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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

DRAFT OPINION

**ON THE PROVISIONS OF THE LAW ON EDUCATION
OF 5 SEPTEMBER 2017**

**WHICH CONCERN
THE USE OF THE STATE LANGUAGE AND MINORITY
AND OTHER LANGUAGES
IN EDUCATION**

on the basis of comments by

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Contents

- I. Introduction..... 3
- II. Preliminary remarks..... 3
 - A. Scope of the present Opinion..... 3
 - B. Background 5
 - 1. Constitutional and legal framework for the use of languages in education..... 5
 - 2. Existing practice 7
 - 3. Ukraine’s international obligations 7
- III. Analysis..... 9
 - A. The new framework introduced by the 2017 Education Law 9
 - B. Adoption procedure 11
 - C. Compliance with relevant international and constitutional provisions 11
 - 1. Uncertainties of Article 7 of the Law on Education..... 11
 - 2. Legitimacy of the aim of the protection of the state language 14
 - 3. Article 7 as an appropriate means to realise the legitimate aim 16
 - 4. Compliance with the principle of non-discrimination 21
- IV. Conclusion..... 23

Draft - restricted

I. Introduction

1. By letter of 29 September 2017, the Ministry of Foreign Affairs of Ukraine requested the Venice Commission to prepare an opinion on Article 7 of the Law on Education of 5 September 2017 (hereinafter the Education Law), which regulates the use of the state language and minority and other languages in education (see CDL-REF(2017)047). In its Resolution 2189(2017) of 12 October 2017 (*The new Ukrainian law on education: a major impediment to the teaching of national minorities' mother tongues*), the Parliamentary Assembly of the Council of Europe expressed concerns about this Law and asked the Ukrainian authorities to fully implement forthcoming recommendations and conclusions of the Venice Commission and to modify the new Education Act accordingly.
2. The Venice Commission invited Mr Sergio Bartole, Mr Michael Frendo, and Mr Jan Velaers, to act as rapporteurs for this Opinion. Mr Rainer Hofmann and Mr Robert Dunbar (experts of the Directorate General of Democracy (DGII) of the Council of Europe) also contributed to this Opinion.
3. On 31 October - 1 November 2017, a delegation of the Venice Commission, composed of Mr Michael Frendo, Mr Jan Velaers, Mr Robert Dunbar and Mr Rainer Hofmann accompanied by Mr Thomas Markert, Director, Secretary of the Venice Commission and Ms Artemiza Chisca, Head of the Democratic Institutions and Fundamental Rights Division, visited Kyiv and had discussions with representatives of the Ukrainian authorities and of Ukraine's national minorities. The Venice Commission delegation is grateful to the Ukrainian authorities and to the other stakeholders they met for their excellent cooperation during the visit.
4. The present Opinion was prepared on the basis of contributions by the rapporteurs and experts and on the basis of the English translation of the Education Law provided by the Ukrainian authorities. Inaccuracies may occur in this Opinion as a result of incorrect translations.
5. [*This opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ... 2017).*]

II. Preliminary remarks

A. Scope of the present Opinion

6. The Venice Commission has already had the occasion to examine provisions pertaining to the protection of languages in Ukraine in 2011, when it was asked by the Ukrainian authorities to assess two draft laws dealing with the issue of languages. The findings and recommendations contained in its 2011 assessment remain entirely relevant for the purpose of the present opinion.
7. Already in 2011, the Commission stressed that "*the use and the protection of languages has been and remains, in Ukraine, a complex and highly sensitive issue, which has repeatedly become one of the main topics in different election campaigns and continues to be subject of debate - and sometimes to raise tensions - within the Ukrainian society*" and that "*[t]he balance between regional and/or minority language protection and the protection of Ukrainian as the state language, including the specific situation of the Russian language, continues to be a serious challenge for the authorities of Ukraine*".¹

¹ See Opinion on the Draft Law on languages in Ukraine adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), CDL-AD(2011)008), paragraphs 27 and 28.

8. In its Opinion adopted in March 2011, the Commission examined a draft Law which, in view of the specific protection provided by it to the Russian language, had engendered heated discussions in Ukraine. While acknowledging the legitimate aim of establishing up-to-date and modern legislation on languages, the Opinion stressed, in the light of Ukraine's Constitution, Ukraine's historical, linguistic and political background, the need for an appropriate balance between the promotion and development of Ukrainian as the state language, and the protection of the various regional and/or minority languages in use in the country. The Commission nevertheless found the draft unbalanced as its provisions were disproportionately strengthening the position of the Russian language, without taking appropriate measures to confirm the role of Ukrainian as the state language, and without duly ensuring protection of other regional and minority languages. It expressed its concern that, based on such an approach, the draft might increase existing linguistic divisions in the country rather than decrease them. In the view of the Commission, careful consideration and a very cautious approach was needed with regard to the protection of the Russian language, in view of the very sensitive nature of this issue.

9. The Opinion adopted in December 2011² examined a second, revised draft Law submitted by the Ukrainian authorities, the "Draft Law on principles of the State Language Policy in Ukraine." The Commission welcomed a more balanced text, and an approach which could be beneficial, in certain areas of public life, to the protection of other regional or minority languages as well. It concluded, however, that increased guarantees were needed to ensure a fair balance between the protection of the rights of minorities and their languages, including Russian, and the protection of the Ukrainian language as the sole, constitutionally guaranteed, State language. The final text of the draft, which was subsequently adopted by the Ukrainian Parliament,³ was not submitted to the assessment of the Venice Commission.

10. In the context of the present Opinion, the Venice Commission has not examined the entire text of the new Education Law, nor the overall Ukrainian legal framework in the field of language protection, or the practical situation of national minorities and their languages in this country. The present Opinion is limited to the assessment of the provisions of the new Education Law which concern the use of languages in education, namely "**Article 7. The language of education**" and **Article 3 paragraph 18 of the Concluding and Transitional Provisions**.

11. According to the information received during the visit to Kyiv, the Law on Education is to be considered as a framework law. Implementation modalities will thus need to be provided by subsequent legislation, in particular by the forthcoming Law on Secondary Education. The present analysis and ensuing recommendations are therefore only based on the provisions in force at the date of its adoption, although for their understanding, the position expressed by the Ministry of Education and Science of Ukraine, both during the exchange of views held in Kyiv and in writing, has also been taken into account (see "Position on the Article 7 of the Law of Ukraine "On Education",⁴ dated 27 October 2017, hereinafter the "Ministry of Education Position Paper").

² See Opinion on the draft law on principles of the state language policy of Ukraine adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), (CDL-AD(2011)051).

³ Notably, the adopted text, which raised strong criticism and sparked big protests in the country, gave Russian or any other minority language the status of a "regional language" and authorized its use in courts, schools and other government institutions in areas of Ukraine where the percentage of persons belonging to national minorities exceeds 10% of the total local population. Since then various cities and regions of Ukraine declared Russian a regional language in their jurisdictions. Hungarian, Moldovan and Romanian also became regional languages in the relevant settlements.

⁴ CDL-REF(2017)051, Ministry of Education and Science of Ukraine, "Position on the Article 7 of the Law of Ukraine "On Education", 27 October 2017.

12. The Venice Commission has assessed the above provisions in the light of the European and international standards applicable to the protection of national minorities and their languages, as laid down in particular in the Framework Convention for the Protection of National Minorities (hereinafter the Framework Convention)⁵ and the European Charter of Regional and Minority Languages (hereinafter the Charter).⁶ The Commission has also taken into account, in its examination, the obligations undertaken by Ukraine under these instruments, as well as those deriving from the non-discrimination provisions, as enshrined in the European Convention on Human Rights (ECHR) and its Protocol 12, and other international texts.

13. Due attention was paid, in this analysis, to the overall legal and constitutional framework for language and minority protection in force in Ukraine, and the consistency of the relevant provisions. The somewhat unclear and diverging information received with regard to the applicability of the 2012 Law on principles of the State Language Policy in Ukraine, added further complexity to the present analysis (see comments in paragraphs 22 to 24).

14. In line with the request submitted to the Venice Commission,⁷ a number of comments in the present Opinion make reference to the Constitution of Ukraine. However, the Venice Commission considers it important to make clear that it is not its intention nor within its mandate to take a final stand on the conformity of the provisions submitted to it with the Ukrainian Constitution. It belongs to the Constitutional Court of Ukraine to assess the constitutionality of the Ukrainian legislation. According to the information available to the Commission, the Constitutional Court has already been seized with regard to the constitutionality of Article 7 of the new Education Law.

B. Background

1. Constitutional and legal framework for the use of languages in education

15. Several articles of the Ukrainian Constitution contain guarantees related to the protection of languages and linguistic rights and freedoms in Ukraine.

16. Article 10 is the key provision from this perspective, as it lays down the basic/constitutional principles for the operation of languages in Ukraine:

*“The State language of Ukraine shall be the Ukrainian language.
The State shall ensure comprehensive development and functioning of the Ukrainian language in all spheres of social life throughout the entire territory of Ukraine.
Free development, use, and protection of Russian and other languages of national minorities of Ukraine shall be guaranteed in Ukraine.
The State shall promote the learning of languages of international communication.
The use of languages in Ukraine shall be guaranteed by the Constitution of Ukraine and shall be determined by law.”*

17. Article 11 guarantees the protection of languages as part of people’s identity, in the framework of the state’s obligation to *“promote the consolidation and development of the Ukrainian nation, its historical consciousness, traditions, and culture, as well as development of*

⁵ Ukraine ratified the Framework Convention on 26 January 1998. The Framework Convention entered into force in respect of Ukraine on 1 May 1998.

⁶ Ukraine ratified the Language Charter on 19 September 2005. The Language Charter entered into force in respect of Ukraine on 1 January 2006.

⁷ The request letter asks the Venice Commission to consider Article 7 both in the light of the relevant international instruments and of the obligation enshrined in article 10 of the Ukrainian Constitution, that *“The State shall ensure comprehensive development and functioning of the Ukrainian language in all spheres of social life throughout the entire territory of Ukraine.”*

ethnic, cultural, linguistic, and religious identity of all indigenous peoples and national minorities of Ukraine”.

18. The non-discrimination clause in Article 24.2 prohibits “*privileges or restrictions based on race, skin colour, political, religious, and other beliefs, gender, ethnic and social origin, property status, place of residence, linguistic or other characteristics.*”

19. Article 22.3 establishes that “[*t]he content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force.*”

20. Finally, Article 53.5 states that “[*c]itizens belonging to national minorities shall be guaranteed, in accordance with law, the right to education in their native language, or to study their native language at the state and communal educational establishments or through national cultural societies.*”

21. The Constitutional Court of Ukraine, in its ruling n°10-rp/99 of 14 December 1999,⁸ provided its interpretation of Article 10 of the Constitution. According to the Court, pursuant to the provisions of Article 10 of the Constitution of Ukraine and the laws of Ukraine on guaranteeing the use of languages in Ukraine, including in the educational process, the language of instruction in pre-school, general secondary, vocational and higher state and communal educational institutions of Ukraine is the Ukrainian language. In state and communal educational institutions, in addition to the state language, in accordance with the provisions of the Constitution, in particular part five of Article 53, and the laws of Ukraine, the languages of national minorities can be used and studied in the educational process.

22. At the legislative level, the protection of language related rights of persons belonging to national minorities is mainly guaranteed by: the 1992 Law on National Minorities (see Articles 6 and 8)⁹; the Law of 15 May 2003 № 802-IV on Ratification of the European Charter for Regional or Minority Languages; and the Law No. 5029-VI of 3 July 2012 on Principles of the State Language Policy (hereinafter the 2012 Language Law). More specific provisions may be found in sectoral legislation.

23. Article 4.1 of the 2012 Language Law states that “[*f]oundations of the state language policy are embodied in the Constitution of Ukraine, while the use of languages in Ukraine is regulated solely by the present framework law. The latter shall serve as a basis for other legislative acts that regulate the use of languages in specific spheres of public life*”. However, during the exchanges held in Kyiv with the Venice Commission delegation, some representatives of the Ukrainian authorities expressed the view that, in the specific context currently prevailing in Ukraine, this particular Law, the constitutionality of which has been challenged before the Constitutional Court, has lost its (legal) relevance.

24. It is recalled that, on 23 February 2014, the Ukrainian Parliament voted for the abrogation of this Law. Yet, the acting Ukrainian President declared that he would not be signing the repeal bill until a new law on languages is adopted. So far, no such law has been adopted, although several drafts seem to be in preparation at the date of the present Opinion. It is important to

⁸<http://www.ccu.gov.ua/docs/406>

⁹ Law On National Minorities, Law no. 2494-12 of June 25th, 1992 (Supreme Executive Council, No. 36, Art. 529): Article 6 : “*The state guarantees to all national minorities the rights to national-cultural autonomy: the using and learning of their native languages and the using and learning of their native languages in state educational establishments or at national-cultural societies; development of national-cultural traditions, using of national symbols, celebration of their national holidays, exercising their religions, satisfying their needs for literature, art, mass media, establishing their national-cultural and educational institutions and any activity, which is not in conflict with this law. Nationalities’ historical and cultural heritage on the territory of Ukraine is protected by law.*”;

Article 8: “*At working places of state bodies, public associations as well as enterprises, establishments and organisations situated in places where the majority of a population is made up by a national minority, its native language may be used as well as the Ukrainian state language*”.

note, in this connection, that following a request for constitutionality review in July 2014, the 2012 Law is under consideration by the Constitutional Court. The case is still pending before the Court for final decision. It would appear thus that the 2012 Language Law remained (and in legal terms is at present) in force (see also footnote 3 above).

2. Existing practice

25. There is a long history in Ukraine of teaching of, and teaching through the medium of, minority languages.

26. As indicated in the Ministry of Education Position Paper,¹⁰ according to official statistics, presently there are around 400,000 children from national minorities in 735 schools in Ukraine in which teaching is conducted exclusively in the language of the national minority, with Ukrainian only studied as a subject. Monitoring reports of the Committee of Experts under the Language Charter indicate that education at primary and secondary school levels, primarily through the medium of Russian, is particularly widespread in Ukraine, but that such education is also widely available in other languages, including Hungarian, Romanian and Moldovan.

27. Bilingual education at both primary and secondary school levels, in a variety of minority languages, combined with Ukrainian, is also available, and many minority languages are taught as subjects in primary and secondary school curricula.

3. Ukraine's international obligations

28. Ukraine has ratified international treaties on the protection of human rights,¹¹ which prohibit discrimination on the ground of language and contain general guarantees for the protection of minority rights: Article 14 of the European Convention on Human Rights (hereinafter ECHR), in connection with Article 2 of the First Additional Protocol; Article 1 of Protocol 12 to the ECHR; Article E of the European Social Charter; Article 26 (non-discrimination clause) and Article 27¹² of the International Covenant on Civil and Political Rights; Article 2 (2) of the International Covenant on Social, Cultural and Economic Rights.

29. Ukraine is also party to the Council of Europe instruments specifically devoted to the protection of national minorities and their languages - the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. The fulfilment of Ukraine's international obligations to protect the language rights of persons belonging to national minorities is monitored by the specific supervisory bodies of the Council of Europe - the Advisory Committee on the Framework Convention for the Protection of National Minorities and the Committee of Experts of the European Charter for Regional or Minority Languages,¹³ and has led to the adoption of specific recommendations by those bodies and the Committee of Ministers of the Council of Europe.

¹⁰ See CDL-REF (2017)051.

¹¹ According to 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."

¹² "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

¹³ Advisory Committee on the Framework Convention, Opinion on Ukraine, 1 March 2002, ACFC/INF/OP/I(2002)010, Second Opinion on Ukraine, 30 May 2008, ACFC/INF/OP/II(2008)04; Third Opinion on Ukraine, 22 March 2012, ACFC/INF/OP/III(2012)02; Application of the Charter in Ukraine. Initial monitoring cycle, ECRML (2010) 6, 7 July 2010; Application of the Charter in Ukraine. 2nd monitoring cycle, ECRML (2014) 3, 15 January 2014.

i. Obligations under the Language Charter

30. According to the declaration made by Ukraine upon ratification, “*the provisions of the Charter shall apply to the languages of the following ethnic minorities of Ukraine: Byelorussian, Bulgarian, Gagauz, Greek, Jewish, Crimean Tatar, Moldavian, German, Polish, Russian, Romanian, Slovak and Hungarian.*” In the Declaration contained in the instrument of ratification deposited on 19 September 2005, Ukraine further declared that “*in application of the provisions of the Charter, the measures aimed at the establishment of the Ukrainian language as the official language, its development and functioning in all spheres of social life in the whole territory of Ukraine shall not be construed as preventing or threatening the preservation or development of the languages to which the provisions of the Charter shall apply [...]*”

31. Ukraine has chosen to apply precisely the same provisions of Part III to all of the regional or minority languages referred to in its instrument of ratification. Under Article 8, paragraph 1 a, in relation to pre-school education, Ukraine has committed itself to subparagraph a iii, which obliges Ukraine either (1) to making available such education in the relevant regional or minority language - essentially, minority language-medium education - or (2) to making available “a substantial part” of such education in the language - apparently some form of bilingual education. With respect to primary and secondary education, Ukraine has committed itself to subparagraphs b iv and c iv, which oblige Ukraine either: (1) to making available such education in the relevant regional or minority language - as with pre-school education, essentially minority language-medium education - or (2) to making available “a substantial part” of such education in the language - again, some form of bilingual education - or (3) to provide for the teaching of the language as an integral part of the curriculum - essentially, the teaching of the language as a subject. In all cases, the obligations apply “within the territory in which such languages are used, according to the situation of each of these languages”.

ii. Obligations under the Framework Convention

32. By ratifying the Framework Convention, Ukraine undertook, in terms of language protection in education, to recognise that every person belonging to a national minority has the right to learn his or her minority language (Article 14.1) and, in areas traditionally or substantially inhabited by national minorities, if there is sufficient demand, to make efforts “*to ensure, as far as possible and within the framework of [the] education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.*” (Article 14.1) Article 14.3 further provides that such support measures “*shall be implemented without prejudice to the learning of the official language or the teaching in this language.*”

33. Under Article 12, appropriate measures should be taken to promote equal opportunities for access to all levels of education and to foster knowledge of both minorities and the majority’s history, culture, and religion, including by ensuring adequate teacher training, availability of pedagogical material and promoting intercultural interaction. Ukraine also committed to recognise minorities’ right to set up and to manage their own private educational and training establishments under Article 13 of the Framework Convention.

34. The promotion of minorities’ cultures, languages and traditions, and abstaining from assimilation policies (Article 5), as well as the promotion of equality and the protection against discrimination based on belonging to a national minority (Article 4), constitute further important obligations deriving from the Framework Convention for Ukraine, as does the promotion of tolerance, dialogue and mutual respect between all persons living on its territory (Article 6). Finally, as a party to this Convention, Ukraine must ensure effective participation of national minorities in public affairs, in particular those concerning them (Article 15).

35. Ukraine also committed to protecting national minorities and their cultures, linguistic identity and diversity, as well as intercultural dialogue in the context of the 2014 Association Agreement with the European Union and its Member States.¹⁴

36. Equally important, Ukraine assumed specific obligations for protecting national minorities and their languages, including in education, within the framework of its bilateral agreements with its neighbouring countries, and the kin-states of its minorities (Bulgaria, Belarus, Croatia, the Czech Republic, Hungary, Poland, Romania, the Republic of Moldova, the Russian Federation, the Slovak Republic). Negotiations are currently being held with some of these countries, following the entry into force of the new Education Law and the significant changes it brings to the system of minority language education.

37. The Ukrainian authorities have stressed that these negotiations are of particular importance for the next steps in the determination of the new regime introduced by Article 7 of the Education Law, in particular in the context of the elaboration and adoption of the forthcoming Law on Secondary Education. They also assured the Venice Commission rapporteurs that this Law and subsequent implementing rules would duly reflect the output of those negotiations and would allow the adjustment of the implementation parameters to the particular situation and needs of the respective minorities.¹⁵

III. Analysis

A. The new framework introduced by the 2017 Education Law

The principle of the state language as a language of instruction

38. Article 7, paragraph 1 of the new Law establishes, as an overarching principle, that Ukrainian, the (sole) official language of the state, “*is the official language of educational process in educational institutions of Ukraine*”. It further adds that the state guarantees every citizen’s right to formal education at all levels in Ukrainian.

39. With regard to minorities, Article 7 creates different regimes for different categories of minority.

The languages of “indigenous peoples of Ukraine”

40. First, the Law distinguishes between “national minorities” and “indigenous peoples” of Ukraine”. These terms do not appear to be defined in the Education Law itself, nor are they identified in the 1992 Law on National Minorities or in the 2012 Language Law.¹⁶ During the visit to Kyiv, the Venice Commission delegation was given to understand that “indigenous peoples of Ukraine” are those minorities which do not have a kin-state. Specific reference was made to the Crimean Tatar, Karaim and Krimchak minorities, but this category would presumably also include the Gagauz, the Roma and Ruthenian minorities.

¹⁴ Association agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part: https://eeas.europa.eu/sites/eeas/files/association_agreement_ukraine_2014_en.pdf (Articles 4, 430)

¹⁵ According to the information provided by the Ukrainian authorities, at the date of the Venice Commission visit to Ukraine, agreements had already been achieved with Bulgaria and Poland, and the negotiations with Romania were quite advanced.

¹⁶ Article 7.2 of the 2012 Language Law provides that the “regional languages” of Ukraine, for the purposes of that law (in connection with the Language Charter), are the following: Russian, Belorussian, Bulgarian, Armenian, Gagauz, Yiddish, Crimean Tatar, Moldavian, German, Modern Greek, Polish, Roma, Romanian, Slovak, Hungarian, Ruthenian, Karaite (referred to in certain other instruments as Karaim) and Krymchatska (referred to in certain other instruments as Krimchak).

41. “Indigenous peoples of Ukraine” will benefit from the most favourable regime (described in Article 7, paragraph 1.5). They have the right to study in their language along with Ukrainian at the pre-school, primary, basic secondary and upper secondary levels (primary, basic secondary and upper secondary education is described as “general secondary education”). The Law does not specify which proportion of the education is in the medium of the indigenous language as opposed to Ukrainian, but appears to contemplate at least some form of bilingual education. The Law seems to provide, however, that the right is realised - “in accordance with the law” - through the creation of separate classes within Ukrainian-speaking schools rather than in stand-alone minority language schools. Article 7, paragraph 1.6 furthermore provides that persons belonging to “indigenous peoples of Ukraine” have the right to study their language as a subject from primary to the end of general secondary education.

The languages of “national minorities of Ukraine”

42. With regard to persons belonging to “national minorities of Ukraine”, there are two separate regimes.

43. First, such persons have the right to pre-school and primary education “in the language of the national minority they belong to and in the official language of the State”; as with indigenous peoples of Ukraine, the proportion of the education which takes place in the two languages is not specified, but appears to contemplate at the very least some form of bilingual education (Article 7, paragraph 1.3). Again, the Law seems to provide that the right is realised through the creation - again, “in accordance with the law” - of separate classes within Ukrainian-speaking schools rather than in stand-alone minority language schools.

44. Second, persons belonging to all “national minorities of Ukraine” have the right to study their language as a subject from the beginning of primary to the end of secondary education (Article 7, paragraph 1.6).

45. However, two different approaches are taken to education through the medium of the language of the national minority at the basic secondary and upper secondary levels.

46. Article 7, paragraph 4 provides that “one or more disciplines” *can* be taught through the medium of English and other official languages of the European Union. Thus, speakers of official languages of the EU - Bulgarian, Greek, German, Polish, Romanian, Slovak and Hungarian - may receive at least some of their education at basic and upper secondary education through the medium of their language, along with education in the state language.

47. That being said, it is important to note, however, that the Law does not guarantee that such speakers have *a right* to education in their language, since Article 7, paragraph 4 merely states that such education is possible; it would appear, therefore, that the provision of such education would be at the discretion of the education authorities.

48. Under the same Article 7, paragraph 4, it will no longer be possible for speakers of languages of other minorities - Belorussian, “Jewish” Language, Moldovan and, very significantly, Russian - to receive any education at basic or upper secondary level (after the primary classes) through the medium of their language. These persons will, however - as already noted - be able to study their language as a subject. Persons belonging to the concerned minorities are therefore at a disadvantage, both as compared to those belonging to indigenous peoples and to those belonging to other national minorities (whose languages are EU official languages). It is worth mentioning the peculiar situation of the Moldovan minority, whose language is identical to the language spoken by the Romanian minority, but which is nevertheless not an official language in the EU, as is the case for Romanian. Since the language of the Moldovan community is not an official language of the EU, persons belonging to the Moldovan minority will, in the context of medium and upper secondary education, only

enjoy the right of being taught their language as a subject. By comparison, the Romanian minority will be entitled to one or more subjects provided in the Romanian language.

49. Finally, with regard to vocational and higher education, the general rule is that such education will be provided in Ukrainian “*up to the level that allows to perform one’s professional activities in the chosen area using the Ukrainian language*” (Article 7, paragraph 2). However, upon request, the concerned educational institutions may organise the teaching of a language of indigenous peoples or of a minority language (Article 7, paragraph 5).

50. According to the Concluding and Transitional Provisions of the Law, a transitional period of 3 years is provided, enabling persons entering secondary education before 1 September 2018 to continue receiving education according to the rules in force before the entry into force of the Law, “*with gradual increase of the quantity of subjects taught in the Ukrainian language.*”

B. Adoption procedure

51. Paragraph 4 of Article 7 of the Language Charter provides that, in determining their policy with regard to regional or minority languages, States must take into consideration the needs and wishes expressed by the groups which use such languages.

52. Article 20, paragraphs 2 and 3 of the 2012 Language Law also makes specific reference to the citizens’ needs as a decisive factor in the determination of the language of education. In more general terms, Article 15 of the Framework Convention requires parties to create conditions for the effective participation of persons belonging to national minorities to public affairs, in particular those affecting them. As indicated in the Explanatory Report to the Framework Convention, this involves *inter alia* consultation with these persons when states are contemplating legislative or other measures likely to affect them directly, as well as involving them in the assessment of the possible impact that planned measures might have on them.

53. It appears, from information received by the Venice Commission, that representatives of at least some minorities were extensively consulted in relation to an earlier draft of Article 7 of the Education Law, which did not receive the necessary majority in Parliament. It also appears that the – quite different – version of Article 7, which was finally adopted, was prepared very rapidly during a break in the parliamentary debates and that no consultations on this text took place.

54. Evidently, it is part of the legislature’s powers to amend a legislative draft until very last moment before its final adoption. Nevertheless, in view of the significant changes introduced into the system of minority language education and their potential effect on the minorities’ linguistic identity, the adequate consultation of national minorities, and their inclusion in the discussions held on the last amendments, would have been beneficial to the legislative process, both in terms of acceptability and subsequent implementation. From this perspective, to respond properly to the imperative of adequacy to existing needs, it will be crucial to ensure, when adopting subsequent legislation as well as in the context of its implementation, that relevant needs and concerns of national minorities are heard and taken into account, in line with Ukraine’s obligations in this sphere.

C. Compliance with relevant international and constitutional provisions

1. Uncertainties of Article 7 of the Law on Education

a. Issues of legal precision and clarity

55. Assessing the extent to which Article 7 complies with applicable international instruments binding on Ukraine and with the guarantees provided by the national Constitution proves not to

be an easy task, as the precise level of protection of the linguistic rights it grants to Ukraine's national minorities and indigenous people, remains unclear.

56. According to Article 7.1.3, in municipal institutions of pre-school and primary education, the right to education in the language of the national minority will be guaranteed in "separate classes" "along with the official language". It is unclear what this provision precisely implies, as the concept "along with the official language" can be implemented in many ways. Will pre-school and primary education be mainly in the minority language? To what extent will it be bilingual? Which percentage of the lessons will be given in the state language and which percentage in the minority language? Several interlocutors indicated that primary education should generally take place in the minority language, in addition to the study of the Ukrainian language. If this is the intention, it should have been spelt out more clearly.

57. The same questions arise regarding Article 7.1.5, guaranteeing to indigenous peoples the right to study at pre-school and in general secondary education in their language "in separate classes" "along with the official language".

58. Also, under Article 7.1.6, both indigenous peoples and national minorities are guaranteed the right to study their language in municipal institutions of general secondary education or in national cultural associations. It is unclear to the Venice Commission what the provision precisely implies. Will this right be guaranteed in all grades of primary and secondary schools? How many hours of language teaching will there be per week? Does this right involve an obligation for municipal schools to provide teaching of the minority language or will the task be left to national cultural associations? It is recalled that, under to Article 14.1 of the Framework Convention, Ukraine undertook to "recognise that every person belonging to a national minority has *the right* to learn his or her minority language".

59. Furthermore, according to Article 7.4 one or more disciplines *may* be delivered in two or more languages: the state language, in English, in other official EU languages. It is, again, unclear what the provision precisely implies: Who will decide on these additional courses? Will the demand by students be taken into account? Under which conditions and in under which circumstances will they be given? How many courses will it be possible to teach? In how many additional languages?

60. From the perspective of the Framework Convention (see Article 14.2), the system put in place by the Law requires a certain degree of specification of the most important aspects involved by this protection. These include: the communities, the territorial areas and the educational institutions where teaching in/learning of the minority languages will have to be provided (and the criteria/thresholds to determine the areas concerned); the procedural aspects of the creation/closure of the relevant schools/classes, and the rules governing the decision making processes (the presentation of a demand and the number of adhesions required to support it); the deciding authorities; the important step of a prior consultation with the minority.

61. Likewise, under the Language Charter, in all such cases, the obligations are to be applied "according to the situation" of each language and "within the territory in which such languages are used" (defined in Article 1 b as the geographical area in which the language is the mode of expression of a sufficient number of people to justify the adoption of the measure). Also, as already indicated, the Charter requires State Parties, when designing their language-related policy, "*to take into consideration the needs and wishes expressed by the groups which use such languages*" (Article 7.4 of the Language Charter).

62. Article 7 is silent on these points, be it the subjects of the protection, the relevant territorial areas or the necessary criteria, procedures, or the stakeholders involved in the decision.

63. It seems evident that, without appropriate guidance in the national legislation, the domestic implementation of Ukraine's obligations in terms of minority languages in education may hardly be ensured. It is true that in Ukraine, international treaties ratified by Parliament are in force and are part of the national legislation. Yet, both the Framework Convention and the Language Charter are made up of programmatic provisions stating principles, which cannot be directly applied and implemented without the interposition of the national legislation. Article 7 having itself a very programmatic content, it is difficult to assess whether the principle of the state language as a language of instruction, in its paragraph 1, is coupled, as required by international standards, with adequate guarantees for the preservation and development of the linguistic identities of Ukraine's minorities.

64. The uncertainty noted also appears problematic in the light of Article 92 of the Ukrainian Constitution, which provides that both the rights of indigenous peoples and national minorities and the procedure for the use of languages have to be determined exclusively by the laws of Ukraine. Moreover, since the new framework involves a diminution of the protection available, a further issue of constitutionality might be raised, in the light of Article 22.3 of the Constitution (see comments in Section C.3.i below). It belongs to the Constitutional Court of Ukraine to take a stand on these questions.

65. It is worth noting that, in the Ministry of Education Position Paper, there is a tendency to assign specific relevance to a minority in view of the protection of its language only when the persons belonging to the minority constitute "the majority of the population" (page 6 § 15.3, quoting Article 8 of the Ukrainian Law " On the principles of State Language Policy") or where there is a place "of compact residence of indigenous and national minorities " (page 7 § 19.1, quoting Article 2.1.3 of the Ukrainian Law on Local State Administration). Since, under international texts, the adoption of measures of protection is subject to the presence of a consistent, but not necessarily prevalent, number of persons belonging to a minority, this approach cannot be supported.

66. As it results from the above comments, since the Education Law is a framework law, forthcoming special laws, in particular the Law on Secondary Education, will be crucial for the determination of the specific criteria, modalities and procedures for implementing the new framework for language education.

b. The position of Article 7 in the hierarchy of norms

67. An additional concern derives from the lack of clarity as to the position of Article 7, part of a framework law regulating the State's policy in the sphere of education, in the domestic hierarchy of legal norms, and the relationship with existing provisions, more generous for minority language education, in other Ukrainian laws, in particular the 2012 Language Law. As mentioned above, according to its Article 4.1, the 2012 Law "*shall serve as a basis for other legislative acts that regulate the use of languages in specific spheres of public life*". The lack of consistency between the respective norms, added to the vagueness of the text of Article 7, raises a clear issue of legal uncertainty likely to create serious problems of interpretation and application, and therefore needs to be addressed through clear and consistent rules.

68. As already indicated, the Venice Commission was assured that the future Law on Secondary Education would provide clear and precise guidance on the various aspects of the implementation of the new regime introduced by Article 7. Yet, the question arises whether one may reasonably predict the final result of a legislative process when politically sensitive issues, such as the language policy, are at stake. At the same time, it is not entirely clear from the information provided to the Venice Commission whether (and to what extent) all issues raised

by Article 7, as described in the present Opinion, will be in fact addressed by the Law on Secondary Education.

69. This being said, it is important to point out that the actual function of a framework law is, in the interest of clarity and legal certainty, to set out in a precise manner the general principles and directions for the area to be regulated: in the present case, the meaning that the domestic legislature intends to give, in implementing them, to the provisions of the Framework Convention and the Language Charter and of the national Constitution. Otherwise, there is a risk of free-hand interpretation and application of the Law.

70. It is recognised that international instruments on language and minority protection leave a certain discretion to states to implement their provisions. It is, on the other hand, true that the Venice Commission has no indications that the Ukrainian authorities have the intention to opt for an implementation that is not in compliance with the minimum standards. However, in view of the above observations on the legal uncertainty affecting Article 7, the Venice Commission feels obligated to reserve its position and limit itself in this Opinion to a number of general observations, which the Ukrainian authorities will have to take into account when implementing this provision, in particular in designing and adopting subsidiary legislation. These observations pertain to the legitimacy of the aim of protecting the state language (2), the adequacy of the changes introduced by Article 7 as a means to realise this aim (3), the fairness of the balance to be struck with the protection of minorities (4) and the compliance with the principle of non-discrimination (5).

2. Legitimacy of the aim of the protection of the state language

71. The authorities of Ukraine have repeatedly indicated that the overriding goal of Article 7 of was not to weaken minority and indigenous languages, but to improve knowledge of and competence in the Ukrainian language as the sole official language, thereby contributing to the development of its use in all spheres of public life. It was furthermore explained that the new Law did not in any way aim at closing down minority schools, but on the contrary at mitigating current instances of discrimination facing persons belonging to minorities and offering such persons equal opportunities to higher education and to public sector employment. Moreover, the alleged inability of many students educated in minority language, to communicate adequately through the state language appears, and this is another major concern, as a barrier to full integration and effective participation of these persons in Ukrainian society.

72. In this connection, the Venice Commission was provided with official statistics showing that children studying in minority schools have fewer opportunities than Ukrainian-speaking pupils of the same age. For example, official statistics in 2016 indicate that 55% of children from the schools in the Romanian densely populated communities and 62% of those from the schools in the Hungarian densely populated communities failed the External Independent Testing (EIT) on competence in the Ukrainian language, which is administered at the end of secondary education and which must be passed in order to gain admission into tertiary education and to have access at least to some public sector jobs.¹⁷ Although questions have been raised as to the methodology having led to such statistics, the necessity to improve the teaching and command of the state language among persons belonging to minority communities is not questioned. On the contrary, it is clear to the Venice Commission from its exchanges with minority representatives that not only is there consensus in this regard among minorities, but there is also concern within their communities, over the methodology and quality of Ukrainian teaching so far provided in minority schools.

¹⁷ See Ministry of Education Position Paper, making reference to the statistics of the Ukrainian Centre for the Education Quality Assessment.

73. It is also clear that the Ukrainian state-building and the strengthening of the state language as one of its foundations, is an important consideration in the development of Article 7 of the Education Law. The Ministry of Education Position Paper notes the historical policies of “russification” which prevailed for a long period of time, until the independence of Ukraine in 1991, and the need to ensure that Ukrainian, the sole official language of the state, is capable of acting as the medium of wider communication in Ukraine.¹⁸ Beyond this, the elaboration and adoption of the new framework for language education appears to respond to underlying concerns related to national security requirements which, in the light of recent developments in the country, have become imperative. According to the Ministry of Education Position Paper (paragraph 7), the authorities realised that the continuation of the previous language policy in education “*not only does not contribute to national accord, but it is also a threat to national security, state sovereignty and territorial integrity of Ukraine.*”

74. In its Opinion on the draft Law on Languages in Ukraine, adopted in March 2011, the Venice Commission clearly stated *the aim of “strengthening of the status of the Ukrainian language as one of the crucial components of national identity of the Ukrainian people and a guarantee of its national sovereignty”* was in full compliance with Article 10 of the Constitution.¹⁹

75. The Commission also addressed this issue in its 2010 Opinion on the State Language Law of the Slovak Republic²⁰ where, after examining provisions regulating the use of languages in constitutions of Council of Europe member states, it concluded:

“40. Against this comparative background, the Venice Commission wishes to emphasise that state authorities are perfectly entitled to promote the knowledge and use of the official language and to ensure its protection²¹, although it is more usual for states to regulate and protect the use of minority languages.

[...]

42. [...] The promotion of the State language guarantees the development of the identity of the State community, and further ensures mutual communication among and within the constituent parts of the populations. The possibility for citizens to use the official language throughout the country can be ensured also in order to avoid that they be discriminated against in the enjoyment of their fundamental rights, in areas where the persons belonging to national minorities have a majority position.”

76. The legitimate aim of the protection of the state language and its role as a factor of social cohesion and integration are also expressly recognised by the Framework Convention (Article 14. 3) and the Language Charter (see Preamble to the Charter and paragraph 1 of Article 8), as well as the supervisory bodies of the two instruments. In both the initial and second monitoring reports in respect of Ukraine²², the Committee of Experts of the Charter explicitly recognised

¹⁸ “*Learning of the Russian language was stimulated in schools for the national minorities. Learning of the Ukrainian language was practically abandoned. The current situation in communities where national minorities live bears witness to the statement above: representatives of the older generation speak Russian much better than Ukrainian.*” Ministry of Education Position Paper, paragraph 4

¹⁹ See CDL-AD(2011)008. The Commission further explained: “*As the Venice Commission understands it, Article 10 was introduced in 1996 in the Ukrainian Constitution as the constitutional expression of the will to protect and to promote the Ukrainian language as the basis of the cohesion of the Ukrainian society and the mutual understanding of its members. After a long period of prohibition of non-Russian languages in the public sphere, leading to the predominance of Russian in many aspects of public and private life, and having an adverse effect on the preservation of the linguistic identity of considerable numbers of ethnic Ukrainians, Article 10 of the Constitution expresses the commitment to a comprehensive development of the Ukrainian language “in all spheres of social life throughout the entire territory of Ukraine”.* (paragraph 50)

²⁰ CDL-AD(2010)035, Opinion on the act on the state language of the Slovak Republic, 28 October 2010

²¹ This has also been underlined on several occasions by the Advisory Committee of the Framework Convention See e.g. Opinion on the Russian Federation ACFC/INF/OP/I(2003) 005, 2002.

²² See Footnote 13.

this principle, but also noted that, conversely, “*the promotion of the State language shall not be done to the detriment of regional or minority languages present on the territory of the State*”²³.

77. Hence, the measures taken to achieve this legitimate purpose have to be coordinated and adequately balanced with guarantees and measures for education in and/or of the languages of Ukraine’s minorities. A key issue which needs to be examined for the purpose of this Opinion is, therefore, the *manner* in which Ukraine has chosen, through the new regime in Article 7 of the new Education Law, to promote the learning of the state language (see comments below).

3. Article 7 as an appropriate means to realise the legitimate aim

a. Problems of implementing Article 7 in practice

78. Article 7 of the Law on Education strengthens the education in the state language. It provides that the language of education is the state language (Article 7.1.1), and that the state guarantees to each citizen of Ukraine the right to obtain formal education at all levels (from pre-school to higher education), as well as out-of-school and postgraduate education in the state language (7.1.2). Finally, Article 7.2 provides for mandatory study of the state language in vocational education and higher education, to the extent required to perform the chosen professional activity using the state language. Appropriate conditions for study of the state language are created for individuals belonging to indigenous people, national minorities of Ukraine, foreigners and stateless persons.

79. The adequacy of these measures has to be assessed in the light of the problems the Ukrainian authorities have already been faced with in the past and are still faced with at present, due to a lack of qualified teachers, and adequate schoolbooks and pedagogical methodology for the teaching of the Ukrainian language. The Ukrainian authorities acknowledge the existence of this situation, which most likely will become even more problematic with the entry into force of Article 7 of the new Law on Education.

80. According to Article 3, paragraph 18 of the Concluding and Transitional Provisions, for persons belonging to national minorities or indigenous peoples having entered into general secondary education before 1 September 2018, Article 7 of the new Law on Education will only enter into force on 1 September 2020, although “a gradual increase”²⁴ of the number of subjects taught in Ukrainian is foreseen for these persons too. This leaves the Ukrainian authorities less than three years to find sufficiently qualified teachers to take over the courses in hundreds of secondary schools, which had hitherto a “national minority” character and which will become schools where almost all subjects will have to be taught in Ukrainian. The transition period will certainly be particularly short for those minority languages where the situation will change from full schooling in the minority language through all secondary levels to an abrupt - instead of “gradual” - change to schooling in the minority language only at pre-school and primary levels.

81. The transitional provisions also imply that, for persons entering primary education on 1 September 2018, the schools will already have to apply the new system, namely to create separate classes or groups for education “*in the language of the respective national minority group along with the official language of the State.*” To translate the new framework into practice, the authorities will have to rely, taking due account of the principles contained in Article

²³ Initial monitoring report, ECRML (2010) 6 para. 71. See also paragraph 70 explaining: “*The Committee of Experts is aware of the particular historical and other circumstances that have led to a dramatic decrease of the use of the Ukrainian language prior to the independence of the country. It understands the important role of the Ukrainian language in the development of the Ukrainian national identity.* »

²⁴ The Ukrainian authorities explained that discussions were ongoing on the possible target for the *ratio* state language/minority language (60:30; 70:30 or other options), pending the elaboration of the Law on Secondary Education.

7, on criteria, rules and procedures to be locked in legislation (the planned Law on Secondary Education), between now and 1 September 2018.

82. The Venice Commission has serious doubts as to whether the Ukrainian authorities will be able to adopt implementing legislation and to solve, in such a short time, the important problem of the lack of qualified teachers in the Ukrainian language, which will become even more acute under the new framework. In the Commission's view, the provisions of Article 7 of the Law on Education can only be deemed to contain appropriate measures to realise the legitimate aim of strengthening the state language in education, when additional measures (of a legislative and practical nature) are taken to create the required conditions to implement these provisions in practice. It recommends, therefore, to amend the transitional provision and to determine, in consultation with the representatives of the minorities, a more realistic transitional period.

- b. Does Article 7 strike a fair balance between the promotion of the state language and protection of the linguistic rights of the national minorities?

83. In order to assess the compliance of new Article 7 of the Law on Education with international standards, not only the aim it pursues but also its effects on the rights of national minorities must be taken into account. The Law has to strike a fair balance between the promotion of the state language and protection of the linguistic rights of the national minorities,²⁵ which may not be unduly diminished.

84. In order to strike a proper balance, the changes introduced by the Ukrainian Law have to be proportionate, i.e. they must not only be appropriate, but also necessary - less restrictive means for the minority languages should be privileged, if they are available.

85. To measure the proportionality of these changes, it is essential to examine the actual impact of the implementation of Article 7, both in terms of immediate consequences on the enjoyment of linguistic and educational rights of persons belonging to national minorities, and in a longer perspective.

i. Diminution of existing level of protection

86. At first glance, Article 7 of the Education Law appears to be consistent with Ukraine's obligations under Article 14.2²⁶ of the Framework Convention, allowing parties to opt for either education in the minority language, or teaching of that language, and the Language Charter (Article 8, subparagraphs 1 a iii, 1 b iv, and 1 c iv), since Ukraine has chosen the less demanding option in these instruments. In relation to all of the regional or minority languages designated by Ukraine for the purposes of Part III of the Charter, it appears that Ukraine will continue to provide, as a minimum, a substantial part of pre-school and primary school education through the medium of the minority or indigenous language. At the secondary school level, Ukraine will continue at a minimum to provide for the teaching of all regional or minority languages as an integral part of the curriculum; also, since languages of EU member states may be used as the medium of instruction for one of more other subjects, it is possible that Ukraine will continue to make available a substantial part of secondary education in those languages.

²⁵ See 2010 Opinion on the Slovak Act on the State language, CDL-AD(2010)035, paragraph 47; see also F. de Varennnes, "Article 10" in M. Weller (ed.), *The Rights of Minorities. A commentary on the European Framework Convention for the Protection of National Minorities*, Oxford University Press, 2006, 326: "However legitimate it may be to have measures supporting and spreading knowledge of the official language, this must not be at the expense of the right to use a minority language as outlined in Article 10."

²⁶ Article 14.2 stipulates: "In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language."

87. However, the precise effects of Article 7 of the Law on Education are, at this stage, not yet established due to the legal uncertainties noted and to the fact that its implementation depends on the drafting and adoption of the Law on Secondary Education. It is clear, though, that the framework and parameters within which that implementation will have to be carried out are narrower than under the former Law, and that it will considerably reduce the rights previously granted to national minorities concerning their language of education. One may remark, for example, that, if minority languages, which are official languages in the EU member states, *may* indeed be used as the medium of instruction for one or more subjects in secondary education, Article 7 only enables, but does not provide for, a right to such education.

88. In this connection, while clearly not substituting its judgment for that of the Constitutional Court, the Venice Commission draws attention to the provisions of Article 22.3 of the Ukrainian Constitution (see paragraph 19 above), expressly disallowing the diminution of “existing rights” in the adoption of new laws or in the amendment of existing laws.

89. At first sight, this provision seems to contain a stand-still clause implying that the legislature is obliged to maintain the “content and the scope of the existing rights” and is not allowed to diminish them in the adoption of a new law. The question arises, however, whether the term “existing rights and freedoms” only refers to the rights and freedoms as they are guaranteed in the Constitution (first hypothesis) - in which case Article 22.3 would not have an additional value (it would only confirm that the Law may not violate the Constitution), or it refers to the rights and freedoms as guaranteed in the laws implementing the Constitution (second hypothesis).

90. Article 53 of the Constitution is, for this Opinion, the relevant constitutional provision. It provides: *“Citizens who belong to national minorities are guaranteed the right to receive instruction in their native language, or to study their native language in state and communal educational establishments and through national cultural societies in accordance with the law.”*

91. In the first hypothesis, article 7 of the Law on Education does not infringe Article 22.3 of the Constitution, as Article 53 of the Constitution only guarantees linguistic rights in education “in accordance with the law”. This is the position of the Ukrainian authorities, as expressed in the Ministry of Education Position Paper:²⁷ *“Thus, provided that ‘in accordance with the law’ the guarantees for national minorities are preserved with regard to the education in the native language at some levels of education, and the study of the mother tongue at other levels of education in state and municipal educational institutions (and not only ‘through national cultural societies’), there is no narrowing of the content or scope of constitutional rights provided in Article 53 of the Constitution of Ukraine, including the right to free-of-charge pre-school, full secondary, vocational, higher education in state and municipal schools.”*

92. In the second hypothesis, the new framework introduced by Article 7 would appear to infringe the clause in Article 22.3 of the Constitution, as it diminishes the level of protection guaranteed by the legislation so far implementing Article 53 of the Constitution (i.e. Article 20 of the 2012 Language Law), and actually the level of protection currently available, in practice, in Ukraine.

93. The Venice Commission is not in a position to take a firm stance on this issue, as it does not have at its disposal the necessary relevant material (such as case law, doctrinal comments) on the interpretation of this provision, and this is not within its mandate. The provisions of the Law on Secondary Education, still to be adopted, will also be relevant in this respect and the situation may be different with respect to different languages. It will be up to the Constitutional

²⁷ See Ministry of Education Position Paper, p. 12.

Court of Ukraine to assess the compliance of Article 7 of the Law on Education with Article 22.3 of the Constitution.

94. The Commission wishes to point out however that, in its initial monitoring report on Ukraine, the Committee of Experts of the Language Charter pointed out that, under Article 4, paragraph 2 of the Charter, "*the provisions of this Charter shall not affect any more favourable provisions concerning the status of regional or minority languages, or the legal regime of persons belonging to minorities which may exist in a Party . . .*" (paragraph 59). As a consequence, the Committee of Experts underlined that "*a higher level previously achieved should not be lowered because of the ratification of the Charter*", and invited the authorities of Ukraine to take these observations into consideration in the context of revisions to the Law on the ratification of the Charter, which were taking place at the time (paragraph 154).

95. The Committee of Ministers has also recommended, in relation to the initial monitoring of Ukraine, that Ukraine "develop in close consultation and co-operation with the representatives of minority language speakers a structured education policy for regional or minority languages and *secure the right of minority language speakers to receive education in their languages, while preserving the achievements already attained and the existing best practices in this field*" (emphasis added, Recommendation CM/RecChL(2010)6 of the Committee of Minister, adopted 7 July 2010).

ii. Are there less restrictive means to reach the legitimate goal?

96. In the context of the Framework Convention monitoring mechanism, changes from one model to another have been accepted as (possibly) being justified by the legitimate goal of any state to support and (re)vitalise its state language(s) in the case of e.g. Estonia and Latvia.²⁸ It must be recalled, however that, in pursuing a legitimate public policy objective, to satisfy the proportionality requirement, the policy option chosen should be the one with the least degree possible of adverse impact on the legitimate interests of those concerned.

97. From this perspective, one may question whether the legitimate goal of full state language proficiency for all upon completion of secondary education can only be achieved by introducing the new model as described in Article 7 of the new Education Law. In spite of the assertions by the Ukrainian authorities, it is not entirely clear that the significant reduction in teaching through the medium of a minority language is the only or even the best alternative available.

98. As noted, the authorities have offered evidence of high failure rates among certain students in Hungarian and Romanian medium secondary education. It is not clear, however, whether such high failure rates apply to all students in such education, or whether there are particular circumstances in certain areas which explain these rates. Furthermore, no evidence was provided as to the failure rates of children in Ukrainian-medium education in the districts in which there are high failure rates for children in minority language education, the most obvious comparators. Also, no evidence was offered as to failure rates amongst students in Russian-medium secondary education. Finally, it is not clear what other options were considered in trying to address the problem of abilities in Ukrainian that are perceived to exist amongst certain students in minority language education, such as improving the quality of teaching the Ukrainian language in the minority schools. It is indeed the view of most interlocutors the Venice Commission has met among minority representatives that the teaching of and in the state language could be improved (through quality and better-adapted methodology, textbooks and pedagogical material, as well as by improved teacher training), within the schools currently providing education in the minority language, which would not exclude increasing the number of hours available to teaching Ukrainian. This will actually also respond to one of the concerns and

²⁸ See ACFC/INF/OP/I/(2002)5, Opinion on Estonia, 14 September 2001, paragraphs 50 to 54; ACFC/OP/I/(2008)002, Opinion on Latvia, 9 October 2008, paragraphs 143, 146.

demands addressed to the Ukrainian authorities by the representatives of minorities. The aim of strengthening the command of the state language could in this way be achieved, in the spirit of a better integration in the society of persons belonging to minorities, without undermining their rights and identity.

99. Should the Ukrainian authorities consider that the mere strengthening of the teaching of the Ukrainian language will not be sufficient, but that more teaching of other subjects in Ukrainian is also required, this still does not completely justify abolishing the possibility of teaching other subject matters in minority languages as from the secondary level. In view of the long-term impact of the new rules on the operation and existence of minority schools in Ukraine, and on the preservation of the linguistic identity of the persons/communities concerned, a more balanced approach is required.

100. It is worth mentioning that there are in Ukraine, century-old minority schools, with a long and reputed tradition of quality education, which are part of the minorities' cultural heritage and have contributed substantially, throughout the history, to the preservation and development of their specific (including linguistic) identity. In its *Thematic commentary on the language rights of persons belonging to national minorities*,²⁹ the Advisory Committee of the Framework Convention has stressed the importance of the preservation of local minority language school networks, which in its view "should be guaranteed". In this context, the Advisory Committee also pointed out the importance of the dimension of continuity in minority language education, stressing that "the lack of incentives or insufficient possibilities at pre-school, secondary or higher level can seriously reduce the attractiveness of minority language learning at primary level" (paragraph 7). Of particular relevance, in this context, is also the judgment of the ECtHR in the *Cyprus v. Turkey*³⁰ case, on the failure to make continuing provisions for Greek-language schooling at the secondary school level as a denial of the substance of the right to education, as protected by Article 2 of Protocol No. 1 ECHR.

101. At the same time, the fact that minority schools are at risk also raises concern in the light of Ukraine's obligations under the Framework Convention (Article 5) and the Language Charter (Preamble), as well as those deriving from the Ukrainian Constitution (Article 11), in terms of protection of minorities' national identities and cultures. It is widely acknowledged that minority schools also play a valuable role as cultural centres and active promoters of minorities' cultural heritage.

102. In addition, traditional minority schools should also be regarded as being part of the historic heritage of Ukraine and, as such, be allowed to continue functioning in the traditional way, provided that there is a strong increase in the quality of instruction of Ukrainian. This could be a viable solution, more in line with the requirement of proportionality and with the principles of interethnic dialogue, respect and understanding. It is recalled that, under Article 6 of the Framework Convention, Ukraine has committed, as all other parties to this Convention, to take effective measures to promote tolerance, intercultural dialogue and co-operation among all persons living on their territory, in particular in the fields of education, culture and the media.

103. With regard to these considerations, only a solution providing for teaching both in the state language and the minority language may be justified. For official languages of EU member states, Article 7 paragraph 4 of the Law indeed envisages the possibility that more than one subject may be taught in the respective language. Therefore, it will be crucial to make as ample and flexible use of Article 7 paragraph 4 as possible, provided that there is sufficient demand for such (additional) instruction. In order to be proportional, for the numerically more important

²⁹ See Advisory Committee of FCNM, Thematic commentary no 3 - The language rights of persons belonging to national minorities under the Framework Convention, adopted on 24 May 2012, paragraph 69

³⁰ ECHR, *Cyprus v. Turkey*, Application no. 25781/94, judgment of 10 May 2001

minorities speaking EU official languages such as Hungarian and Romanian,³¹ this could mean that a substantial part of secondary education would be provided in the minority language. In particular, it will have to be ensured that, alongside the increased teaching in Ukrainian, sufficient room is left for a teaching in the minority language which will enable the students belonging to the minority to attain a sufficiently high level of oral and written proficiency in the language, enabling them to also address complex issues in their native language.

104. The Venice Commission notes that the Ukrainian authorities have indicated their readiness to provide in the Law on Secondary Education for the teaching of other subjects in the minority language concerned. This can, however, only be regarded as satisfactory if there are guarantees that, as indicated before, the scope of this teaching will be sufficient for a high proficiency in the respective language. The results of present bilateral talks with minorities' kin-states, could provide useful input to the implementation of Article 7 in this respect.

105. Finally, it is noted that, under Article 7, no exception is made, from the principle of compulsory education in the state language, for private education. This measure is not only in contradiction with Article 20.6 of the 2012 Language Law (which leaves to the founder/owner of the school the decision as to the language of instruction), but is also in breach of Article 13 of the Framework Convention.³² It is recommended to include a clause in Article 7 excluding private schools from the application of the new rules

4. Compliance with the principle of non-discrimination

106. As described earlier in this Opinion, Article 7 provides for a differential treatment both among different categories of Ukrainian citizens and their respective languages.

107. On the one hand, national minorities and indigenous people are treated differently: while for national minorities education in their language is only guaranteed at pre-school and primary level, for indigenous peoples education in their language is guaranteed at pre-school and general secondary school level. (Article 7.1.3 and 7.1.5). On the other hand, different treatment is applied to national minorities according to whether their language is also (or not) an official language of the EU. On the basis of Article 7.4, one or more additional subjects may be taught, in English or another official EU language. Thus, the Bulgarian, Hungarian, Romanian, and Polish minorities, for example, would benefit from a higher level of protection of their linguistic rights than the Russian minority.

108. Correspondingly, different categories are established among the languages spoken in Ukraine, which will be subject to different levels of protection: (a) Ukrainian - language of instruction at all levels of education; (b) the languages of indigenous peoples. (c) the languages of national minorities which are EU official languages; (d) the languages of minorities that are not EU languages (Russian, Belarusian etc.).

109. Such differential treatment of the Ukraine's minorities raises questions in the light of the principle of non-discrimination, as laid down, for example, in Article 4 of the Framework Convention (paragraph 1), stating that the Parties "*undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.*"³³

³¹ According to the discussions with the Ukrainian authorities, Moldovan could in practice be treated like Romanian.

³² The right of minorities to set up and manage their own private schools is protected under article 13 of the Framework Convention.

³³ See also non-discrimination provisions, including non-discrimination based on language, in international instruments ratified by Ukraine: Article 14 ECHR (since Ukraine has also ratified the First Optional Protocol, which includes in Article 2 a right to education, the protection of Article 14 ECHR should extend to protection against

110. It is true that not every form of unequal treatment amounts to a legally prohibited discrimination and that affirmative measures might be necessary to protect and promote the distinct identity of national minorities, as recognised in Article 4 (3) of the Framework Convention with regard to unequal treatment between majority and minority populations. Moreover, paragraph 2 of Article 4 requires the state to “*take due account of the specific conditions of the persons belonging to national minorities*”. Similar considerations should also apply as regards unequal treatment between minority groups. This would, for example, mean that there might indeed be good reasons to provide preferential treatment to indigenous peoples, as foreseen in Article 7 of the Education Law (although the reason invoked by the Ukrainian authorities - the absence of kin-states - is generally not considered to be acceptable under applicable European standards; any differentiation must be based on other grounds such as, e.g., different degrees of vulnerability or need of state support). With respect to the present situation of the Crimean Tatars and other small minorities, affirmative action in their favour may indeed be justified.

111. It is much more difficult, however, to see any reason justifying the treatment differentiating³⁴ between, on the one hand, national minorities speaking an official language of the EU, and, on the other hand, national minorities such as the Russian minority which, under the new framework, after the end of primary school education, will only be entitled to teaching of their languages as a subject. In particular, the relegation of the Russian language, which to date has served as a language of instruction for minority communities to the end of secondary education, to one through which instruction is possible only to the end of primary education, seems problematic.³⁵

112. Taking into account the particular place of the Russian language in Ukraine (the most widely used of all of Ukraine’s regional or minority languages, and, as the Committee of Experts of the Language Charter has noted, the main language of communication for many persons belonging to non-Russian minorities), its more restricted use than that of official languages of EU member states, as it seems to be contemplated in Article 7 of the Education Law, is clearly problematic. It could be argued that the historical language policy, which favoured Russian, and the current political context, may be factors which could justify such an approach. However, it appears that even the domestic constitutional order of Ukraine gives some recognition to the particular place of Russian. Article 10 of the Constitution of Ukraine provides that the state language of Ukraine is Ukrainian, but it also guarantees “the free development, use and

discrimination based on language, among other things, in education) and the Protocol 12 to the ECHR, as well as in domestic law of Ukraine, such as Article 24 of the Constitution of Ukraine.

³⁴ See *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium* (merits). Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), 23 July 1968, in which the Court found that the Belgian Act of 2 August 1963 did not comply with Article 14 of the Convention, read in conjunction with Article 2 of Protocol 1, on the basis that it prevented certain children from having access to French-language schools in the communes on the outskirts of Brussels solely because of the residence of their parents. The Court established that the right to education implied the right to be educated in the national language, but did not include the provision that the parent’s linguistic preferences be respected. In reaching its decision, the Court established that the principle of equality of treatment enshrined in Article 14 was violated if the distinction had no objective and reasonable justification, did not pursue a legitimate aim, and was not proportionate to the aim pursued.

³⁵ Under the Language Charter, the Committee of Experts has made a number of specific observations of relevance in relation to Russian. For example, the initial monitoring report noted that the Russian language is considered by many persons belonging to national minorities and by some ethnic Ukrainians as their mother tongue, and, “it is therefore not in the same position as other regional or minority languages”. The report furthermore noted that “given the number of Russian speakers in Ukraine, it is clear that the Russian language must be accorded a special position” (paragraph 79). See also the Explanatory of the Charter in relation to the flexibility provided in choosing Part III obligations and the need to take into account, when deciding the level of protection, “the situation of the language”; this would imply, for instance, in the absence of other factors, that the larger the number of speakers of a regional or minority language and the more homogeneous the regional population, the “stronger” the option which should be adopted; a weaker alternative should be adopted only when the stronger option cannot be applied owing to the situation of the language in question” (paragraph 46).

protection of Russian, and other languages of national minorities of Ukraine". It is therefore far from clear that a consideration of the historical factor would justify the less favourable treatment accorded to Russian under Article 7 of the Education Law.

113. Some interlocutors in Ukraine have referred to the fact that most Russian native speakers in Ukraine actually live in Russian-speaking areas, and thus will use Russian regularly in daily life anyway and have broad access to media in Russian. Moreover, since the Russian and Ukrainian languages belong to the same language group, it is easier to retain a sufficient level of proficiency in both languages. In their view, the fact that Article 7 maintains teaching in the Russian language at the primary level and teaching of the Russian language at the secondary level will enable the Russian-speaking students to maintain a high level of proficiency in their language. On the other hand, representatives of the Russian minority underlined that the fact that the Russian and Ukrainian languages belong to the same linguistic family, explains that already under the previous law, pupils from schools with Russian as the language of education, had - unlike the other minorities - good results for the "Ukrainian language and literature" EIT exam. Therefore, they argue that for these students the need to pursue the entire secondary education in the state language is less imperative.

114. Although the Venice Commission is not in a position to assess all factual elements that play a role in the language education policy of Ukraine, it is, in the light of all the elements mentioned in the previous paragraphs, of the view that, unless a more convincing justification is provided, the less favourable treatment of the Russian language (and other languages which are not official languages of the European Union), in Article 7 paragraph 4, is not justified in the light of the principle of non-discrimination, and raises potential issues of constitutionality in relation to Article 10 and Article 24 (the equality clause) of the Ukrainian Constitution, as well of consistency with other relevant provisions of the Ukrainian legislation (Article 20 of the 2012 Language Law).

115. A treatment equal to that of EU languages of Ukraine's minorities would certainly be more in conformity with the way in which Article 10 of the Constitution is formulated. Maintaining, at least, some prominent Russian schools as part of the historic and cultural identity and heritage of the concerned communities, to be selected through consultations with the representatives of the Russian minority, would be a possible way to accommodate existing expectations within this minority, and would also reflect a more open and inclusive approach, on the part of the authorities, towards all the country's minorities. This can only contribute to preserving social peace and good inter-ethnic relations and be beneficial to the Ukrainian society as a whole.

IV. Conclusion

116. The Venice Commission has examined the provisions dealing with the language of education - Article 7 and Article 3 paragraph 18 of the Concluding and Transitional Provision - in the new Law on Education adopted by the Ukrainian Parliament on 5 September 2017.

117. Since Ukraine gained its independence, the language issue has always featured prominently in the national debate, being legitimately considered to be an important element, if not the main factor, in state and nation-building. At the same time, in the specific demographic, social and geo-political context prevailing in Ukraine, designing a language policy likely to respond to the various expectations and interests within the Ukrainian society, respectful of the applicable standards and the linguistic rights of both the majority and the country's minorities - with different historical backgrounds, expectations and needs - is a difficult challenge. This is all the more true in the current situation of the country.

118. The Venice Commission wishes to underline, in the first place, as it did on previous occasions, that it is a legitimate and commendable aim for states to promote the strengthening of the state language and its command by all citizens, and to take action for its learning by all,

as a way to address existing inequalities and to facilitate more effective integration of persons belonging to national minorities into society.

119. While introducing a comprehensive reform of the Ukrainian education system which globally seems to be positively received, the new Education Law also proposes new principles for the use of languages as medium of education and as subject of instruction. In particular, Article 7 of the new Law, by reducing the scope of education in minority languages, notably at the secondary level, has drawn strong criticism and protests both domestically and internationally.

120. This criticism seems justified to a considerable extent. The Article, as adopted, is quite different from the draft on which minorities were consulted. Article 7 contains important ambiguities and does not appear to provide the guidance needed from a framework law in the application of the country's international and constitutional obligations. It contains some guarantees for education in the minority languages, mainly limited to primary education, though the exact scope of such guarantees is not as clear as it could be. It actually allows to radically change the previous language regime, at least in secondary education, towards a system focused on the compulsory use of the Ukrainian language as the language of education. This would result in a severe decrease in the opportunities available to persons belonging to national minorities to be taught in their languages, which amounts to a disproportionate interference with the existing rights of persons belonging to national minorities. In addition, the short deadline for the implementation of the new rules raises serious concerns about the quality of education.

121. The very vagueness of Article 7 makes it, however, also possible to implement the provision in a manner that is more friendly towards the rights of national minorities, and the Ukrainian authorities seem ready to use such possibilities. As regards primary education, Article 7 contains some guarantees only for the continuation of education in minority languages, but it is also not an obstacle. The Venice Commission understands that the Ukrainian authorities seem to intend to continue with the teaching of most subject matters in minority languages in specific classes for national minorities.

122. As regards secondary education, Article 7, while clearly aimed at increasing the role of the state language and reducing the role of minority languages, still leaves room for some flexibility. The Education Law is a framework law and the Law on Secondary Education, still to be adopted, could provide for more detailed and balanced solutions. If the law were implemented in a manner that minority languages could only be taught as a subject and there would no longer be the possibility to teach other subjects in the minority language, this would clearly be a disproportionate interference with the existing rights of minorities. However, Paragraph 4 of Article 7 provides a legal basis for the teaching of other subject matters in official languages of the EU.

123. The intention of the Ukrainian authorities seems, indeed, to use this provision to also enable the teaching of other subjects in these languages. This could be an acceptable solution for these languages, but only if there are sufficient guarantees in the implementing legislation, specified following adequate consultation of minorities, that the scope of this teaching will be sufficient to enable the students to attain a high level of oral and written proficiency, enabling them also to address complex issues. The results of the current bilateral talks with minorities' kin-states, could provide useful input to the implementation of Article 7 in this respect.

124. However, paragraph 4 of Article 7 provides no solution for languages which are not official languages of the EU, in particular the Russian language, as the most widely used language apart from the state language. The less favourable treatment of these languages is difficult to justify and therefore discriminatory. Having regard to these considerations, the appropriate solution would certainly be to amend Article 7 and replace this provision with a more balanced

and more clearly worded one. In particular, the issue of discriminatory treatment of other minority languages would have to be addressed in this context.

125. Many concerns may, however, also be immediately addressed through other legislative acts and when implementing the law. In this respect, the Venice Commission recommends in particular:

- to fully use, when adopting implementing legislation, the possibilities provided by paragraph 4 of Article 7 to ensure a substantial level of teaching in official languages of the European Union for the respective minorities;
- to continue ensuring a sufficient proportion of education in minority languages at the primary level, in addition to the teaching of the state language;
- to improve the quality of teaching of the state language;
- to amend the relevant transitional provisions of the Education Law to provide more time for a gradual reform;
- to exempt private schools from the new language requirements in accordance with Article 13 of the Framework Convention;
- to enter, within the framework of the implementation of the new Education Law, into a new dialogue with representatives of national minorities and all interested parties on the language of education.

126. The Venice Commission and the Directorate General of Democracy (DG II) of the Council of Europe remain at the disposal of the Ukrainian authorities for any assistance they may need in this respect.