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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS ON

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

by

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Preliminary remarks

The version of the Draft Law that was provided to the Venice Commission has obvious translation weaknesses that might be the source of certain misunderstandings and inconsistent constructions resulting in critical interpretations and comments.

The position of the draft Law in the hierarchy of norms

1. This is the first Law, which will regulate the status of indigenous people in Ukraine. As regards its position in the hierarchy of norms, the Law on the Status of Indigenous (autochthonous) Peoples of Ukraine is not a constitutional law, but an ordinary one.

2. This draft Law is based on Articles 11 and 92, paragraph 3 of the Constitution of Ukraine.

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.

Article 92, paragraph 3, stipulates that the rights of indigenous peoples are determined by the law of Ukraine exclusively.

The draft Law in question contains the main provisions that regulate the legal status of indigenous peoples of Ukraine, and the relations governing the realisation of their rights and freedoms.

3. In addition to the above mentioned constitutional foundations it is important to notice that according to Article 9 of the Constitution, international treaties that are in force and approved as binding by the Verkhovna Rada of Ukraine are also part of the national legislation of Ukraine. The Constitution establishes the principle of direct applicability of the provisions of the international agreements on human rights and freedoms. International treaties come after the Constitution and prevail over ordinary legislation of Ukraine.

4. According to this draft Law, most of the rights prescribed will be exercised in accordance with specific laws. Furthermore, the implementation of this Law will require other legal instruments (regulations, secondary legislation etc.). Such instruments are needed to facilitate further practical realisation of the rights of indigenous peoples (in the field of education, public administration, media, communication with the government organs, etc.)

5. In this regard, we find it proper to stress the importance of the by-laws that will follow the implementation of this Law in maintaining its specific nature as a *lex specialis* in the hierarchy of norms.

Definitions

6. The draft Law is based on the complex definitional framework aimed at distinguishing the notion of indigenous (autochthonous) peoples of Ukraine from other ethnic-national categories of Ukrainian citizens.

This effort is worth noticing since there is a lack of definition on this matter at the international level. In this context, the drafters have made serious effort to develop a definition that will, on one hand, reflect the complex ethno-national structure of the Ukrainian population, and, on the other, will follow the general principles of international law and practice. Yet, the results achieved give only vague conceptual base for the law. This weakness seems even more troublesome due to the evident problems with the translation of such delicate ideas.

Article 1 of the draft Law distinguishes the indigenous (autochthonous) peoples of Ukraine from the several others ethnic-national categories of Ukrainian citizens: Ukrainian people, the Ukrainians in terms of native Ukrainians, the ethnographic groups, the indigenous (autochthonous) peoples and the national minorities.

In this context, we would suggest that the Law should contain definition only on indigenous (autochthonous) peoples, or more precisely there should be an article which will explain who belongs to this group of people only. This is important especially bearing in mind that for some of the other ethnic-national groups mentioned, special laws are envisaged.

7. In connection with the previous definition it should be recognised that the draft Law applies only to citizens of Ukraine. According to Article 26 of the Constitution of Ukraine, foreigners and stateless persons who are legally staying in Ukraine enjoy the same rights and freedoms, having the same duties as the citizens of Ukraine, with the exceptions established by the Constitution, laws or international treaties acceded to by Ukraine.

The definition on indigenous (autochthonous) peoples is also based on the conditions on the Ukrainian "citizenship" status of Byelorussian, Bulgarian, Armenian, Gagause, Greek, Jewish, Karaite, Crimean Tatar, Krymchak, Moldavian, Polish, Russian, Romanian, Slovak, Hungarian, Czech nationals.

This approach is in accordance with the present international law. Yet, in relation with this general issue, the Commission has already noted that "a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past." This approach is in accordance with the considerations of the Advisory Committee on the Framework Convention for the Protection of National Minorities contained in the opinion on Ukraine, para. 18 (ACFC/INF/OP/I(2002)010).

8. Nomotechnically, if Article 1 is subtitled, than the following articles should be subtitled as well, or the subtitle from Article 1 "Definitions" should be deleted.

Assembly of Indigenous People of Ukraine

9. The draft Law prescribes the establishment of Assembly of Indigenous People of Ukraine, as a consultative and representative body to function under the special authorised governmental body of the executive power.

This Assembly may have an important role in ensuring better protection of the status and the interests of the indigenous people of Ukraine.

The provisions concerning elections (delegation), the organisation and the functioning of the Assembly of Indigenous People are not clear or are missing. Further clarification concerning the

relation between the Committee on human rights, interethnic relations, indigenous peoples and national minorities and the Assembly of Indigenous People of Ukraine is needed.

Guarantees for indigenous people the right to equal legal protection

10. According to Article 7 of the draft Law, the State guarantees its citizens who belong to indigenous peoples the right to equal legal protection and equality under the laws in all spheres. Protection of rights of indigenous people guaranteed in the draft law is of particular importance.

In this connection, it seems important from the perspective of protection of the rights of indigenous people, to precisely state which are the domestic institutions in charge of the protection of the rights of indigenous people (judicial authorities, Ombudsman, Committee on human rights, Constitutional Court, etc), the nature of the complaint and who may institute the complaint.

The right of persons belonging to indigenous people to be elected or designated to any posts

11. Article 8 of the draft Law determines the right of citizens of Ukraine who belong to indigenous peoples to be elected or designated to any post of the bodies of legislative, executive and judicial power, local authorities, armed forces of Ukraine, enterprises, institutions and organisations.

This provision has no legal tools having in mind that the Constitution of Ukraine guarantees the equal electoral (passive and active) rights to all of its citizens (Constitution Art. 38).

From that perspective, if the Article in question is meant to reaffirm the above mentioned constitutional provisions it should be written in a non-restrictive manner, as it is already stipulated in the Constitution.

Use of national family name, first name and patronymic name of citizens of Ukraine belonging to indigenous people

12. The right of citizens of Ukraine belonging to indigenous people to use national family name, first name and patronymic name as well as to renew them according to current legislation is fully in compliance with the Article 11 of the Framework Convention. National family name, first name and patronymic name are individual rights of the person concerned.

Right to participation in cultural, religious, public, economic and state life

13. Article 12 of the draft Law states that the State ensures the right of citizens who belong to indigenous peoples to participate in 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 what are the specific legal interests of citizens belong to indigenous peoples and how the state will intervene in solving questions concerning the protection of their legal interest.

Right to education and use of language of "appropriate indigenous people"!

14. Article 13 is certainly affirmative. The right to education, and instruction in the mother tongue, and to use the language in private and public sphere in oral and written communication and possibility for organising private educational institutions is one of the most important rights for any human being. It should be also welcomed that the state provides the conditions for teaching and learning the language.

Yet, it seems unclear who are the "appropriate indigenous people", mentioned in Article 14 and to whom the rights in Article 13 apply. Such a distinction is not needed, and we would recommend the word "appropriate" to be left out.

Mass media

15. According to Article 16 citizens who belong to indigenous peoples and their public organisations have the right to receive and disseminate information in their own mother tongue by way of mass media, in compliance with the Ukrainian legislation as well as to establish their own mass media and to publish literature in languages of indigenous peoples.

This article is in accordance with the relevant international standards in the filed.

Conclusions

The draft Law of Ukraine on the status of indigenous (autochthonous) peoples of Ukraine contains important and positive general provisions. It should be noted that Ukraine has made commendable efforts to design legislation of a general nature for the protection of indigenous people.

Further improvements are needed for the purpose of definitional clarification and for establishing legal guaranties for the indigenous people.

It is important to notice that this draft Law is only a general frame for the status of indigenous (autochthonous) peoples of Ukraine. This means that it is important to develop the bylaw documents with aimed at the improvement and establishment of better practical implementation of the Law.

Protection of indigenous people, same as the protection of other minority groups is integral part of the system of international protection of human rights. The Preamble of the Framework Convention recognises that the protection of national minorities is essential to the stability, democratic security and peace of our continent. This is one of the reasons why in Article 18 States are urged to conclude bilateral and multilateral agreements, encouraging trans-border cooperation, as well. This is the reason why we recommend introduction of an Article which will refer to such a future cooperation and that will serve as legal ground for future bilateral or multilateral agreements.