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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON THE RESOLUTION ON THE PRINCIPLES  
OF THE STATE POLICY OF UKRAINE  
IN THE SPHERE OF HUMAN RIGHTS  
ADOPTED BY THE VERKHOVNA RADA OF UKRAINE  
ON 17 JUNE 1999**

**based on comments by**

**Mr Gerard BATLINER**  
**(Member, Liechtenstein)**

## Introduction

1. *On 7 November 2001, as part of its procedure for the monitoring of the honouring of obligations and commitments by Ukraine, the Parliamentary Assembly wrote to the Venice Commission asking for its opinion on whether the Resolution on the Principles of the State Legal Policy of Ukraine in the Sphere of Human Rights, adopted by the Verkhovna Rada on 17 June 1999, could be considered a framework act on the legal policy of Ukraine for the protection of human rights as referred to in Assembly Opinion No. 190 (1995).*
2. *Following this request, the Commission appointed Mr Batliner rapporteur. <At its 50<sup>th</sup> Plenary Meeting (Venice, 8-9 March 2002), the Commission adopted the present opinion on the declaration of intention concerning the principles of the state policy of Ukraine in the sphere of human rights adopted by the Verkhovna Rada of Ukraine on 17 June 1999>.*

## I General legal context at the time when Ukraine's obligations and commitments were established

3. When Ukraine became a member of the Council of Europe in 1995, the Constitution in force was that adopted by the Soviet Socialist Republic of Ukraine in 1978. A number of amendments had been made to the Constitution, particularly with a view to ensuring Ukraine's transition from a communist regime to freedom, democracy and the rule of law. The Parliament (the *Verkhovna Rada*) and the President of Ukraine had also drawn up a Constitutional Agreement on the basic principles of the organisation and functioning of central government and local self-government in Ukraine, pending the adoption of a new constitution. This somewhat exceptional situation could be understood in the context of Ukraine's transition to democracy (see Mr Masseret's Report on the application by Ukraine for membership of the Council of Europe, Doc. 7370 of the Parliamentary Assembly, §§19-28).

4. As regards human rights protection, the Parliament had still not yet adopted a new declaration of human rights since the Declaration of Sovereignty and Independency of Ukraine. As a result, the 1978 Constitution was still applicable to human rights. However, the Ministry of Justice had prepared a draft framework act on the legal policy of Ukraine in the sphere of human rights. In July 1995 this draft legislation was approved by the Cabinet of Ministers of Ukraine and returned for finalisation. The draft framework act was to be submitted for consideration by Parliament in the second half of 1995. (See the Addendum to Mr Masseret's Report on the application by Ukraine for membership of the Council of Europe: Clarification from the Ukrainian authorities on the points requested by the Council of Europe, Doc. 7370 Add., 6(a), pp.15-16). However, this draft law has never been enacted.

5. In 1995 the Venice Commission noted in its opinion on the constitutional situation in Ukraine, following the adoption of the Constitutional Agreement between the Supreme Council and the President of Ukraine (Doc. CDL (1995) 40, § 7 and chapter G), that, in keeping with the principles of socialist law, the main purpose of the provisions of the 1978 Constitution with regard to human rights was to entrust the State authorities with the obligation to create the material conditions for ensuring the enjoyment by citizens of their rights and freedoms. The constitutional provisions placed more weight on the material guarantees of rights and freedoms than on their legal protection and attached more importance to social and economic rights than to the civil and political rights of individuals.

This situation left much to be desired, particularly since it did not meet all of the Council of Europe's requirements in this field. Although the signature and ratification of international instruments for the protection of human rights and fundamental freedoms by Ukraine might help to remedy some of these problems, the Commission nevertheless drew the following conclusion:

The text of the constitutional Agreement bears the marks of a period of transition, in many respects it represents admirable progress, but the future content of the constitutional law of Ukraine will have to provide for more stable and principled solutions, in particular:

- the human rights chapter will have to be in conformity with international standards.

## **II The enactment of a framework act on the legal policy of Ukraine for the protection of human rights as one of the commitments entered into by Ukraine on its accession to the Council of Europe**

6. The many commitments accepted by Ukraine when it became a member of the Council of Europe are set out in §§11 and 12 of Opinion No. 190 (1995) of the Parliamentary Assembly. §11 v., which covers some of these commitments, reads as follows:

- v. the following legislation, in conformity with Council of Europe standards, will be enacted within a year from accession:
  - a new constitution;
  - a framework-act on the legal policy of Ukraine for the protection of human rights; [...]

7. It should be noted that, as far as these two commitments are concerned, the Ukrainian authorities already intended to enact the texts in question (see Doc. 7370 Add., No. 1(b) and 6 (a)); all that was at stake was the implementation of a process that had already been provided for. On the other hand, Opinion No. 190 (1995) of the Parliamentary Assembly is silent as to the relation between the new constitution and the framework act on the legal policy of Ukraine in the sphere of human rights. However, a review of the Ukrainian legislative proceedings in progress or foreseen in 1995, and that were to be taken into consideration at its accession to the council of Europe, appears to provide some clarification.

8. As far as Mr Masseret, Rapporteur for the Parliamentary Assembly's Political Affairs Committee, is concerned (Doc. 7370, §31):

A "framework-act on the legal policy of Ukraine for the protection of human rights" in conformity with international standards is to be submitted to the Parliament before the end of 1995 [see Addendum, under 6 (a), p. 14]. Moreover, a human rights section in conformity with such standards should be part of the new Constitution of Ukraine.

9. In the opinion of Mr Németh, Rapporteur for the Parliamentary Assembly's Committee on Legal Affairs and Human Rights (Doc. 7398, §33):

The Agreement supplemented with a new bill of rights may constitute the two legs of a future constitution. The commitment of the authorities to adopt a Framework Act on the Legal Policy of Ukraine for the Protection of Human Rights is to be warmly welcomed. The intention of signing and ratifying the European Convention on Human Rights and its main protocols within a year is of great importance.

10. It therefore appears that the framework act was to be enacted prior to the new Constitution – this, at all events, was the Ukrainian authorities' intention. The Assembly's main concern was also clear: i.e. to ensure that Ukraine enacted texts that would guarantee a level of human rights protection that was in keeping with international standards.

### **III The current legal framework**

11. On 28 June 1996 the Ukrainian Parliament adopted the new Ukrainian Constitution. This Constitution, on which the Commission gave an opinion (Doc. CDL-INF (97) 2), includes a chapter on human and citizens' rights, freedoms and duties. No framework act on Ukrainian legal policy for human rights protection has been enacted to date. However, in a resolution dated 17 June 1999, the Parliament approved the principles of the state policy of Ukraine in the sphere of human rights.

12. According to the last paragraph of the preamble to the Constitution, the Constitution is the "fundamental law of Ukraine". The supremacy of the Constitution stems from Article 8 paragraph 2, which stipulates that "The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it".

13. Various constitutional provisions affirm the importance of human rights (see, for example, Article 3 and paragraph 4 of the preamble). Chapter II of the Constitution is entirely concerned with human and citizens' rights, freedoms and duties. As regards the legal provisions (other than the Constitution) governing these rights, the Constitution stipulates the following:

#### Article 91

The *Verkhovna Rada* of Ukraine adopts laws, resolutions and other acts by the majority of its constitutional composition, except in cases envisaged by this Constitution.

#### Article 92

The following are determined exclusively by the laws of Ukraine:

1) human and citizens' rights and freedoms, the guarantees of these rights and freedoms; the main duties of the citizen; [...]

14. The scope of the resolutions and the conditions for their adoption by the Parliament are not regulated in greater detail in the Constitution, which makes no reference to

parliamentary resolutions other than the one mentioned above<sup>1</sup>. On the other hand, there are several constitutional provisions governing the procedure to be followed when enacting laws (see, for example, Articles 91-94). In view of these provisions and the absence of constitutional provisions governing resolutions, it is reasonable to conclude that resolutions are of lesser weight than laws. The Permanent Representative of Ukraine, in his letter to the Venice Commission dated 3 December, refers to a “declaration of intention”.

15. It will be noted that, in practice, the Ukrainian parliament makes more frequent use of its possibility to adopt resolutions than the Constitution implies<sup>2</sup>. The fact remains, however, that, under the constitutional provisions, human rights fall to be regulated exclusively by law.

#### **IV. Formal compliance by Ukraine with its undertaking to enact a framework act on legal policy in the sphere of human rights**

16. In formal terms, a framework act is usually at least equivalent to a law. A parliamentary resolution – which, as we have seen, in Ukraine, does not have the character of a law – cannot therefore replace a framework act. This is all the more true with regard to the sphere of human rights issues, which is governed solely by law.

17. Moreover, the resolution in question mainly comprises a declaration of the “principles of state policy” and the “main guidelines for state activities in the sphere of human rights” and does not entail any official guarantee that these stated intentions, whose legal implications are unclear, will effectively be put into practice. The final provision simply stipulates that the “provisions of the Principles of the state policy of Ukraine in the sphere of human rights shall be the basis for lawmaking activity in the sphere of human rights and fundamental freedoms”. The Permanent Representative of Ukraine refers to a declaration of intention.

18. In view of these considerations, it is difficult to affirm that the adoption by the Ukrainian parliament of Resolution No.757-XIV of 17 June 1999 constitutes formal compliance with its undertaking to enact a framework act on Ukrainian legal policy for the protection of human rights.

#### **V As regards the advisability of upholding this commitment**

19. We noted above (see §10) that it appeared that the framework act on Ukrainian legal policy in the sphere of human rights was to be enacted prior to the adoption of the new Constitution. The fact that Ukraine undertook to enact such a framework act when it joined the Council of Europe should be considered within the context prevailing at that time. The Assembly’s primary aim was obviously to ensure that the level of human rights protection

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<sup>1</sup> In the English translation of the Constitution, Article 87 refers to another possibility for Parliament to adopt “resolutions”, i.e. resolutions of no confidence in the Council of Ministers. In the original text, however, the reference is not to “ *постано́ву* ” as in Article 91 but to “ *резолюцію* ”. A more appropriate English translation of this term would be “ *motions* ”, as in the French translation.

<sup>2</sup> Indeed, on the day on which the resolution which is the subject of this opinion was adopted, the Parliament adopted no fewer than five resolutions (information available on the Verkhovna Rada website, <http://www.rada.gov.ua/laws/pravo/all/main1pr.htm>, 6 February 2002).

was in keeping with international standards in this field, in Ukraine as in the other countries which had applied for membership of the Council of Europe. Although it is regrettable that no framework law on human rights was in force during the period preceding the adoption of the new Constitution in June 1996, one may wonder whether there is any point in enacting such legislation in the current legal context in Ukraine.

20. The adoption of the 1996 Constitution brought about a distinct improvement in human rights protection at constitutional level. Chapter II on human and citizens' rights, freedoms and duties comprises a comprehensive catalogue of protected rights and reflects a willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights and to ensure that these rights are effectively implemented, as the Commission pointed out in its opinion on the Ukrainian Constitution (CDL-INF (97) 2). The prohibition of abolishing these rights by means of constitutional amendments and the articles stipulating that provisions concerning human rights shall be directly applied and protected by the courts are also very positive aspects. The incorporation of a provision whereby the constitutional rights and freedoms of Ukrainian citizens may not be restricted, except in cases envisaged by the Constitution of Ukraine, is based on a recommendation made by the Commission in its opinion on the preliminary draft Constitution and fills an important gap in human rights protection in Ukraine. On the other hand, it is regrettable that there is no general clause enshrining the principle of proportionality.

21. Moreover, although some of the weaknesses pinpointed in the Commission's opinion on the draft Constitution of Ukraine (CDL-INF (96) 6) have been eliminated in the final text, others still remain. The lack of structure in Chapter II remains a potential source of problems, given the different content of its various provisions. Different types and methods of protection should be provided in respect of the different types of rights concerned – notably in respect of fundamental freedoms on the one hand and social, economic and environmental rights on the other – so as to avoid the downgrading of the rights and liberties which provide true individual subjective rights, which must be clearly protected in the Constitution.

22. For more detailed comments on this point, see the Commission's opinions on the Constitution of Ukraine (CDL-INF (97)2) and the Draft Constitution of Ukraine (CDL-INF (96)6).

23. Finally, it will be noted that, under Article 9 of the 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." Ukraine is party to several international instruments for the protection of human rights, in particular the European Convention on Human Rights and its various protocols, including, since 1 May 2000, Protocol No. 6 concerning the Abolition of the Death Penalty. It has also signed and ratified the European Convention on the Prevention of Torture and the Framework Convention for the Protection of National Minorities. It has signed but not yet ratified the European Charter for Regional or Minority Languages and the (revised) European Social Charter; Ukraine had undertaken to sign and ratify the European Charter for Regional or Minority Languages within a year of becoming a member of the Council of Europe<sup>3</sup>.

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<sup>3</sup> For information concerning the Council of Europe conventions signed and ratified by Ukraine see <http://conventions.coe.int>. The main UN instruments to which Ukraine is party include the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International

24. It is beyond the scope of the present opinion, which concerns Ukraine's fulfilment of its specific undertaking to enact a framework act on its legal policy for the protection of human rights, to examine Ukrainian national human rights legislation in greater detail. Within the context of the present opinion, it can be noted that the adoption by Ukraine of a new Constitution and the ratification of various Council of Europe conventions in the field of human rights, which are now part of Ukrainian national legislation, appear to fulfil sufficiently the functions for which the framework act was intended. It therefore appears more important to ensure that these texts are effectively applied in Ukraine in a manner which is in keeping with the international standards in force.

## **VI Conclusions**

25. The Commission notes that:

- the Ukrainian parliament has not formally honoured its commitment to enact a framework act on the legal policy for the protection of human rights, as mentioned in Opinion No. 190 (1995) of the Parliamentary Assembly of the Council of Europe;
- however, since becoming a member of the Council of Europe, Ukraine has adopted a new Constitution, Chapter II of which is entirely devoted to human and citizens' rights, freedoms and duties and stipulates that provisions concerning human rights must be directly applied and protected by the courts;
- Ukraine has also ratified a large number of international instruments concerning the protection of human rights, which, under the terms of the Constitution, are now part of national legislation;
- the enactment of a framework act on legal policy for the protection of human rights no longer seems relevant, given the principles enshrined in the new Constitution and in national legislation.

26. The Commission stresses, however, that it is of the utmost importance that these texts be applied in Ukraine in conformity with international standards.

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*Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Ukraine was already party to these instruments before becoming a member of the Council of Europe. (Information available on 6 February 2002 on the site of the UN High Commissioner for Human Rights: <http://www.unhchr.ch/html/intlinst.htm>.)*