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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE DRAFT LAW ON LANGUAGES
IN UKRAINE

On the basis of comments by

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I. Introduction

1. On 27 November 2010, the President of the Parliament of Ukraine (the Verkhovna Rada) - requested the Venice Commission to prepare a legal opinion on the Draft Law of Ukraine "On Languages in Ukraine", hereinafter "the Draft Law").
2. A working group of Rapporteurs was set up, composed of Messrs Sergio Bartole, [Ben Vermeulen] and Jan Velaers. In the preparation of the present opinion, the comments provided on the Draft Law under consideration, by Mr Marcus Galdia, expert of the Directorate General for Human Rights and Legal Affairs of the Council of Europe, have also been taken into account.
3. From 16 to 18 February 2011, Messrs Sergio Bartole and Jan Velaers, accompanied by Ms Artemiza-Tatiana Chisca of the Venice Commission secretariat, travelled to Ukraine to obtain clarifications on the Draft Law under examination and better understand the Ukrainian legal and factual background. During the visit, meetings were held both with the authorities and with representatives of the civil society, including Ukraine's national minorities. The Venice Commission wishes to thank them all for the fruitful discussions which took place on this occasion.
4. The present Opinion was adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011).

II. Background

5. According to the information provided to the Venice Commission, the Draft Law was submitted to the Ukrainian Parliamentary Committee on Culture and Spirituality on 7 September 2010.
6. According to the Explanatory Note accompanying the request, the adoption of such a law - as a framework law - is needed to ensure effective implementation of Articles 3, 10, 11, 21, 22, 24 and 53 of the Constitution of Ukraine and to bring Ukraine's language-related legislation, as a matter of "urgent necessity", in compliance with applicable international standards. The Explanatory Note specifically mentions in this context the obligations resulting from the ratification of the European Charter for Regional or Minority Languages and states that, in the preparation of the Draft, "practically all the recommendations of the Council of Europe experts" have been taken into account.
7. The Venice Commission notes that the Draft Law under consideration has engendered heated discussions in Ukraine and has raised strong criticism within various circles of the political sphere and the civil society. In particular, concern has been expressed with regard to the conformity of the Draft with the Ukrainian Constitution and its provisions regulating the position of the Ukrainian language as the State language of the country. Legal analysis/expert conclusions on the Draft have been provided by numerous stakeholders, such research institutes, high education establishments, but also research and expert departments of the parliament and the executive, including the Ministry of Justice and the Ministry of Education.
8. The Draft Law appears not to be on the 2010-2011 plenary agenda of the Verkhovna Rada. The Venice Commission has however been informed that several other language-related draft laws have been registered with the parliament and that a draft law on languages has also been elaborated by the Ministry of Culture and is under discussion within the Government.

A. Linguistic situation in Ukraine

9. Ukraine is a multi-ethnic state. According to the Ukrainian population census of 2001, ethnic Ukrainians make up 77.8% of the population. Other significant ethnic groups are Russians (17.3%), Belarusians (0.6%), Moldovans (0.5%), Crimean Tatars (0.5%), Bulgarians (0.4%), Hungarians (0.3%), Romanians (0.3%), Poles (0.3%), Jews (0.2%), Armenians (0.2%), Greeks (0.2%) and Tatars (0.2%).¹ Although the Ukrainian language is the state language of Ukraine, a considerable number of ethnic Ukrainians and persons belonging to non-Russian minorities have a command of the Russian language and even consider it to be their “native language”. According to the 2001 census, 67,5 % of the population of Ukraine declared Ukrainian to be their “native language”, while 29,6 % declared Russian to be their “native language”.

10. It is however not clear to the Venice Commission what the concept of “native language” exactly means. The concept is rather ambiguous and, according to non-governmental sources, it has been understood by the persons filling out the census to mean either the language in which I think and can speak fluently (34%), the language of the nationality to which I belong (32%), the language my parents speak (24%) or the language I use most often (8%).

11. It should be stressed at this point, however, that if many Ukrainian citizens are indeed bilingual, bilingualism, as the OSCE High Commissioner on National Minorities pointed out in his legal assessment of the Draft Law under consideration², “is still asymmetrical in the sense that a higher proportion of ethnic Ukrainians are fluent in and actually use Russian in many communicative situations than ethnic Russians fluent in and using Ukrainian.” This situation, where the Russian language has a dominant/prominent position with particular historic roots and specific protection³, should receive all the attention due when determining the actual needs and priorities of Ukraine’s linguistic policy.

12. The Venice Commission has been informed that a new population census is planned for 2012. It expresses the hope that the census will provide adequate opportunities to obtain up-to-date and reliable data on the actual composition of the population of Ukraine, including from linguistic and ethnic point of view.

13. The Venice Commission considers that increased clarity is needed with regard to the identification of the persons’ linguistic affiliation, both in terms of criteria and methods to be used to obtain such information. While it has been informed by some government representatives that a new population census is scheduled for 2012, the Commission was not able to obtain information on whether the authorities have already begun preparations for this. In any case, it appeared that the exact wording of the questions on individuals’ language, ethnic origin and religion in the census forms was not decided at the time of its visit to Ukraine.

14. In the Venice Commission’s view, it is essential for the authorities to ensure that, in the future census, questions and forms be drawn up in such a way as to allow individuals to express their linguistic, but also ethnic identities freely. Adequate questions and flexibility are essential - optional questions and an open list of alternative answers with no obligation to affiliate to a set category and including also the possibility for multiple identity affiliations (e.g. for children of mixed marriages) 4 - to allow the census results to reflect each individual’s

¹“Ethnical composition of the population of Ukraine”; 2001 Census, <http://www.ukrcensus.gov.ua/eng/results/general/nationality/>.

² OSCE High Commissioner on National Minorities, Assessment and Recommendations on the Draft Law “on Languages in Ukraine”, (No 1015-3)”, nr. 4

³ See the 1989 Language Law, still in force in Ukraine (Law of the Ukrainian Soviet Socialist Republic on Languages in the Ukrainian Soviet Socialist Republic).

⁴ See in this respect the Conference of European Statisticians Recommendations for the 2010 Censuses of Population and Housing, prepared in cooperation with the Statistical Office of the European Communities (EUROSTAT) and the United Nations Economic Commission for Europe. According to paragraph 426, “respondents should be free to indicate more than one ethnic affiliation or a combination of ethnic affiliations if they wish so”, while paragraph 431 states that “Questions will generally refer to one language only. Multiple languages may be required for the mother tongue and main languages of minority groups”.

actual choices. Likewise, respect for the free expression of ethnic and linguistic identity when processing the data collected is crucial.

15. The Commission recalls in this respect the principle of free self-identification enshrined in Article 3 of the FCNM and encourages the authorities of Ukraine to ensure that this principle is scrupulously respected and that international standards on personal data protection are observed. It is also important for the authorities to ensure that representatives of the various population groups are consulted on the formulation of the questions and the list of options for answering them. Particular attention should also be paid to the matter of the languages used for the census forms.

16. While being aware, in the light of the specific linguistic situation prevailing in Ukraine, of the difficulty facing the authorities of Ukraine in drafting the linguistic question, the Commission considers that the individual choice should be the main criterion for obtaining reliable information in this regard. The criterion of the use of the language, as proposed by the Draft Law, might lead to undue distortion of the actual linguistic composition of the population, its needs and expectations. At the same time, it would perpetuate an approach which may have its justification in the situation inherited by Ukraine due to its recent history, but which would not be in line with the fundamental principle of the respect of individuals' identity (see in this respect Article 5 of the Framework Convention). (See also related comments in Part V of this Opinion).

B. Constitutional and international provisions on the use of languages

17. Several articles of the Ukrainian Constitution deal with the protection of linguistic rights and freedoms. The main article is Article 10 which reads as follows:

“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.”

18. Furthermore, Article 11 prescribes that the State shall “promote the consolidation and development of the Ukrainian nation, its historical consciousness, traditions, and culture, as well as development of ethnic, cultural, linguistic, and religious identity of all indigenous peoples and national minorities of Ukraine”.

19. Article 24, § 2, forbids “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.”

20. Finally article 53, § 5, stipulates: “Citizens 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. Ukraine has ratified international treaties on the protection of human rights, which prohibit discrimination on the ground of language⁵ and which protect minority rights - notably Article 27

⁵ See Art. 14 European Convention on Human Rights; Art. 1 of Protocol No. 12 to the ECHR; Art. E of the European Social Charter; Art. 26 of the International Covenant on Civic and Political Rights; Art. 2 (2) of the International Covenant on Social, Cultural and Economic Rights.

of the International Covenant on Civic and Political Rights⁶, the Framework Convention for the Protection of National Minorities (Framework Convention) and the European Charter for Regional or Minority Languages (Language Charter). 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 Minorities⁷ and the Committee of Experts of the European Charter for Regional or Minority Languages⁸, and has led to the adoption of recommendations by the Committee of Ministers of the Council of Europe.

C. Linguistic legislation

22. Despite efforts, in recent years, to update and modernize the legal framework pertaining to the protection of languages, the use of languages, of particular importance for public communication and social interaction, continues to be regulated in Ukraine, in addition to the Constitution, by the legislation dating back to 1989 - the Law of the Ukrainian Soviet Socialist Republic on Languages in the Ukrainian Soviet Socialist Republic, still in force. According to the preamble of this law, *"the development of the understanding of the social value of the Ukrainian language as the state language of the Ukrainian Soviet Socialist Republic and the Russian language as the language of the interethnic communication of peoples of the Union of Soviet Socialist Republics among citizens regardless of their national affiliation shall be the duty of the state, party and public bodies and mass media of the Republic. The choice of the language of the interpersonal communication among citizens of the Ukrainian Soviet Socialist Republic shall be an inalienable right of citizens themselves."*

23. Protection of the language-related rights of persons belonging to national minorities is also guaranteed by the provisions 1992 Law on National Minorities (see in particular Article 6 and 8)⁹, the Law "On the Ratification of the European Charter on Regional or Minority Languages, other legislative provisions regulating the language use in specific sectors (education, public administration etc.) as well as the international treaties that are legally binding for Ukraine.

III. The object of the Opinion

24. In the present Opinion, the Venice Commission has not examined the overall legal framework in force in Ukraine in the field of language and minority protection. The mandate of the Venice Commission was not to examine the overall situation of national minorities and their languages in this country. The Opinion is therefore limited to the provisions of the English language version of the Draft Law on Languages in Ukraine (1015-3) of 7 September 2010, analysed both as to its compliance with the Ukrainian Constitution and applicable international instruments, and as a component of Ukraine's linguistic legislation. Questions related to the linguistic policy and to the protection of national minorities are taken into consideration as a

⁶ "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".

⁷ See Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Ukraine, 1 March 2002, ACFC/INF/OP/I(2002)010

⁸ See Application of the Charter in Ukraine, Report of the Committee of Experts on the Charter, ECRML (2010) 6, 7 July 2010.

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 »

background of a predominantly legal scrutiny and to the extent that they are or might be directly or indirectly affected, if adopted, by the Draft Law under consideration.

25. For their compatibility with the international standards, the Commission refers to the reports, opinions and recommendations adopted by the supervisory bodies in charge of monitoring of the previously mentioned instruments applicable – the Framework Convention and the Language Charter, the ECHR as well as the OSCE, EU and UN relevant recommendations. The Venice Commission regrets to note in this context that, although Ukraine is a State Party to the Framework Convention and has undertaken specific language-related obligations under this Convention, no reference is made to this instrument neither in the Draft Law nor the in accompanying Explanatory Note. Moreover, the protection of languages as it results from the Draft Law appears to be disconnected from the protection of the relevant minority groups.

26. The Venice Commission however wishes to underline from the outset that the use and the protection of languages has been and remains a complex and highly sensitive issue in Ukraine, which has repeatedly become one of the main issues in different election campaigns and continues to be subject of debate - and sometimes to raise tensions - within the Ukrainian society.

27. The current Draft Law, while being a step towards an approximation with the linguistic reality of the country, invites, in addition to more technical issues raised by its specific provisions, general comments on several key topics. These general comments, which will be found throughout the entire text of the present opinion, concern especially:

- the relation between the Ukrainian and the Russian languages as two languages that dominate Ukraine's linguistic landscape and
- the position of smaller languages in this setting.

28. The 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 and will be addressed in detail in the present Opinion.

29. The Venice Commission notes in particular that the differential treatment provided to the Russian language by the current Draft Law and its potential consequences on the preservation of Ukrainian and its use as the state language, have raised concerns and criticism amongst some parts of the population and their political representatives. These concerns have been brought to its attention during its visit to Ukraine. It is the duty of the Venice Commission to analyse the legislative provisions at issue in the light of the specific historical, linguistic and political context prevailing in Ukraine and through dialogue with the various parties concerned.

30. In order to assess the compatibility of the Draft with the abovementioned standards and its regulatory efficiency as part of the legal framework available at present in Ukraine in the field of language protection, the Venice Commission will have to examine two key aspects:

- In the first place, the Venice Commission will examine whether the aim and the underlying principles of the Draft are in conformity with the constitutional and international norms on the use of languages, which are binding for Ukraine;
- Subsequently, it will examine the specific provisions regulating the use of languages in the various sectors of public life and their possible impact on the further development of the linguistic landscape in Ukraine.

A. The aim and the basic principles of the Draft Law

31. According to Article 2 of the Draft Law, *“the tasks of the legislation of Ukraine on languages shall be the regulation of social life in the sphere of comprehensive development and use by the population of the Ukrainian, Russian and other languages in the state, economic, political and public life as well as inter-personal and international communication; protection of constitutional rights of citizens in this domain; promotion of respectful attitude to national dignity of an individual, his/her language and culture; strengthening the unity of Ukrainian society.”* In other words, the draft aims to regulate the use and protection of languages in Ukraine based on the principles of the Ukrainian state’s language policy as laid down in the Constitution.

32. As stated in its preamble, the Draft Law is based on three fundamental principles:

- the “inalienable right of every individual to use freely the language of his choice in private and social life”;
- recognition and comprehensive development of the Ukrainian language as the state language of Ukraine, and
- the free development of the languages in use in Ukraine as a basis for social cohesion, integration and cultural enrichment within Ukrainian society.

33. These three principles are further confirmed by its Article 5.1 on the “Purposes and Principles of the State Language Policy”, which further elaborates on them and adds inter alia, as further basic principles: the recognition of the languages in use in Ukraine as part of the national patrimony; the need to provide, according to their specific situation, conditions for the learning and teaching “at all levels” and for its use in different sectors of social life; the importance of the maintenance of development of cultural links between the various linguistic groups; the preservation of the geographical areas of regional languages; the promotion of multilingualism and the protection against granting privileges or imposing restrictions based on languages.

34. From a general point of view, the draft deserves appreciation: the intervention of the legislator in the matter of languages was really necessary, and it is commendable that Draft draws inspiration from basic international treaties aimed at the protection of the human rights. Overall, the aims and principles of the Draft Law are in line with the Ukrainian Constitution and, more generally with the principles enshrined in the applicable international instruments. The modalities of their implementation, as they result from the more specific provisions of the Draft, and the adequacy between these provisions of the draft law and its underlying principles will be examined in the following sections of the present opinion.

35. While acknowledging the particular position of the Russian language in the Ukrainian linguistic landscape and fully understanding the concerns related to its adequate protection at present and in the future, the Venice Commission considers unfortunate the choice to include in the draft, in this respect, statements of a general nature that are potentially controversial. It notes that, according to Article 7.1 of the Draft Law, *“Russian is the native language or language of everyday communication of the majority of the citizens of Ukraine”*. This unnecessary statement has been contested and is subject to divergent views in Ukraine.¹⁰ The Venice Commission is of the opinion that provisions of a purely declarative nature do not have a place in a normative text. More detailed examination of the protection provided by the Draft Law to the Russian language will be found in the fifth Part of this Opinion.

B. The regulation of the use of languages in the various spheres of public

36. In order to assess the Draft Law under consideration and its conformity with its own principles and the applicable standards, the Venice Commission will have to examine the different provisions of the Draft, covering the main aspects of the regulation of language use in Ukraine. Specific provisions and sections of the Draft Law are devoted, respectively to:

¹⁰ See e.g. Comments and proposals of the Potebnya Institute of Linguistics of the National Academy of Sciences of Ukraine to the bill “On languages in Ukraine”;

- the position of the State Language and its mandatory use (Article 6 and further provisions throughout the Draft);
- the specific protection of the Russian language (Article 7 and further provisions throughout the Draft);
- the protection of regional or minority languages and the identification of the territorial areas where such a protection shall be applied (Article 8);
- the protection of regional or minority languages outside those areas;
- the use of languages, depending on their specific position and level of protection, in the various sectors of public life (Chapters II to VI);
- the protection of individuals' linguistic rights and freedoms (Article 9);
- the responsibility for the implementation of the draft (Article 32, Chapter VIII)
- the liability for breaching its provisions (Article 33, Chapter IX).

37. In formal terms, the Draft Law as such does not change the position of the Ukrainian language as the only State language nor does it provide Russian with an official status. The Draft appears however to be structured around the use of the two dominant languages of the country - Ukrainian and Russian - and the distribution of areas of use between them, or their parallel use. Meanwhile, the wording of the Draft makes this legislative goal less readable as its aim remains the regulation of the linguistic landscape as such, i.e. also the use of all other languages traditionally spoken in Ukraine.

38. The Venice Commission will examine will examine the different provisions of the draft law, in the light of the above-mentioned principles on which the draft is based on. The Commission will therefore first examine to what extent the individual freedom to use the language of one's choice in private and social life is guaranteed (IV). It will furthermore examine the specific articulation, in the Draft Law, between the protection of the state language and the differential treatment of the Russian language, and its possible impact on the preservation and development of Ukrainian as the state language (V). Finally, particular attention will be paid to the impact of the approach underlying the Draft on the protection of smaller regional or minority languages, and the effective enjoyment of the linguistic rights by persons belonging to the concerned groups (VI).

IV. The individual freedom to use the language of one's choice

A. The individual freedom in the Draft Law

39. The inalienable right of every individual to use the language of his or her choice is one of the foundations of the Draft Law. Several articles of the Draft Law, as well as its Explanatory Note, confirm this fundamental option. The Explanatory Note clearly states in this respect that the "current principle of national affiliation is substituted by the principle of free linguistic self-determination."

40. Several provisions of the Draft Law confirm the individual freedom to use the language of one's choice. Article 3.1 stipulates in general "*Everyone shall have the right to freely determine the language he/she considers native, choose the language of communication, consider him/herself bi- or multi-lingual and change linguistic preferences*" and, according to Article 3.2, "*Irrespective of ethnic origin, national and cultural self-identification, place of residence and religious convictions, everyone shall have the right to freely use any language in public and private life as well as to learn and support any language.*"

41. Furthermore, Article 19.1, while imposing the state language as "the main language of economic and social activity of the state enterprises, establishments and organizations", immediately adds that Russian and other languages can also freely be used. The freedom to use the language of one's choice also prevails in science (art. 22), in information technology (art. 23) in the sphere of culture (art. 24) of the mass media (art. 25) and advertising (art. 27.1)

42. The Venice Commission welcomes this recognition of the individual freedom to use the language of one's choice, especially in the spheres of private life, socio-economic activities, science, culture and mass media.

43. The Venice Commission recalls that the use of language of one's choice in the private sphere is protected under international instruments (see Art. 10 of the FCNM) and that this principle is also laid down in Article 3.1, Article 3.2., Article 18 or Article 19.2. of the Draft. The Commission is of the opinion that it would be advisable to mention the freedom to use the language of one's choice in the private sphere, in a general provision of the draft law.

B. Restrictions to the individual freedom to use the languages of one's choice

44. Several articles of the Draft Law however impose certain linguistic obligations or define certain limitations to this individual freedom to use the language of one's choice:

- In order to protect the "linguistic rights and freedoms of the individual and the citizen", article 9.1 states that "public humiliation or disrespect, deliberate distortion of the Ukrainian or other languages in official documents or other texts, hindering and limiting their use, instigating feud on linguistic ground shall entail legal liability";
- Within the territory in which a regional language is spoken by 10% or more of the population the council can decide that "names of (...) citizen associations, companies, establishments and organizations, texts on their stamps, seals, letterheads and signs" shall be drawn up in two languages, the State and the regional language. (Article 12.6);
- Article 18.3 disposes that is forbidden for enterprises, establishments and organizations, irrespective of the form of ownership, to adopt any internal rules preventing or restricting communication of the employees in the State, Russian and other languages;
- Article 22, 2nd paragraph imposes the obligation to present a summary in Russian and other languages of the selected research results published in Ukrainian scientific publications and vice versa;
- Article 24 disposes: "Announcements during concerts and other cultural events, hosted by persons belonging to different linguistic groups, and performances of foreign artists shall be conducted in the State language, Russian and other regional languages of choice of event organizers."

45. To the extent that these provisions can be considered as limitations to fundamental rights and freedoms, guaranteed in the Ukrainian Constitution and in the international human rights treaties, they have to be justified in the light of the relevant limitation clauses.

46. By introducing a "legal liability" in case of "public humiliation or disrespect" of the Ukrainian or other languages, Article 9.1 imposes a restriction on the freedom of expression. Therefore it has to meet the conditions determined Article 10, § 2, of the European Convention on the protection of Human Rights and Fundamental Freedoms. The Venice Commission notes that the precise meaning of the nature of the "legal liability" is unclear, and that the range of the notions "humiliation" and "disrespect" are uncertain. It therefore doubts whether this provision meets the condition that every limitation of the freedom of expression has to be "foreseen by law". according to the case law of the European Court on Human rights, this implies that it has to be formulated with sufficient precision to enable citizens to regulate their conduct and to foresee, if need be with appropriate advice, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹¹

47. Also, by prohibiting enterprises, establishments and organizations, to adopt "*any internal rules preventing or restricting communication of the employees in the State, Russian and other languages*", Article 18 (3) precludes these enterprises, establishments and organizations from adopting rules on their working languages and can thus be considered as imposing a restriction on the freedom of association, which could hardly be considered "necessary in a democratic society" in the meaning of article 11, § 2 ECHR. In addition, application of such a prohibition to private enterprises would also be problematic.

¹¹ ECtHR, Sunday Times v. The United Kingdom Judgement, 26 April 1979.

48. Finally, as to the obligation in Article 24, imposed on the organizers of concerts and other cultural events, to conduct announcements in the state language, Russian and other regional languages of their choice, the Venice Commission reiterates the comments it has made on an analogous obligation in the Slovak State Language Act:

“The obligation to provide information on cultural events (publicity, catalogues, programmes, etc.) and to provide a verbal presentation of these events in the Slovak language, serves a legitimate aim, as it makes it possible to inform persons belonging to the Slovak majority of cultural events which although in the first place intended for national minorities, are open to the general public.

This legitimate aim, however, must be proportionate, including to the extent of the interest which the Slovak majority may have in following minor expressions and manifestations of the life of the minorities. Indeed, it is not excluded that cultural events in minority languages will often appeal to few Slovak-speaking persons. In order to comply with the principle of proportionality, the Slovakian Government should therefore consider providing public funding for translation into the Slovak language, as the financial burden might cause substantial disruption and could have a chilling effect on the organisation of cultural events in minority and foreign languages.”¹²

V. The strengthening of the status of Ukrainian as the state language of Ukraine

A. The status of the State language in the Constitution and in international law

49. The second aim of the Draft Law is “the 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.” By pursuing this aim, the Draft Law is in full compliance with Article 10, of the Constitution (see paragraph 13 above).

50. 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”.

51. It should be pointed out that the applicable international treaties, the Language Charter and the Framework Convention, are neutral with respect to the issue of determining the state language. This is fully understandable as their declared goals are, respectively, the protection and promotion of regional or minority languages and that of national minorities. These instruments require, however, the balancing between the use, learning or teaching of both the State and the regional or minority languages. These safeguards aim undoubtedly to ensure that neither the State language nor the regional or minority languages would be exposed to detrimental influence that negligent linguistic policy might cause.

52. In its recent opinion on the State Language of the Slovak Republic, the Venice Commission examined the provisions on the use of languages in the constitutions of member states of the Council of Europe and 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

¹² Opinion on the Act on the State language of the Slovak Republic, Adopted by the Venice Commission At its 84th Plenary Session (Venice, 15-16 October 2010), § 93-94

ensure its protection¹³, although it is more usual for states to regulate and protect the use of minority languages.

41. In the first place, protecting and promoting the official language can respond to public order needs as the use of the State Language allows the State authorities to have access to official communications and documents which are essential to fulfil their public responsibilities.

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.”

53. In the same document, the Commission pointed out moreover that “[i]n addition, knowledge of the official language is also important from the perspective of persons belonging to national minorities”.

54. It is important to recall, at this point, that the legitimate aim of the protection of the state language has also been clearly recognised by the international instruments to which Ukraine is a contracting party, namely the Framework Convention (Article 14. 3) and the Language Charter, as well as, as indicated above, by their supervisory bodies in the context of their monitoring. In this context the European Court on human rights ruled in its decision in the case *Mentzen against Latvia*¹⁴:

"The Court further notes that most of the Contracting States have chosen to accord one or more languages the status of official language or State language and have recorded them as such in their respective Constitutions. That being so, the Court acknowledges that the official language is, for these States, one of the fundamental constitutional values in the same way as the national territory, the organisational structure of the State and the national flag. A language is not in any sense an abstract value. It cannot be divorced from the way it is actually used by its speakers. Consequently, by making a language its official language, the State undertakes in principle to guarantee its citizens the right to use that language both to impart and to receive information, without hindrance not only in their private lives, but also in their dealings with the public authorities. In the Court's view, it is first and foremost from this perspective that measures intended to protect a given language must be considered. In other words, implicit in the notion of an official language is the existence of certain subjective rights for the speakers of that language."

55. According to the Explanatory Report of the Framework Convention, “[t]he opportunities for being taught the minority language or for receiving instruction in this language are without prejudice to the learning of the official language or the teaching in this language. Indeed, knowledge of the official language is a factor of social cohesion and integration”. The Language Charter also points out from the outset (in its Preamble) that “the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them”.

56. The Venice Commission notes in this respect that, in his recent assessment of the “Draft Law on Languages in Ukraine, the OSCE High Commissioner on National Minorities rightly pointed out that:

“The State language can be an effective tool in ensuring cohesion. Consequently, promoting the use of the State language is also beneficial to persons belonging to national minorities. Having a command of the State language increases the opportunities for effective participation in society at all levels. This requires that persons belonging to

¹³ This has also been underlined on several occasions by the Advisory Committee on the Framework Convention for the Protection of National Minorities See e.g. Opinion on the Russian Federation ACFC/INF/OP/I(2003) OO5, 2002. Art. 10, para 79; First Opinion on Estonia, 14 September 2001, para. 39; Second Opinion on Estonia, 24 February 2005, para. 90.

¹⁴ ECHR , decision of 7 December 2004, Application no. 71074/01 by Juta MENTZEN also known as MENCENA against Latvia :

national minorities are given and make use of the opportunity to learn the State language. All members of society, including persons belonging to national minorities, may be expected to use the State language in certain communicative situations in the public domain, as specified by law. To put it differently, there is no right of persons belonging to national minorities never to be expected to use the State language. [...] On the other hand, the use of the State language must not affect the right of persons belonging to national minorities to preserve their identity”.

B. The status of the Ukrainian language as the state language in the Draft Law

57. The Commission notes that the Draft repeatedly mentions the importance of strengthening the status of Ukrainian as the state language and explicitly stresses the value of Ukrainian as “*one of the crucial components of national identity of the Ukrainian people and a guarantee of its national sovereignty*”. While the preamble of the Draft points out “the value of strengthening of the State Ukrainian language “, its Article 2 underlines the connection between the legislation of languages and “the regulation of the social life “, and Article 5.2.2 states as a principle of the law “the ensuring of comprehensive development and functioning of Ukrainian as the State language “. In addition, according to Article 6.2, “*the Ukrainian as the State language is mandatory for use at the whole territory of Ukraine* “. Legal Clarity on such a crucial issue is indeed of key importance for the proper understanding of the Ukrainian official approach to the linguistic question and, if adopted, to the adequate implementation of the Draft.

58. Notwithstanding these provisions and in spite the fact that Article 10 of the Constitution only recognizes the Ukrainian language as the State Language, the overall impression the Draft Law gives is that the Russian language is protected at an equal or almost equal level. This impression is not only corroborated by the fact that Russian is the only non-state language to be separately mentioned in specific provisions of the draft, but also, and more explicitly, by article 7.2 stating: “Historically established Ukrainian-Russian bilingualism is an important accomplishment of the Ukrainian people and a powerful factor of consolidation of multi-national Ukrainian society”. Although some articles of the Draft confirm the status of the Ukrainian language as the sole official language of Ukraine, several other articles place or tend to place the Ukrainian and Russian languages on the same level, in many other spheres of public and private life and especially in those regions where 10% or more of the population speak Russian.

59. In the light of the above considerations, the evaluation of the status of Ukrainian as the State language therefore implies, on the one hand, verifying the coherence of the draft with Article 10 of the Constitution and its own principles, and on the other hand the internal consistency of its provisions.

a) Ukrainian as the sole state language in Ukraine

60. As previously mentioned, several articles of the Draft Law confirm the status of the Ukrainian language as the official language of Ukraine. Articles 5.1 and 5.2.(2) indicate, as a general point, that the State language policy of Ukraine is based on the recognition and comprehensive development and functioning of Ukrainian as the State language in all spheres of public life, on the whole territory of the State. In the meantime, Articles 6.1 and 6.2 confirm Ukrainian as the state language and impose its mandatory use “*at the whole territory of Ukraine in the work of legislative, executive and judicial bodies of power, in international treaties, in educational process, in the education establishments*”. Moreover, the State “*promotes the use of the State language in mass media, science, culture and other spheres of public life.*”

61. More specifically other articles of the Draft point out that the use of Ukrainian language is mandatory as the sole official language in certain aspects of public life, namely for:

- *the proceedings of the Verkhovna Rada of Ukraine and of its committees (art. 10.1);*
- *the introduction of draft laws and other normative legal acts (art. 10.2);*
- *the adoption of acts of central state bodies (art. 11.1);*
- *the documentation and records of the state (art. 12.1);*

- *the documents for the elections of the President of Ukraine and of people's deputies of Ukraine and the documents for the All-Ukrainian referendums (art. 13.1);*
- *the official identity documents - other than passports - of the citizen of Ukraine and documents that certify identity of foreign citizens or persons without citizenship (art. 14.1);*
- *the international treaties (in addition to the "language of the other side")*
- *the armed forces (art. 30).*

62. Finally the use of State language is mandatory, although not exclusively, for the issues such as: the publication of the acts of the central state bodies; the acts, documentation and records of local state administrations and local self-government bodies; the communication from public servants and officials with visitors; the conferences, meetings and other official gatherings conducted by state and local self-government bodies and public organizations; the names of the state and local self-government bodies, companies and citizen associations; the documents of the Verkhovna Rada of the Autonomous Republic of Crimea; voting ballots for elections and referendums; product labels and user manuals; toponyms etc.

63. The Venice Commission notes that Ukrainian remains the only State language in Ukraine, as the Draft Law does not introduce any formal changes in this regard. Nevertheless, it will be established hereafter that several of its provisions allow the choice of another language for an important number of sectors of public life.

b) Official use of Russian and other languages

64. The recognition and further development of the State language is however not the only purpose of the Draft. This appears from both its Articles 5 and 6. Article 5.3 determines as one of the other "purposes and principles of the State Language Policy" *"the facilitation of the use of Russian and other regional or minority languages in speech and writing in education and mass media, creating opportunities for their use by state and local government bodies, in judicial, economic and social activities, in conducting cultural events and in other spheres of public life within the territories in which such languages are used and taking into consideration the specific conditions of every language."* Article 6.3 adds : *"Mandatory use of the State language or promotion of its use in one or another sphere of public life should not be interpreted as denying or diminishing the right to use Russian or other regional or minority languages in a given sphere."*

65. Although these articles mention both Russian and "other regional and minority languages", it appears from a closer analysis of the other articles of the Draft that it focuses especially on the Russian language. The main effect of the Draft will be to protect and promote Russian at an almost equal level as the State language in many spheres of public, social, economic, cultural and educational life throughout the entire territory of Ukraine. In the Draft Law three different types of provisions can be distinguished:

- *provisions which place the Russian language on an equal level as the State language;*
- *provisions which protect the minority language in regions where it is spoken by 10 % of the population, which condition is almost only fulfilled by the Russian language;*
- *provisions which provide an additional protection for every minority language.*

i. Russian language on an equal level as the State language

66. Several articles dealing with specific sectors of social life place the State language and the Russian language on the same level. In these sectors, the Russian language benefits from such a preferential treatment irrespective of the number of the persons who uses it at the regional level. The stakeholders concerned have, in most cases, the choice between the two languages. This implies that, in practice, Ukrainian would not be used in all cases where it should fulfil its function as the state language of the country. More specifically an equal protection of both languages is foreseen for:

- publication of acts of central state bodies, in which case the text in both languages shall have equal legal force (Article 11.1);
- passports of the citizen of Ukraine and personal data documents (Article 14.1) (in both languages);
- pre-trial investigation, interrogation and prosecutor supervision (Article. 16)
- education in “pre-school, general secondary and out-of-school, vocational and higher educational institutions, according to the citizens’ needs (Articles 21.2 and 21.8 to 11)
- study of the State language and the Russian language in all establishments of general secondary schools (Article 21.7)
- mailings and telegrams (Article 26.2)

67. In its Article 7.1, the Draft Law explicitly places the Russian language on an equal level as the State language. This article stipulates:

“According to the Constitution of Ukraine, the free development, use and protection of the Russian language shall be guaranteed in Ukraine, taking into account that Russian is the native language or language of everyday communication of the majority of the citizens of Ukraine, it is generally established along with Ukrainian as a language of inter-personal communication at the whole territory of Ukraine, and is one of the official languages of the General Assembly of the United Nations Organization, UNESCO and other international organizations. Command of the Russian language provides the citizens of Ukraine with a wide access to achievements of world science and culture “.

68. The Commission has already expressed its concern over the inclusion of such a statement, too general in its nature and potentially highly controversial, in the Draft. In addition, as it is formulated, the statement does not adequately reflect the results of the 2001 population census and seems to anticipate the results of the next census. The Commission understands that, if a large number of the Ukrainian citizens identified their national and linguistic identity on the basis of the choice of the Russian language, it would be admissible to confer it a preferential position among the languages which are different from the State language¹⁵. Nevertheless, In Ukraine a constitutional authorisation for such an option is missing. The Commission makes reference, in this context, to its previous comments on the forthcoming population census and the importance of the way in which the linguistic question will be drawn up.

69. Moreover, the preferential treatment of the Russian language versus other regional or minority languages and in many cases “on a par” with the State language raises issues of consistency both as regards the Draft itself and more broadly, as far as the state language policy is concerned. To the extent that the draft law implies that the Russian language or another minority language is protected on an equal basis as the sole official language, it also raises questions as to its compliance with article 10 of the Constitution.

Consistency with the principles of the draft law and with the language policy of the Ukrainian State

70. The option for a preferential treatment of the Russian language versus other regional or minority languages and in many cases “on a par” with the State language appears to be incoherent and inconsistent with the principles of the State language policy stated in the preamble and in the mentioned provisions of the Draft. Article 7.2 of the Draft makes reference to the Ukrainian - Russian bilingualism as “*an important accomplishment of the Ukrainian people and a powerful factor of the consolidation of multinational Ukrainian society*”. This appears to de facto equalize the position of the two languages and to actually endanger the mandatory role of the State language and the promotion of its use, which the legislation has to provide for (Article. 6.2 of the Draft).

¹⁵In a number of European countries, there are minority languages that benefit from a preferential status compared with other minority languages, due to the fact that they are chosen as part of their identity by a larger number of citizens than those adopting other languages (e.g. French and German in Italy).

71. In addition, such a preferential legislative treatment of the Russian language promotes a de facto obliged use of that language, with potentially damaging effects on the results of the forthcoming census. The census has to establish, as required by Article 8.5 of the Draft Law, the individuals' belonging to particular linguistic groups. As pointed out previously in this opinion, the wording of the linguistic question in the forthcoming census will be of key importance. In particular, it is essential, through appropriate census questions, to distinguish people who choose to speak Russian as a manifestation of their national identity and people who use Russian as an everyday language as an effect of the practice adopted in the past history of Ukraine.

72. The Venice Commission is of the opinion that the protection of the Russian language and its use as an expression of the identity of members of the Ukrainian society who have freely chosen this linguistic identification - therefore as a language of a national minority - is indeed a legitimate aim. This implies clear and stable legal guarantees, according to the criteria and conditions set out in the main applicable international standards, the Language Charter and the Framework Convention.

73. It is important for the Ukrainian authorities to make sure that such guarantees are available for the Russian language as well as for other regional and minority languages in accordance to the Ukrainian Constitution and Ukraine's international obligations. A comprehensive and inclusive approach, which would imply an overall review of the relevant legislation, including the law on the protection of national minorities and various sectoral laws, would be a pre-condition for establishing clear, stable and consistent guarantees in this field.

74. At the same time, while being aware of the complex linguistic situation in Ukraine, in particular in the specific context resulting from the dissolution of a former larger multi-ethnic State, the Commission is of the view that the preferential protection of the Russian language as a general measure might be questionable from a legal point of view and raise undue tensions within the Ukrainian society. Where the use of the Russian language is already an everyday fact, and the Russian language is used even by people who identify themselves as Ukrainians with Ukrainian language as linguistic identity, such a preferential level of protection is not needed and would have an adverse impact on the efforts made to consolidate Ukrainian as a State language.

Conformity with Article 10 of the Constitution

75. As to the conformity of such a preferential treatment with the Ukrainian Constitution, it should be recalled that the Ukrainian Constitution makes a clear distinction, in its Article 10, between the functioning of Ukrainian as the state language and the need to provide adequate protection to "Russian and other languages of national minorities". It thereby establishes the constitutional basis for Ukraine's approach to the protection of languages.

"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".

76. According to the ruling n° 10-rp/99 of 14 December 1999 the Constitutional Court of Ukraine, Article 10 of the Constitution implies that "public sectors in which the state language is used include above all the sectors in which legislative, executive and judicial bodies, other state and local self-government bodies exercise their authority (the language of acts, work, records, documentation etc.)" The Constitutional Court also held that "while exercising their authority, local executive bodies, bodies of the autonomous Republic of Crimea and local self-government bodies may use alongside the state language the Russian and other languages of national minorities within the limits and in line with the procedure defined by laws of Ukraine."

77. The Venice Commission is of the opinion, also in the light of the Ruling n° 10-rp/99 of 14 December 1999 of Ukrainian Constitutional Court, that several articles of the Draft law do not comply with article 10 of the Constitution, as they place the Russian language and the state language on the same level¹⁶.

78. Moreover, by underlining the bilingual character of the Ukrainian society and by expressly stating, in Article 6.3, that the “mandatory use of the State language or promotion of its use in one or another sphere of public life should not be interpreted as denying or diminishing the right to use Russian or other regional or minority languages in a given sphere”, the Draft undermines the very notion of the state language as the sole official language, and demotivates Ukrainian citizens to learn and to use it.

ii. Official use of minority/regional languages in regions where they are spoken by at least 10% of the population

79. In several other provisions of the Draft law, a special protection is guaranteed to the use of regional and minority languages “*on condition that the number of persons speaking the regional language and residing at the territory in which this language is used comprises 10 percent and more of the total population*” (Article 8.3.). More specifically in these areas the Russian language and/or another minority language will be used “on a par” with the State language:

- “*by local state administration, the government of the Autonomous Republic of Crimea and by local self-government bodies; it shall be used and taught by the state and municipal educational institutions and also used in other spheres of public life in the scope prescribed by the present law.*” (Article 8.6);
- *for acts of the local state administrations and self-government bodies (Article 11.2.);*
- *for documentation and records of the local self-government bodies (Article 12.1);*
- *services to the visitors of the state and local self-government bodies (Article 12.2);*
- *communication from public servants and officials with visitors (Article 12.3);*
- *conferences, meetings and other official gatherings conducted by the state and local self-government bodies and public organizations (Article 12.4);*
- *text of official announcements, by the decision of the local council (Article 12.5);*
- *names of the state and local self-government bodies, citizen associations, companies, establishments and organizations, texts on their stamps, seals, letterheads and signs, by the decision of the local council (Article 12.6);*
- *documents for the elections of the Verkhovna Rada of the Autonomous Republic of Crimea and of the deputies and officials of the local self-government bodies, by the decision of the territorial election commission and documents of local referendums, by the decision of the local council (Article 13.1);*
- *voting ballots for the elections of deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, deputies and officials of the local self-government bodies, by the decision of the territorial election commission, (Article 13.2);*
- *voting ballots for All-Ukrainian or local referendums, by the decision of the local council of the voting ballots (Article 13.4);*
- *acts of civil status and documents issued by bureaus of civil registration (drafted in the State language or the given regional language (Article 14.2);*
- *judicial proceedings in civil, administrative, commercial and criminal cases, at the request of one of the parties (Article 15.1)¹⁷ (see also Article 15.3-6);*
- *education in “pre-school, general secondary and out-of-school, vocational and higher educational institutions, according to the citizens’ needs (Articles 21.2 and 21.8 to 11);*
- *official information about activities of the state and local self-government bodies (Article 25.2);*

¹⁶ See also point 7 of the Opinion of the Justice Ministry of Ukraine 11 October 2010, n° 1383, 01-10-18: “Articles 11-14 and 16 of the bill need to be brought in compliance with clause 1 of the operative part of the ruling of the Constitutional Court of Ukraine No 10-rp of December 14, 1999”. See also Conclusions made by the Supreme Council of Ukraine Committee for culture and spirituality with regard to the draft on languages in Ukraine November 19 2010; and Conclusions to the draft “on Languages in Ukraine, of the Supreme Council of Ukraine Apparatus, Main research and expert department, November 12 2010;

¹⁷ The requirement to safeguard this right shall be taken into account during recruitment of judges.

- *printed material for public use distributed by state and local self government, state enterprises, institutions and organizations (Article 25.7);*
- *toponyms (geographical names) (Article 28.1).*

80. In addition to these specific provisions, Article 8.7 more generally imposes the obligation on “*state and local self-government bodies, associations of citizens, establishments, organizations, enterprises, their officials, public servants and citizens – subjects of entrepreneurial activity and natural persons*”, in regions where 10% or more of the total population speak the regional or minority language, to take “measures for development, use and protection” of this language.

81. The criterion used in these provisions - “*regions where a regional or minority language is spoken by 10 % of the population*” - lacks clarity and fails to ensure the legal certainty necessary to assess their exact meaning.

82. In first place it is not clear to which administrative territorial unit the word “region” refers to in these provisions. Does it refer to the province or oblast, or can it also refer to a village, a city, a neighbourhood or rayon level (mentioned by Article 1 of the Draft when defining the “territory in which the regional language is used”)?

83. Also, the concept of “regional language” appears to be unclear. According to the last paragraph of Article 1 of the Draft, the “*regional language*” is defined as a “*language that is traditionally used within a given territory of the State by the members of the regional language group that belong to a linguistic minority*” (the term of “linguistic minorities” is only mentioned in this provision of the Draft). It is not clear whether this definition, based on the territorial dimension of the use of the relevant language, also applies to areas that do not correspond to the traditional understanding of the concept of region - such as a village, a township, or a city. Would this mean that the specific measures of protection provided by Article 8 of the Draft would also cover languages traditionally used by 10 % of the population of a village or a city, including cases or the 10% condition is not reached within the higher administrative unit (rayon or oblast)?

84. If the proposed interpretation is correct, one can conclude that a person using the “regional” language in a village would not be able to benefit from the protection of that language in the frame of the superior administrative territorial unit. This would in particular affect relations between citizens and the authorities when the superior unit exercises certain public functions or services of interest for the citizens of a lower unit.

85. The Commission notes that, according to art. 8.8, “beyond the territory in which the regional language is used, it can be used freely in the scope prescribed by this law “. One possible interpretation could be that no support measures shall be provided outside the mentioned territory, in which case further implementation problems would arise.

86. The Venice Commission considers that it is of the utmost importance to clarify the exact meaning of the concepts used to define the beneficiaries of the rights and guarantees contained in the Draft Law and to use them in a consistent manner, in line with the concepts in use by the relevant international instruments. In this context it has to be recalled that according to the Language Charter, “regional or minority languages” means “languages that are: a) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and b) different from the official language(s) of that State”. The two dimensions mentioned by the Language Charter have not been taken into account by the authors of the draft when proposing a definition of a regional language (“language that is traditionally used within a given territory of the state by members of the regional language group that belong to linguistic minority”).

87. The concept of “speaking the language” also lacks clarity: does it mean that 10 % or more of the population “are able to speak the regional or minority language”, “predominantly” speak it or “preferably” speak it? If the criterion stands for “the ability of speaking the minority language”, the Russian language would in most parts of Ukraine meet the criterion, as many inhabitants of

Ukraine are bilingual. If the criterion stands for the “predominantly spoken language”, it will, as the HCNM rightly pointed out, “disadvantage speakers of smaller minority languages who are not always free to use their language of preference. (...) The use of language will not necessarily coincide with that of the preferred choice of the individual as that person will almost certainly be under economic or social pressure to use the dominant language of that area.”¹⁸ An alternative and for the smaller minorities less detrimental criterion could be the “native language”, on the condition that the criterion is clearly defined as the “mother tongue” or the “first language learnt in early childhood”.

88. Moreover, the draft does not offer a clear suggestion on how to deal with the cases of bilingualism or multilingualism (see art. 3.1). While everyone has the right to freely determine the language he/she considers “native”, the “native” language appears not to be relevant in the identification of the regional languages that deserve specific protection. The main criterion taken into account in this context is, according to the Draft Law, the “use” of the language, which in many cases is de facto imposed by the specific conditions available in the concerned area.

89. Finally, it is not clear whether the authors of the Draft Law have taken into account that in a given territorial unit two or more languages may meet the threshold of 10% and the possible consequences of such a situation on the implementation of the said provisions.

90. Whatever will be the clarification of the concepts in the phrase “regions where a regional or minority language is spoken by 10 % of the population”, it is from the outset clear that Russian will most probably meet the criterion in a majority of the “oblasts”.¹⁹ This implies that, for a number of aspects of public life, Russian will be used “on a par” with or even instead of the state language in many if not most parts of the territory of Ukraine.

iii. Additional protection of Russian or other regional or minority languages

91. Finally, several other articles explicitly guarantee the protection of the regional or minority language, without the above mentioned numerical condition. These languages may be used alongside the state language or alone for:

- *information posters of the presidential candidates, of the candidates nominated by political parties for people’s deputy of Ukraine, candidates for deputy of the Verkhovna Rada of the Autonomous Republic of Crimea and of the local self-government bodies - upon request of an appropriate subject of the election process, in both the state language and the regional language (Article 13.4)*
- *documents of education obtained at the educational establishments with the regional language of instructions, at request of the person concerned - in both languages, the State and the regional language (Article 14.3) -*
- *the information of a detainee of the causes of arrest or detention and of the nature and cause of the charge against him/her (Article 16)*
- *notary records, if the person requiring services of a notary has no knowledge of the State language (Article 17)*
- *legal assistance (Article 18)*
- *facilitation of the production and distribution of audio and audiovisual works and printed sources - in State language, Russian and other languages (Article 25.1)*
- *regional and local broadcast - in State language, Russian and other regional or local languages, commensurate with the numerical strength of the regional language groups (Article 21.3)*
- *postal services and telecommunications - in the State language, Russian and other regional languages (Article 26.1)*

¹⁸ Assessment and Recommendations of the OSCE High Commission on National Minorities on the Draft Law “on Languages in Ukraine” (No 1015-3), n°27.

¹⁹ See for the other minority language infra Part. V.A.

iv. The position of the majority as “minority in a specific area of the State”

92. Finally, special attention has to be drawn to the position of the persons belonging to the nationwide Ukrainian majority in regions where a minority has a dominant position.

93. The Venice Commission notes in this respect that the Advisory Committee on the Framework Convention has recognised on several occasions that a majority at a national level can constitute a minority on a regional level, if the regional authorities dispose of powers that are relevant to the rights guaranteed in the Framework Convention²⁰. The Ukrainian authorities should examine whether persons speaking Ukrainian are in need of protection in regions where they constitute a minority.

94. In this context, the Venice Commission draws attention to the important issue of the establishment of minority language schools. Under the present legislation, the local authorities are competent to assess whether there is a need to establish and to maintain such minority schools. The Venice Commission considers that it would be welcome, in order to enhance legal certainty for all minorities as well as for the majority, that the law itself would contain precise provisions on the number of requests that are necessary to guarantee an enforceable right to have such schools established and maintained, and on the relevant decision-making procedures. The Venice Commission would like to indicate in this context that, during its visit to Ukraine, worrying information was brought to its attention of cases of undue closure of Ukrainian classes in certain areas of Ukraine where the majority is in a “minority position”.

C. The fair balance between protection of the state language and the protection of regional or minority languages

95. The international treaties on human rights and on the protection of minorities, such as the Framework Convention and the Language Charter, do not impose specific obligations on member states as to the recognition and the protection of an official/state language and they do not explicitly set boundaries on the protection of minority rights either. Nevertheless, it has always been acknowledged that these treaties imply that the member states have to strike a fair balance between the protection of the linguistic rights of persons belonging to national minorities, on the one hand, and the maintaining of the cohesion between the different linguistic groups of the country, on the other hand. In achieving this last aim, the state language can be of the utmost importance.

96. By protecting and promoting the Russian language on almost the same level as the Ukrainian language, which is the sole official language of Ukraine, the Draft Law threatens to diminish the integrative force of this language. Especially in important areas of public life such as public administration, the educational system and the media, the draft law clearly diminishes the position of the State language. Although the Ukrainian language will, if the Draft law is adopted, to a certain extent maintain its position as sole official language for different aspects of public administration, the Ukrainian language and the Russian language will be treated on an equal level.

²⁰ See First Opinion on Switzerland, 20 February 2003, § 21; First opinion on Denmark, 22 September 2002, § 20; Second opinion on Denmark, 11 May 2005, § 47; First Opinion on Finland, 22 September 2002, § 17; Second Opinion on Finland, 22 March 2006, § 22; First Opinion on Bosnia- Herzegovina, 27 May 2004, § 26-28; Second Opinion on Romania, 24 November 2005, § 92-93, 96.

See also Venice Commission, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium, CDL-AD(2002)1, Strasbourg, 12 March 2002. See also S. Granata-Menghini, “The Application of the Framework Convention for the Protection of National Minorities in Belgium”: The Opinion of the European Commission for Democracy through Law”, in European Yearbook of Minority Issues, 2002/3, p. 359. and A. Verstichel, “Personal scope of application: an open, inclusive and dynamic approach - the FCNM as a living instrument”, in A. Verstichel, A. Alen, B. De Witte en P. Lemme,s (eds), The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?, Antwerp, Intersentia,n 2008, p. 142-143.

97. The same conclusion has to be drawn for the educational system. Although the study of the Ukrainian State language - as of the Russian language - shall be ensured in all the establishments of general secondary education (Article 27.1), the draft law makes it possible that the entire education curriculum from pre-school to university could be conducted in Russian (Article. 21). The Venice Commission notes in this context that, in some areas, in non-Russian minority schools, the teaching of the Ukrainian Language is restricted to language and literature, while instruction is in many cases provided in Russian. Finally, although it has to be welcomed that the linguistic freedom is recognised in the media and for cultural events (Articles 24 and 25), this will have as a consequence the Russian dominance in these areas. As the HCNM rightly underlined, *“market considerations, in combination with the situation of asymmetrical bilingualism in Ukraine, will promote the import and production of Russian-language programmes, films and publications, as these will be considerably cheaper to produce or import.”*²¹

98. The Venice Commission also draws special attention to Article 15 of the Draft Law. This Article provides that judicial proceedings in Ukraine in civil, administrative, commercial and criminal cases shall be conducted in the State Language. However, in the territory in which a regional language that conforms to the requirements Article 8.3 is used, at the request of one of the parties, judicial proceedings can be conducted in the given regional language. This provision does not guarantee the right for the other party to insist on holding the proceedings in the State language. In order to draw a fair balance not only between the rights of both parties, but also between the state language and the regional language, the Venice commission suggest to provide that the court proceedings shall be held in the regional language at the request or with the consent of both parties.

99. The Venice Commission is of the view that appropriate legal guarantees are indispensable to ensure the effective preservation of the above-mentioned balance, on the basis of a stable, sustainable and clearly defined long-term linguistic policy. It notes with regret that Draft reflects the absence of such a long-term linguistic policy for Ukraine and that it fails to propose viable solutions to the most challenging questions facing Ukraine in this field.

VI. The free development of the languages in Ukraine as a basis for social cohesion, integration and cultural enrichment

100. The third principle on which according to the Draft Law, the national language policy is based is “the free development and equality of all national languages and high culture as a basis for mutual understanding, cultural enrichment and consolidation” (preamble, Article 5.3 on “Purposes and Principles of the State Language Policy” and Article 8.1).

101. The Venice Commission welcomes the intention of the authors of the Draft to protect the linguistic rights of the Russian and the other minorities. It more specifically welcomes the expansion, in Article 8.2. of the Draft, of the list of languages to which the measures aimed at the use of regional languages are applied. Article 8.2 determines that, “in the context of the European Charter for Regional and Minority Languages, the regional languages of Ukraine for which this Law provides measures targeted at the use of regional languages, are the following: Russian, Belarussian, Bulgarian, Armenian, Gagauz, Yiddish, Crimean Tatar, Moldovian, German, Modern Greek, Polish, Roma, Romanian, Slovak and Hungarian Languages.” In comparison with the law on the Ratification of the European Charter for Regional and Minority languages²², the Draft Law thus considers three additional languages as “regional languages”, namely the language of the Romany national minority, language of the Jewish minority (Yiddish) and Modern Greek.

102. The Venice Commission however also wishes to recall that still only a limited number of regional languages are listed in the draft Law, whereas the Language Charter and the

²¹ See footnote 18.

²² Law of Ukraine “On the Ratification of the European Charter for Regional or Minority Languages” No 802-IV of May 15, 2003.

Framework Convention, ratified by Ukraine, guarantee protection to all regional and minority languages and to all national minorities. In their recently published report on Ukraine, the Language Charter Committee of Experts pointed out that the Language Charter also applies to other languages such as Karaim, Krimchak and Ruthenian.²³

103. Moreover, the Venice Commission has to underline that, as it appears from a closer analysis of the dispositions of the Draft, apart from the Russian language, very few of the other regional languages, expressly mentioned in article 8.2., will effectively enjoy a special protection under the “Law on languages in Ukraine.”

104. As it results from the Draft Law, access to the special protection provided by its provisions is only open to regional languages that meet the 10% threshold set by Article 8 (3). It is clear that these provisions will be mainly beneficial to the Russian-speaking minority, and scarcely to the smaller minorities, as they do not reach the required threshold. According to the HCNM, “only Hungarian (in Zakarpattia), Romanian (in Chernivitsi) and possibly - depending on the criteria used - Crimean Tatar (in Crimea) will reach the threshold. (...) Other minority languages spoken by a relatively large number of speakers, but who are not sufficiently concentrated in one area in order to meet the 10 per cent threshold at oblast level, would therefore not qualify for protection at regional and national levels.”²⁴

105. In addition, in sectors in which the protection of regional or minority language is not subject to the fulfilment of the 10 % condition, the Russian language benefits from preferential treatment. It is the case, for instance, in the field of education where, according to the Draft Law, Russian shall be taught as mandatory subject in all schools that operate in another minority or regional languages or even in the State language.

106. The Venice Commission acknowledges that the Framework Convention and the Language Charter do not impose an obligation on the state authorities to grant an identical protection to every single minority group. It considers however that, in elaborating a law “on Languages in Ukraine”, the Ukrainian legislator should take the opportunity to re-examine the overall linguistic situation of minorities in Ukraine. By focussing on the Russian language, the current Draft Law pursues language regulation reform in isolation from other minority issues. Therefore the Venice Commission supports the recommendation of the HCNM that the Ukrainian authorities undertake a comprehensive modernization of the legal framework concerning minority protection including the use of minority languages.

VII. Conclusions

107. The Venice Commission has examined the Draft Law on the Languages in Ukraine registered with the parliament of Ukraine in September 2010. It finds commendable that the draft pursues the legitimate aim of establishing, as recommended by international monitoring bodies in the sphere of language and minority protection, an up-to-date and modern legislation on language use. The Commission notes that legislating on language protection continues to be an important concern for the Ukrainian authorities and acknowledges that, in the complex historical, linguistic and politic context prevailing in Ukraine, structuring the linguistic landscape of country represents a serious challenge.

108. It is positive that the Draft’s main principles - the right to free linguistic-affiliation, the strengthening of the status of Ukrainian language as a state language and the free development of languages as a tool for social cohesion and integration within society - are rooted in the Ukrainian Constitution and generally in compliance with the applicable international standards.

²³ ECRML 7 July 2010, (2010)6, Chapter 3, sub Z.

²⁴ See footnote 19.

109. In spite of these positive general features of the Draft, the Venice Commission finds that the Draft fails to propose a sufficiently precise, consistent and balanced legal framework for the use and protection of Ukraine's languages, and might - if enacted in its current form - prove counter-productive as a means of regulation of language use in the country.

110. The Venice Commission finds the draft unbalanced. It is concerned that, by strongly protecting the Russian language, without taking additional measures to confirm the role of Ukrainian as the State language and to ensure protection of other regional or minority languages, the Draft might increase existing linguistic divisions in the country rather than decreasing them.

111. Although the Draft does not provide the Russian language any additional formal status, it may be perceived as an attempt to broaden the scope of use of the Russian language in the country and as a step towards practical official bilingualism. It therefore raises numerous issues of incompatibility with both the Ukrainian Constitution and its provisions pertaining to language protection (notably Article 10) and the international instruments applicable, namely the Language Charter and the Framework Convention. Also, only limited efforts are noticeable in the Draft in the direction of promoting smaller languages.

112. It is regrettable that, while in its general provisions, the Draft explicitly confirms the constitutional guarantees available for the protection and development of Ukrainian as the state language and the use and protection of Russian and other regional or minority language, its operational part appears to move from this approach and concentrate its focus on one language.

113. The Venice Commission acknowledges that the regulation of the spheres of use of the Ukrainian and the Russian languages as the two main languages in the country is an understandable legislative goal under the circumstances prevailing in Ukraine. This undoubtedly aims to respond to a real need and to legitimate social, linguistic and political concerns. Nevertheless, it is of the opinion that a more comprehensive approach, paying adequate attention to the situation and needs of all Ukraine's languages and relative minorities would be more appropriate and more respectful of the basic principles mentioned in the general provisions of the draft. It should be pointed out, moreover, that a clear and sustainable language policy, based on a large national consensus and a solid political basis is a key pre-condition for a successful legislative process in this field. Also, reliable statistic data on the individuals linguistic self-identification are of utmost importance. Particular attention should be paid to the way in which the language question will be drafted in view of the next population census.

114. In the Venice Commission's view, the Ukrainian authorities should identify more adequate legislative solutions to confirm the pre-eminence of the Ukrainian language as the only state language, take protective measures in those fields where a further development of the Ukrainian language is needed, and thus establish a fair balance between the protection of the rights of minorities, on the one hand, and the preservation of the State language as a tool for integration within society, on the other hand. In the meantime, clear and sustainable legal guarantees should be provided for the protection of the persons belonging to national minorities and their regional or minority languages, in line with the Constitution and the relevant international standards.

115. Under the current circumstances, the Ukrainian authorities are encouraged to opt for a more comprehensive approach in defining or re-defining the whole Ukrainian language policy, and to initiate an inclusive process of reviewing and modernizing, in line with the Constitution and Ukraine's relevant international obligations, the various components of the Ukrainian language and minority-related legislation.

116. The Venice Commission remains at the disposal of the Ukrainian authorities, should they wish assistance in this respect.