Strasbourg, 23 June 2004

CDL-AD(2004)022
Or. Engl.

Opinion no 265/2003

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE LATEST VERSION OF THE DRAFT LAW AMENDING THE LAW ON NATIONAL MINORITIES

IN UKRAINE

Adopted by the Venice Commission
at its 59th Plenary Session
(Venice, 18-19 June 2004)

on the basis of comments by

Mr Franz MATSCHER (Member, Austria)

I. Introduction

1. On 12-13 March 2004, the Venice Commission adopted an opinion on two previous Draft laws amending the Law on National Minorities in Ukraine (see CDL-AD(2004)013).

2. On the basis of the Commission's opinion and the expert assessments of the two draft laws made by other Council of Europe experts and by the OSCE High Commissioner on National Minorities, a new draft law was prepared, which is the result of a merger of the two previous ones. This new draft was again submitted to the Commission for an expert assessment. Mr Franz Matscher was appointed to act as member rapporteur.

3. The present opinion, which was drawn up on the basis of comments by Mr Matscher, was adopted by the Commission at its 59th Plenary Session (Venice, 18-19 June 2004).

II. Comments

4. The above mentioned opinion had pointed out that a series of problems raised by the two Drafts needed to be clarified. It is to be seen to what extent this has been done in the new draft law.

a. The position of this legislation in the hierarchy of norms

5. The position of this legislation in the hierarchy of norms has not been rendered clearer by the new Draft.

6. According to the information submitted by the Ukrainian representatives, international treaties, including those relating to the protection of human rights and minority rights, come immediately after the Constitution and prevail over ordinary legislation. This is a construction which can be found in several other constitutional systems too.

7. The Law under consideration will not be a constitutional law, but an ordinary one. Of course, the application and the implementation of this Law, which is a framework law, will need a series of other legal instruments (secondary legislation, regulations, decrees of the Cabinet of Ministers etc). In part, such legal instruments already exist (on education, information, local self-government), partly they have to be prepared.

8. Pursuant to No. 4 of the Final Provisions, "within six month the Cabinet of Ministers shall bring its regulatory legal instruments into conformity with the present Act and has to ensure that the same will be done by the competent ministers and other executive authorities." This order however only refers to already adopted regulatory legal instruments, and not also to existing ordinary legislation. As the Venice Commission had stressed in its previous opinion (para. 15), it would be useful if the present Law would lay down expressly its character as a *lex specialis* and if it would set out with some detail the guidelines which the secondary legislation had to respect. This has not been done in the present Draft.

9. It would be useful if the Law would give more concrete indications as to the means to be used for the achievement of the aims and goals set out in it.

b. The definition of "national minorities"

10. As far as the notion of "national minorities" is concerned, the Draft maintains the citizenship requirement. The Venice Commission refers in this respect to its recent opinion on the previous draft laws amending the Law on National Minorities in Ukraine, where it is stated that, in the opinion of the Venice Commission, "Ukraine should omit the reference to citizenship in the general definition of national minorities in the draft legislation under consideration, and add it in the specific clauses relating to the rights specifically reserved to citizens, such as political rights or access to civil service" (see CDL-AD(2004)013, Opinion on two draft laws amending the law on national minorities in Ukraine, §§ 16-22).

c. The substantive rights

11. The rights listed in the draft law largely correspond to the principles flowing from the relevant international instruments, in particular the Framework Convention. The Venice Commission's suggestions have also been partly taken into consideration.

12. The use of the mother language is restricted to dealings with and to official acts of local and authorities *in areas where the majority of the population is of a distinct national minority* (Art 20 of the Draft). This is a too narrow a criterion. Recommendation 1201 (1993) of the Parliamentary Assembly the Council of Europe speaks in Art 7 (3) about "regions in which substantial numbers of a national minority are settled" (see also Art 10 (2) of the Framework Convention).

13. Furthermore, the authorities in question should include the local judiciary.

14. Generally, the limitation to local bodies is too restrictive. The use of the minority language should be provided for also for the contacts with regional bodies. Of course, it will depend on the territorial – administrative assessment of the state, to which degree this idea can be realized in Ukraine.

15. Despite the definition given in Art 1 lit d) and the further developments in Art 10 and following of the draft law, the notions "national and cultural autonomy" and "national and cultural self-determination" are not clear. They seem to refer to (public?) associations of the members of the minorities, which are entrusted with some assignments concerning cultural interests of them. The meaning of the terms "territorial" or "extraterritorial" character is not clear.

16. The establishment of advisory bodies within the local authorities with representatives of the minority organisations, whose organisation and powers will be defined by the Cabinet of Ministers. is to be welcomed. However, the limitation of their activities to the local field is too restrictive.

17. On the other hand, pursuant to the draft law, an advisory body made up of representatives of national minority organisations may be set up within the (central?) executive body. The questions relating to the establishment, the assignments and the functioning of this body have to be clarified.

18. Article 9 of the draft law states that persons from national minorities shall be entitled to judicial protection of the rights provided under this Act.

19. This provision raises a series of questions:

a) Are only individual members of the minorities or also associations of the minorities entitled to bring their case before a court?
b) In the case of an individual application, would the minorities' associations have the status of an *amicus curiae*?
c) Is the judicial protection entrusted to the ordinary courts or to administrative tribunals (if they exist)?

20. The bearing of Art 33 (participation in the management of state and public affairs and representation of the minorities interests in state bodies and local authorities) seems not to be clear.

21. The legislation of various states where there are national minorities in substantial numbers provides specifically for a fair representation of those minorities in the legislative bodies at a local, the regional and the national level. The present Law does not contain any provisions of that kind. It is possible however that this question is addressed in the legal instrument concerning elections.

III. Conclusion

22. The Draft under examination constitutes a valuable improvement vis-à-vis the previous Drafts. However, a series of questions have to be clarified. In this respect the present comments are not exhaustive.

23. It must also be recalled that the "Law amending the law on national minorities in Ukraine" is a framework law. Accordingly, the extent of its adequacy in respect of the international standards may only be evaluated in the light of its concrete application.