population of the State".

6. It will depend on the demographic situation in Ukraine which formula would be more appropriate. At any rate, it is an aspect of the basic problem that the minority must not be "dominant" (see the Opinion of the Venice Commission CDL-AD (2002) 1 on the Belgian minority problem).

Article 2, D2, and article 3, D3

7. These article enumerate the applicable sources of law without establishing a (clear) hierarchy among them. I do not know whether the new law has the character of a constitutional law. At any rate, it should made clear that international instruments will prevail and that the other regulatory instruments have to be consistent with the law.

8. Furthermore, the enumeration of the applicable instruments in n° 4 of the Explanatory Memorandum to D3 should be included in the law, except the reference to the 1992 law which, following the final provisions, should cease to apply.

Article 3, D2 and article 2, D3

9. These articles are a declaration of principles.

10. As far as the equality before the law is concerned, the prohibition of any discrimination is wider than article 14 ECHR and in conformity with Protocol n°12.

11. D3 is more detailed than D2, but there is no difference in substance. Both are in conformity with articles 4 to 6 of the FC.

Article4, D2, and Article 7, D3

12. These articles concern the right of participation of members of the minority 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.

13. The wording of the two drafts is different; D3 is more elaborated and has to be preferred. Nevertheless, some terms of the first one should be included in the second one.

Article 5 et article 17, D2

14. These articles have no direct correspondence in D3; however, the same idea is partly expressed in article 26 and article 27 of D3. The principles should be embodied in the new law. Even if it is expressly stated in various international instruments, the principles as such is a component of minority protection.

Article 6, D2 and article 5, D3

15. The two versions are equivalent and they correspond to article 1, paragraph 1 of the FC.

Article 27, D2 and article 6, D3

16. The real meaning of these provisions needs a clarification.

Article 8, D2 et article 16, D3

17. The use of the own language in the dealings with the authorities is one of the most important rights for minority protection. In this respect, D3 is more elaborated whereas article 8, D2, is rather vague.

Article 9, D2, and article 33, D3

18. This is an important feature for the survival and the further development of minorities; it has a basis in article 17 of the FC too.

Article 10-11, D2, and article 11-13, D3

19. As far as the learning of the mother language is concerned, D3 is more elaborated than D2. Generally spoken, both versions meet the requirements of minority protection; in this respect, article 10 of the FC is more vague and more restrictive.

Article 17, D3

20. The problems of toponomy are amongst the most sensitive in areas where are living minorities and they should be regulated in a minority protection instrument. There is nothing specific in D2 and in the FC.

Article 12-16, D2 and article 18-27, D3

21. As far as the cultural development of minorities is concerned, there is a different approach in D2 and in D3. D2 introduces specifically the notion of cultural autonomy, which should be embodied in a minority protection instrument. Whereas D3 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.

22. A combination of D2 and D3 would be welcomed.

Article 18, D2, and articles 15, 28-30, D3

23. The participation of members of the minority in the legislative and the administrative field concerning minority questions, in particular, at the regional and the local level, is very important. Here, D2 and D3, follow different ways.

24. The creation of a body of the kind of the "minority council" which – following a suggestion made by the rapporteurs of 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, should be envisaged.

III. CONCLUSION

25. To a large extent, D2 and D3 meet the requirements of international minority protection and the standards of the FC. Generally spoken, D3 is more elaborated whereas D2 contains important features, which are missing in D3.

26. Furthermore, I have the impression that some ideas have been drawn from the "Concept of the State ethnic and national policy of Ukraine" (CDL(2001)42). Therefore a combination of D2 and D3 would be recommendable.

27. Neither D2 nor D3 provide something guaranteeing the minorities' proportional representation in Parliament. Also territorial autonomy or something of that kind are not foreseen; articles 13 and 15, D2, speak only of "national and cultural autonomy". The term "areas of compact residence" (articles 1, 6, 13, 14, 27, 30, D2) or of "compact population" (article 7, D2), which could be seen as a kind of territorial autonomy, need clarification.

28. The provisions of article 19, D2, article 13, para. 2, article 22, para. 2 and article 31, D3 concern the financing of the (cultural) developments of the minorities by means of the State or of local budget are to be welcomed as such; however, they need a concretisation.

29. The institution of collective rights is unknown to the drafts. However, the activities of "cultural associations" (articles 15 and 18, D2) and "public associations" (article 7, para. 2; article 16, D2; article 14, D3), and further the institution of "advisory or consultative bodies" (article 18, D2; article 15, D3), as well as the terms "self organisation and self government"(article 14, D2) may be conceived as constituting a kind of collective rights.

30. It needs to be stressed that the FC is very reluctant in this respect.

31. In order to clarify and to concretise some unclear and vague points and to reflect on a merger of D1 and D2, a joint meeting of Ukrainians and the Council of Europe (Venice Commission) experts, as suggested in the letter of the State Committee of Ukraine on nationalities and migration, to the Director of Human Rights, Mr Imbert, dated 3 November 2003, would be useful.