

## Language Policy in Ukraine

### “International standards and obligations, and Ukrainian law and legislation.”

#### Bill Bowring

#### Introduction

Language policy in Ukraine has a political and historical context of unique complexity, even when compared with other post-colonial linguistic puzzles, for example those in Ireland, Spain or Turkey. As Kulyk points out, the Soviet past is “... the only past common to all Ukrainian regions, because it was only in the 1940s that they found themselves in one polity after many centuries of divided existence.”<sup>1</sup> This Report does not seek to analyse the often heated politics of post-Soviet Ukraine, which I have explored over the years in relation to a number of issues<sup>2</sup>, and which are analysed in this volume. It is of course essential to consider law in its social and political context. What follows is an attempt to analyse and evaluate existing and proposed law and practice, and to make recommendations.

The task of analysis and evaluation is made easier by the fact that Ukraine has now ratified almost the complete set of international treaties relating to minority rights. It must be emphasised that each of these instruments create legal obligations for Ukraine, and, by virtue of the 1996 Constitution of Ukraine, they are part of Ukrainian law, with priority over Ukrainian domestic laws.

Since the issue of language policy is so politicised in Ukraine, the instruments and mechanisms to which Ukraine has now committed itself have also acquired specific political significance and symbolic weight. In this context, I have drawn considerable assistance from the work of Reeta Toivanen, in her article “Linguistic Diversity and the Paradox of Rights Discourse.”<sup>3</sup> The problem with which she engages is as follows:

“... whether language rights presuppose a *fixed* conception of such rights, applying to potentially homogenous and static groups, whose ‘genuine’ language needs protection. Upon examination... it becomes apparent that many of the groups treated as ‘language minorities’ are actually seeking official recognition of either their cultural distinctiveness or their difference, while language is only one element – often of varying importance – of their group identity.”<sup>4</sup>

<sup>1</sup> Voldymyr Kulyk (2006) “Constructing common sense: Language and ethnicity in Ukrainian public discourse” v.29 n.2 *Ethnic and Racial Studies* pp.281-314, 287

<sup>2</sup> Myroslava Antonovych and Bill Bowring (2008) “Ukraine’s long and winding road to the Charter” in *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities* (Council of Europe); Bill Bowring (2006) “Ombudsman Institutions and Ethnic Conflict in Russia and Ukraine: A Failure of Local Institution-building?” v. 4, 2004/5 *European Yearbook of Minority Issues* (Brill) pp.269-294; Bill Bowring (2005) “The Crimean autonomy: innovation or anomaly?” in Marc Weller and Stefan Wolff *Autonomy, Self-governance and Conflict Resolution: Innovative approaches to institutional design in divided societies* (Routledge) pp.75-97; Bill Bowring (2002) “Between a (Russian) rock and a (Crimean Tatar) hard place? Ethnic, linguistic and minority issues” in Ann Lewis (ed) *Ukraine and the EU: Neighbours, Friends, Partners?* (The Federal Trust); Bill Bowring (1999) “New Nations and National Minorities: Ukraine and the Question of Citizenship” in Peter Cumper and Steven Wheatley (eds) *Minority Rights in the ‘New’ Europe* (Kluwer Law International) – Prof Antonovych also has an article in this collection.

<sup>3</sup> Reeta Toivanen (2007) “Linguistic Diversity and the Paradox of Rights Discourse” in Dario Castiglione and Chris Longman (eds) *The Language Question in Europe and Diverse Societies: Political, Legal and Social Perspectives* (Oxford: Hart Publishing), pp.101-122

<sup>4</sup> Toivanen, 2007, p.101

She wishes to show that language is “an instrumental symbol, which can easily be put to serve some of the political purposes of the minority, relying on the generalised belief diffuse in our societies that language, as one’s mother tongue, is a natural sign of one’s ethnic identity.”<sup>5</sup> This is strongly associated with the belief that “one nation speaks one language”. This project has shown in various ways that Ukraine is manifestly a space in which there are several “nations”, and that none of them has a unique language.

She cites Pierre Bourdieu to good effect<sup>6</sup>, insisting that language boundaries, real or imagined, can easily be exploited politically – as in Ukraine.<sup>7</sup> Bourdieu observed the “phenomenon of the performative character typical of ethno-political entrepreneurs, who may live ‘off’ as well as ‘for’ ethnicity. By invoking groups, they seek to evoke them, summon them, call them into being. It has been my own observation over the years since my first working visit in 1992 that the concerns and demands voiced by ethno-nationalist leaders (sometimes self-appointed) frequently bear little or no relation to the lived reality of the people they claim to represent. For the most part the mass of the people inhabit a multi-lingual world without too much stress. Svirskaya in this volume explores just such lived reality in Odesa.

More importantly for this Report, Toivanen notices that many of the existing minority rights instruments – like the Framework Convention on Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (the Languages Charter) – “treat minority groups as homogenous and static groups carrying a distinct and genuine language as a permanent feature.”<sup>8</sup> This essentialising of both ethnicity and language use is, as I point out below, a significant feature of Ukrainian legislation, especially the 1989 law “On languages” of the Ukrainian SSR.

She also points out that the Languages Charter “relates mainly to those language groups whose protection and promotion may contribute to the furthering of democracy in Europe, without however jeopardising national sovereignty and territorial integrity”, to use the words of the Preamble.<sup>9</sup> Her impression after reading the FCNM is that its provisions taken together carry the message that “a nation, even one in a minority position, speaks one language.”<sup>10</sup>

It is manifestly the case in Ukraine that ethnic or “national” groups do not speak one language. There is, however, a strong view held by many political actors that they ought to. Such a view is expressed in the legislation, as I show below.

There is one further factor of great importance. Many Ukrainians, proud of their country and the fact that it has at last achieved independence, look with horror at the example of the Irish Republic (Eire). This fear was voiced by a number of my interlocutors when I visited in February 2008. The Irish (Gaelic) language suffered long persecution by England and then Great Britain, and was for centuries suppressed even more fiercely than was Ukrainian. Irish is of course a Celtic language, with no connection whatsoever with English. Eire only achieved independence following the abortive Dublin Uprising of 1916, and then several years of bloody warfare. The Irish language is the official (state) language of Eire, and is taught to all school-children. All official signs are written in both languages, and there is broadcasting in Irish. However, outside the Gaeltacht, the small coastal areas and islands where the inhabitants are

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<sup>5</sup> Toivanen, 2007, p.105

<sup>6</sup> Pierre Bourdieu (1992) *Language and Symbolic Power* (Cambridge, MA: Harvard University Press)

<sup>7</sup> Toivanen, 2007, p.106-7

<sup>8</sup> Toivanen, 2007, p.107

<sup>9</sup> Toivanen, 2007, p.109

<sup>10</sup> Toivanen, 2007, p.109-110

effectively paid to speak Irish, the Irish language is rarely heard, with only 7% stating that they use Irish on a daily basis.<sup>11</sup> English language, popular culture and media dominate. Nic Shuibhne observes as follows:

“It is a common feature of linguistic minorities that they strive to achieve the version of official recognition that they have not been accorded. The Irish language is unique in that its constitutional status goes far beyond mere recognition and confers upon it the privileged position of national and first official language of the State. But its *de facto* minority status has been largely ignored.”<sup>12</sup>

Of course, Ireland is no less independent because of the almost complete loss of its official language, has become an enthusiastic – often a leading - member of the EU (of which Irish is now one of the languages), and now has a higher standard of living than England. However, for those who believe that each nation must have its language, and that this language expresses the “national originality” of the nation (as in the Preamble to the 1989 Law “On languages of the Ukrainian SSR”), the Irish example is truly horrifying.

### **The tendency to focus on the Russian language only**

Political debate in Ukraine often appears to be dominated by the issue of the status of the Russian language; whether it should be a “state” or “official” language. There is another issue which is of great importance but is frequently side-lined. That is the issue of the protection – indeed preservation – of the Crimean Tatar language. It must also be recalled that the Mejlis of the Crimean Tatar People, the main representative body of the Crimean Tatars, has made it very clear over the years that it is not a national minority, but the indigenous people of Crimea.<sup>13</sup>

In his letter of 14 February 1997<sup>14</sup> to Mr Hennady Udoenko, then Minister for Foreign Affairs of Ukraine, the then High Commissioner on National Minorities, Max van der Stoep (for whom I acted as legal expert), stated as follows:

“When referring to international and Ukrainian legal instruments regarding national minorities which are applicable to indigenous peoples, I do not intend to suggest that no distinction can be made between national minorities and indigenous peoples. An important difference is, in my view, that, in contrast to a national minority, an indigenous people does not have a kin-state.”

It is a fact that the Crimean Tatars are unique, and have no kin-state. The Volga and other Tatars of Russia speak a very different language; Crimean Tatar is much closer to Turkish, and, starting

<sup>11</sup> According to the 2006 census, of the Republic of Ireland's 4,057,646 residents who are aged three and over, 1,656,790 people (40.9%) regard themselves as competent in Irish.. The number of people in the Gaeltacht regions of Ireland is 91,862, as of the 2006 census. Of these, 70.8% aged three and over speak Irish and approximately 60% speak Irish on a daily basis. The number of people speaking Irish reflects the fact that, to a certain extent, Irish is a compulsory subject in Ireland. Outside the educational system, 1,203,583 (29.7% of the population aged three years and over) regard themselves as competent Irish speakers. Of these 85,076 (7.1%) speak Irish on a daily basis, 97,089 (8.1%) weekly, 581,574 (48.3%) less often, 412,846 (34.3%) never, and 26,998 (2.2%) didn't state how often. Today, complete monolingualism is restricted to the very elderly in Gaeltacht regions and to native speakers under school age. See

<http://www.cso.ie/census/documents/Final%20Principal%20Demographic%20Results%202006.pdf>

<sup>12</sup> See Niamh Nic Shuibhne (1999) “Ascertaining a Minority Linguistic Group: Ireland as a Case Study” in Deirdre Fottrell and Bill Bowring *Minority and Group Rights in the New Millennium* (The Hague: Martinus Nijhoff)

<sup>13</sup> See also Belitser, N. (2002) “‘Indigenous Status’ for the Crimean Tatars in Ukraine: A History of a Political Debate”, at <http://www.iccrimea.org/scholarly/indigenous>; and Belitser, N. (2003) "Crimean Autonomy: Positive and Negative Aspects in Terms of Ethnic Conflict", paper delivered at the International Conference on Regional Autonomy of Ethnic Minorities, Uppsala University, Sweden, 12 – 17 June 2003 (in possession of the author)

<sup>14</sup> <http://www.minelres.lv/count/ukraine/970214r.htm>

in the 18<sup>th</sup> century, there is a large Crimean Tatar diaspora, several million strong, in Turkey, Bulgaria and other countries.

On the language question Van der Stoel recommended as follows:

“Finally, I permit myself to make some comments on the question of the status of the languages in the ARC. I share the view that Article 10 of the Constitution of Ukraine, which states that the state language of Ukraine is Ukrainian, has to be reflected in the Constitution of the ARC. As far as the question of a reference in the Constitution of the ARC to the Russian and Tatar languages is concerned, I have noted that Article 10 of the Constitution of Ukraine states that "the free development, use and protection of the Russian language and the languages of other minorities is guaranteed in Ukraine", while Article 3 of the Ukrainian Law on Languages lays down the principle that in places of compact settlement of other nationalities their national language can be used alongside the Ukrainian language. Taking this into account, I would recommend that the following formula for the reference to other languages than the state language will be included in the Constitution of the ARC:

"In places of compact settlement of persons belonging to other nationalities (cities, regions, villages or their combinations) their national languages may be used alongside the state language in organs of the ARC, organs of local government, non-public institutions and enterprises. In the Parliament of the ARC, the Russian and Tatar languages may be used alongside the state language. The free development and protection of the Russian language, the Tatar language and other languages spoken in the ARC is guaranteed.”

It is often forgotten that the Crimean Tatar language was enshrined as the State Language of the Crimean Autonomous Soviet Socialist Republic (CASSR) in its Constitutions of 1921, 1926, and 1938, alongside Russian. Prior to the Second World War, there were 371 Crimean Tatar schools in the CASSR.

Crimean Tatar no longer has such a status. Chapter 3 of the Constitution of the Autonomous Republic of Crimea (ARC) adopted on 21 October 1998, sets out the "Guarantees of the rights and freedoms of citizens of Ukraine, and the rights of nationalities in the ARC". Article 10 is entitled "Guarantees for the functioning and development of the state language, Russian, Crimean Tatar, and other national languages in the ARC", and continues that “In the ARC the Russian language as the language of the majority of the population and a language admissible for inter-ethnic communication is used in all spheres of social life”. The right of education in their mother tongue in pre-school educational institutions is guaranteed to all children, as well as education in the Russian language in public educational institutions. Article 11 provides for "the language of documents defining the status of a citizen of the ARC". These are to be completed in Ukrainian and Russian “and, at the request of the citizen - also in the Crimean Tatar language." By Article 12, the language of court proceedings and legal advice and assistance is to be Ukrainian, except where a party to proceedings requests Russian “as the language of the majority of the population of the ARC”.

Thus, the Crimean Tatar language may be used for the state documents described in Article 11, but not in a wide range of court and other proceedings. Russian is privileged in a way which is in doubtful accord with Article 10 of the Ukrainian Constitution.

These and other issues concerning the Crimean Tatars were also highlighted by the Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM) in their Opinion of 1 March 2002<sup>15</sup>, as follows:

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<sup>15</sup> ACFC/INF/OP/I(2002)010, at [http://www.coe.int/t/e/human\\_rights/minorities/2.\\_framework\\_convention\\_%28monitoring%29/2.\\_monitoring\\_me](http://www.coe.int/t/e/human_rights/minorities/2._framework_convention_%28monitoring%29/2._monitoring_me)

67. The Advisory Committee notes that there are specific challenges relating to the implementation of Article 14 of the Framework Convention in Crimea, where the Russian language has been the dominant language in a large majority of schools in contrast to the limited availability of instruction in other minority languages and in Ukrainian. Following the return of formerly deported people, certain commendable efforts have been made to introduce in particular the Crimean Tatar language as the language of instruction, but additional demands in this respect have reportedly at times been challenged on economic grounds by local authorities. The Advisory Committee recognises the economic constraints involved, but urges the authorities concerned to implement the above-mentioned provision concerning introduction of instruction in a minority language whenever the established threshold is met.

and

120. The Advisory Committee believes that the implementation of the Framework Convention has not been fully successful as regards Crimean Tatars and other formerly deported people, inter alia, in terms of their participation in cultural, social and economic life and in public affairs, although the increasing efforts of the central Government have resulted in certain improvements in this respect.

Nevertheless, a report recently published by the Crimean Tatars shows that at the present time there are just 14 Crimean Tatar schools, teaching 3,443 children, and 10 schools with bi- or trilingual teaching (1,477 pupils). No less than 82.2% of Crimean Tatar children, 30,038, are taught in Russian language schools.<sup>16</sup>

### **International obligations of Ukraine**

Many of the most important United Nations instruments were ratified by the Ukrainian SSR, which was, paradoxically, a full member of the United Nations. These were:

- Covenant on Civil and Political Rights (entered into force on 23 March 1976)
- Covenant on Economic, Social and Cultural Rights (2 March 1976)
- Convention on Elimination of All Forms of Racial Discrimination (6 April 1969)
- International Labour Organisation Convention No.111 on Discrimination in the Area of Labour and Occupation (15 June 1960)
- UNESCO Convention Against Discrimination in the Area of Education (15 December 1960)

Article 27 of the ICCPR provides:

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**.

In its General Comment No 23 of 1994<sup>17</sup>, the Human Rights Committee stated:

5.3. The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it

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chanism/4.\_opinions\_of\_the\_advisory\_committee/1.\_country\_specific\_opinions/1.\_first\_cycle/PDF\_1st\_OP\_Ukraine\_en.pdf

<sup>16</sup> Concept of education in the Crimean Tatar language in the Autonomous Republic of Crimea (2007) 1 (11) *Tasil* pp.49-60, Adopted by the 5<sup>th</sup> session of the IV Kurultay of the Crimean Tatar people, Simpheropol, 24 December 2006; approved at the 148<sup>th</sup> meeting of the Medzhlis of the Crimean Tatar people on 8 April 2007. Copy on file with the author.

<sup>17</sup> General Comment No. 23: The rights of minorities (Art. 27) : . 08/04/94. CCPR/C/21/Rev.1/Add.5, General Comment No. 23.

should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings

It should be noted that the General Comment refers to “use” of a minority language.

The UNESCO Convention provides as follows:

#### Article 5

1. The States Parties to this Convention agree that:

(c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, **the use or the teaching of their own language**, provided however:

- (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
- (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
- (iii) That attendance at such schools is optional.

One more UN Convention has been ratified, this time by the new Ukraine;

- Convention on the Rights of the Child (27 September 1991)

There are some significant provisions in the Convention on the Rights of the Child:

#### Article 29

1. States Parties agree that the education of the child shall be directed to:

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(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

#### Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or **to use his or her own language**.

In 2001 the Committee on the Rights of the Child provided a General Comment on the Aims of Education.<sup>18</sup>

Ukraine is a member of the OSCE (Organisation for Security and Cooperation in Europe). It there fore subscribes to the Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE, 1990<sup>19</sup>.

Significant provisions include:

<sup>18</sup> The Aims of Education : . 17/04/2001. CRC/GC/2001/1. (General Comments)

<sup>19</sup> <http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm>

(32) To belong to a national minority **is a matter of a person's individual choice** and no disadvantage may arise from the exercise of such choice.

Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. In particular, they have the right

(32.1) - to **use** freely their mother tongue in private as well as in public;

(32.2) - to establish and maintain their own educational, cultural and religious institutions, organizations or associations, which can seek voluntary financial and other contributions as well as public assistance, in conformity with national legislation;

(32.3) - to profess and practise their religion, including the acquisition, possession and use of religious materials, and to conduct religious educational activities **in their mother tongue**;

(32.5) - to disseminate, have access to and exchange information **in their mother tongue**;

(32.6) - to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations.

Persons belonging to national minorities can exercise and enjoy their rights individually as well as in community with other members of their group. No disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights.

(34) The participating States will endeavour to ensure that persons belonging to national minorities, notwithstanding **the need to learn the official language or languages of the State concerned**, have adequate opportunities for **instruction of their mother tongue or in their mother tongue**, as well as, wherever possible and necessary, **for its use** before public authorities, in conformity with applicable national legislation.

My emphasis.

Several more treaties have been ratified by Ukraine as a result of its post-Soviet membership of the Council of Europe. On acceding to the CoE in 1995, it committed itself to a long list of obligations, including ratification of the main CoE treaties.

These treaties are:

- European Convention on Human Rights – ECHR - (11 September 1997)
- Framework Convention on Protection of National Minorities – FCNM - (9 December 1997)
- European Charter for Regional or Minority Languages – the Languages Charter (1 January 2006)<sup>20</sup>

All these international texts have received authoritative interpretation and consolidation in the *Oslo Recommendations Regarding the Linguistic Rights of National Minorities* prepared in February 1998 for the OSCE's High Commissioner on National Minorities.<sup>21</sup>

The rights in question are encapsulated as follows:

“The linguistic rights of national minorities, i.e. the right of persons belonging to national minorities **to use their language** in the private and public spheres...” (my emphasis)

<sup>20</sup> <http://conventions.coe.int/treaty/en/Treaties/Word/148.doc>

<sup>21</sup> [http://www.osce.org/documents/hcnm/1998/02/2699\\_en.pdf](http://www.osce.org/documents/hcnm/1998/02/2699_en.pdf)

It is clearly laid down by international law that “belonging to a national minority” is a matter of individual choice, and the existence (or not) of a national minority is not a matter to be decided by the state.

### **Ukraine and the FCNM**

Thus, one of the Conventions Ukraine ratified reasonably promptly is the CoE's 1995 FCNM, which it signed on 15 September 1995. The FCNM was ratified by the Verkhovna Rada on 9 December 1997, and entered into force on 1 May 1998. According to Article 9 of the 1996 Constitution, the FCNM is now part of Ukrainian law.

The provisions of the FCNM are therefore binding on Ukraine. Among the most important are:

#### Article 10

1. The Parties undertake to recognise that every person belonging to a national minority **has the right to use** freely and without interference his or her minority language, in private and in public, orally and in writing.
2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible **to use the minority language** in relations between those persons and the administrative authorities.
3. The Parties undertake to guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter. (my emphasis – BB)

#### Article 12

1. The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.
2. In this context the Parties shall *inter alia* provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.
3. The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.

#### Article 14

1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.
2. **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.
3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

My emphasis.

Ukraine submitted its First Periodic Report on implementation of the provisions of the FCNM to the CoE in November 1999. This Report provides a base-line for monitoring future

developments. The FCNM Advisory Committee provided its Opinion on Ukraine on 1 March 2002.<sup>22</sup>

It noted (para 20) that "... amongst persons belonging to the Russian minority in Ukraine there is a certain reluctance to employ the term national minority. Furthermore, it needs to be noted that, in addition to the ethnic Russians, there is a large number of ethnic Ukrainians whose mother tongue is Russian." In para 50 it observed that

"... there are plans to adopt a new law on languages, which would seek inter alia to promote the use of the Ukrainian language. In this connection, the Advisory Committee would like to stress that, while the aim to protect the official language is a legitimate one, it is instrumental that this protection is carried out in a manner that fully protects the rights contained in Articles 10, 11 and other pertinent provisions of the Framework Convention."

Ukraine's Second Report, due in 2004, was received on 8 June 2006. The Advisory Committee has not yet given its Opinion.

### Ukraine and the Languages Charter

The Preamble to the Languages Charter identifies its subject-matter as "... **the right to use a regional or minority language in private and public life...**"

Article 1 defines the phrase "regional or minority languages":

For the purposes of this Charter:

- a. "regional or minority languages" means languages that are:
  - i. 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
  - ii. different from the official language(s) of that State;
 it does not include either dialects of the official language(s) of the State or the languages of migrants;
- b. "territory in which the regional or minority language is used" means the geographical area in which **the said language is the mode of expression of a number of people** justifying the adoption of the various protective and promotional measures provided for in this Charter;
- c. "non-territorial languages" means **languages used** by nationals of the State which differ from the language or **languages used by the rest of the State's population** but which, although traditionally used within the territory of the State, cannot be identified with a particular area thereof.

My emphasis throughout. I return to the question of the meaning of this phrase, below.

Ukraine has entered into the legally binding obligation to apply the provisions of Part II of the Charter to "all the regional or minority languages spoken within its territory", as languages. The word "spoken" clearly means "used".

Ratification of the Languages Charter took a great deal longer than had been anticipated when Ukraine joined the Council of Europe, as Professor Myroslava Antonovych of Kyiv-Mohyla

<sup>22</sup> ACFC/INF/OP/I(2002)010, at [http://www.coe.int/t/e/human\\_rights/minorities/2\\_framework\\_convention\\_%28monitoring%29/2\\_monitoring\\_mechanism/4\\_opinions\\_of\\_the\\_advisory\\_committee/1\\_country\\_specific\\_opinions/1\\_first\\_cycle/PDF\\_1st\\_OP\\_Ukraine\\_en.pdf](http://www.coe.int/t/e/human_rights/minorities/2_framework_convention_%28monitoring%29/2_monitoring_mechanism/4_opinions_of_the_advisory_committee/1_country_specific_opinions/1_first_cycle/PDF_1st_OP_Ukraine_en.pdf)

Academy and I have shown.<sup>23</sup> Following signature on 2 May 1996, the Charter was ratified by the Verkhovna Rada of Ukraine on 15 May 2003<sup>24</sup>. However, the Instrument of Ratification was not deposited at Strasbourg until 19 September 2005. The Charter came into force for Ukraine on 1 January 2006. Article 2 of the Law “On Ratification” provides that the provisions of the Charter apply to the languages of the following 13 national minorities of Ukraine: Belarusian, Bulgarian, Gagauzian, Greek, Jewish, Crimean Tatar, Moldovan, German, Polish, Russian, Romanian, Slovak and Hungarian.

It has been noted, especially in the “Public Report” referred to below, that in its instrument of ratification Ukraine adopted the minimum provision possible under Part III, that is, in the case of the Russian and some other languages, considerably less than was already being done in practice. This failing will have to be rectified in any future amendments to the instrument of ratification (ie Ukraine’s Law on Ratification).

The Ministry of Justice started drafting Ukraine’s First Periodic Report On Implementation in late 2006, and following a meeting with experts of the COE’s Secretariat on 25 January 2007, on 20 April 2007 the Ministry of Justice submitted the draft Report for public discussion. The Initial periodical report of Ukraine was presented to the CoE on 2 August 2007<sup>25</sup>. It reflects substantial labour, and comprises 101 pages.

The Report starts by reproducing the information given in the “Public Report On Implementation of the Charter”, which was prepared by the People’s Deputy V. V. Kolesnichenko and the President of the NGO “Spilna Meta” R. O. Bortnik (his personal assistant).<sup>26</sup> It should be noted that Mr Kolesnichenko is the leading spokesman of the Party of the Regions on language issues, and the author of draft laws discussed below. The fact that the work of persons, however expert, who are politically engaged on one side of the present balance of forces, forms such a prominent part of the report is probably a reflection of the nature of the government at that time.

I note that the Initial Periodical Report refers (p.5) to “language users”. However, quoting from this Public Report, it then refers to “Russians”. The first term, referring to “use”, is consistent with the Charter and other international instruments referred to above. The second is an “ethno-national” term of description, and like all such terminology has a tendency to essentialise ethnic characteristics, and is entirely out of place in a State Report of this kind.

The use of this and other similar expressions demonstrates an unfortunate lack of precision with regard to this all-important terminology. The report writers would do very well to study the Explanatory Report to the Charter more carefully. I deal with this in the next section.

### **The vexed question of the definition of “regional or minority language”**

The Initial Periodical Report states as follows:

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<sup>23</sup> Myroslava Antonovych and Bill Bowring (2008) “Ukraine’s long and winding road to the Charter” in Robert Dunbar and R Gwynedd Parry (eds) *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities* (Council of Europe), forthcoming 2008

<sup>24</sup> Law of Ukraine No.802-IV “On Ratification”

<sup>25</sup> MIN-LANG/PR (2007) 6, at

[http://www.coe.int/t/dg4/education/minlang/Report/PeriodicalReports/UkrainePR1\\_en.pdf](http://www.coe.int/t/dg4/education/minlang/Report/PeriodicalReports/UkrainePR1_en.pdf)

<sup>26</sup> Referred to in the Report, p.5; a copy in English is in the possession of the author, who interviewed Mr Bortnik on 26 February 2008

“It should be noted that the national legislation of Ukraine does not have a definition of the notion of ‘a regional or minority language user’ or a list of groups of citizens belonging to national minorities. Unfortunately, as of today, no specific research has been done or a scientifically grounded methodology for defining these notions has been developed.

At the same time, article 3 of the law of Ukraine “On National Minorities in Ukraine” establishes that national minorities include groups of Ukrainian citizens who are not Ukrainian by nationality and manifest the sense of national identity and community.”<sup>27</sup>

The CoE has fortunately given very useful guidance.

Article 7(1) of the Languages Charter declares that States shall base their policies, legislation and practice on such objectives and principles as "the recognition of the regional or minority languages as an expression of cultural wealth..." and "the need for resolute action to promote regional or minority languages in order to safeguard them". Article 7(4) of the Languages Charter stipulates that "in determining their policy with regard to regional and minority languages,... Parties shall take into consideration the needs and wishes expressed by the groups **which use such languages.**"

The Parliamentary Assembly of the Council of Europe, has come to the same conclusion in Article 7(3) of its Recommendation 1201 which provides that "In regions in which substantial numbers of a national minority are settled, the persons belonging to a national minority shall have the right to use their mother tongue in their contacts with the administrative authorities and in proceedings before the courts and legal authorities."

Paragraph 14 of the Explanatory Report to the Languages Charter<sup>28</sup> stresses that:

“... the charter does not conceive the relationship between official languages and regional or minority languages in terms of competition or antagonism. Rather, it deliberately adopts an intercultural and multilingual approach in which each category of language has its proper place.”

Paragraph 17 sets out a firm position of great importance, which Ukraine must be taken to have accepted:

“17. The concept of language as used in the charter focuses primarily on **the cultural function of language**. That is why it is not defined subjectively in such a way as to consecrate an individual right, that is the right to speak "one's own language", it being left to each individual to define that language. **Nor is reliance placed on a politico-social or ethnic definition** by describing a language as the vehicle of a particular social or ethnic group. Consequently, the charter is able to refrain from defining the concept of linguistic minorities, since its aim is not to stipulate the rights of ethnic and/or cultural minority groups, but to protect and promote regional or minority languages as such.” (my emphasis – BB)

Thus, the terms “regional” and “minority” are defined as follows:

“18. ... The adjective "regional" denotes languages spoken in a limited part of the territory of a state, within which, moreover, they **may be spoken** by the majority of the citizens. The term "minority" refers to situations in which either the language **is spoken by persons** who are not concentrated on a specific part of the territory of a state **or it is spoken by a group of persons**, which, though concentrated on part of the territory of the state, is numerically smaller than the population in this region which speaks the majority language of the state. Both adjectives therefore refer to factual criteria and not to legal notions and in any case relate to the situation in a given state (for instance, a minority language in one state may be a majority language in another state).” (my emphasis throughout – BB)

<sup>27</sup> Report, p.8

<sup>28</sup> <http://conventions.coe.int/treaty/en/Reports/Html/148.htm>

In my view, both these definitions are perfectly well applicable to Ukraine. Crimean Tatar is most certainly a “regional language” in Crimea, while Russian is a regional language in some regions of Ukraine. And Russian is a minority language in Ukraine as a whole (and of course is not the State Language). Furthermore, I note that the definitions clearly relate to language use (“spoken by”) and not mother-tongue status or ethno-cultural designation, as in the census.

Taking all these authoritative considerations together, it will be seen why I am opposed to a definition of “language” on either an ethno-cultural (as denoted by the word “Russians”), or “mother-tongue” basis. The latter could well arbitrarily and perversely exclude a person who had Crimean Tatar or English as a mother tongue, but in fact chooses to speak Ukrainian (or Russian) in everyday life. The language spoken by such a person providing it is “traditional”, that is in use for 100 years or more, is a language protected by the Languages Charter.

### Some comparisons on “official languages”

I emphasise that the Explanatory Report also gives due consideration to the position of the state or official language:

“29. The affirmation of the principles of interculturalism and multi-lingualism serves to remove any misapprehension as to the aims of the charter, which by no means seeks to foster any kind of partitioning off of linguistic groups. On the contrary, **it is recognised that in every state it is necessary to know the official language (or one of the official languages)**; consequently, none of the charter’s provisions should be interpreted as intending to raising obstacles to the knowledge of official languages.”

Kymlicka and Patten say the following<sup>29</sup>:

“Most states require, as a minimum that their public employees and officials be competent in some state or official language, whether it be formally or informally designated as such. In the United States, for example, although there is no formally designated official language at the federal level, it is a de facto requirement for employment in the public sector that the applicant speak English. Although the European Union recognises eleven ‘official and working’ languages, only three of these – French, English, and, trailing well behind, German – are de facto languages of internal communication within the Commission.

Some governments go even further in explicitly designating some particular language or languages for internal communications. The 1991 Law on the Languages of the Peoples of the Russian Federation (arts 3.1 and 11.1) require s that all work of federal government bodies be carried out in Russian. Estonia’s 1995 Languages act (art 3.1), Catalonia’s Act No. 1 on Language Policy of 7 January 1998... ( references to Ethiopia, Canada and Belgium)...

Thus, in the world as a whole, states with an official (or state) languages are the exception. Nevertheless, national, official or state languages are the norm in the post-Communist constitutions of Ukraine’s central and eastern European neighbours. Thus, the Constitution of Bulgaria of 1991<sup>30</sup> provides:

Art. 3.  
Bulgarian shall be the official language of the Republic.

The Constitution of Moldova of 1994<sup>31</sup> provides:

<sup>29</sup> Will Kymlicka and Alan Patten (2003) “Introduction. Language Rights and Political Theory: Context, Issues, and Approaches”, in Kymlicka, W. and Patten, A (eds) *Language Rights and Political Theory* (Oxford: Oxford University Press) pp. 1-51, p.17-18

<sup>30</sup> <http://www.legislationline.org/legislation.php?tid=1&lid=8549>

<sup>31</sup> At <http://confinder.richmond.edu/admin/docs/moldova3.pdf>

Article 13. The National Language, Use of Other Languages

(1) The national language of the Republic of Moldova is Moldovan, and its writing is based on the Latin alphabet.

(2) The Moldovan State acknowledges and protects the right to preserve, develop and use the Russian language and other languages spoken within the national territory of the country.

(3) The State will encourage and promote studies of foreign languages enjoying widespread international usage.

(4) The use of languages in the territory of the Republic of Moldova will be established by organic law.

The Constitution of Poland of 1997<sup>32</sup> states:

Article 27

Polish shall be the official language in the Republic of Poland. This provision shall not infringe upon national minority rights resulting from ratified international agreements.

The Constitution of Estonia of 1992<sup>33</sup> provides:

Article 6.

The official language of Estonia is Estonian.

The 1922 Constitution of Latvia<sup>34</sup>, amended in 1998, provides:

Article 4 [Language, Flag]

The Latvian language is the official language in the Republic of Latvia.

The Constitution of Lithuania of 1992<sup>35</sup> provides:

Article 14

Lithuanian shall be the State language.

The 1991 Constitution of Romania<sup>36</sup> provides:

Article 13 [Language]

In Romania, the official language is Romanian.

However, there are several states which have more than one state or official language. South African – another post-imperial state - for example has 11 State (Official) Languages according to its post-apartheid Constitution of 1996<sup>37</sup>. It should be remembered that South Africa was the site first, of a savage war between the British Empire and the (Afrikaans) Boers, and then the criminal regime of Apartheid, in which Britain was for a long time largely complicit.

Although South Africa has no connection with the Council of Europe, its constitutional provisions on language policy are a perfect exemplification of the spirit of the Languages Charter. That is because South Africa since 1996 has been a model of constitutional, human rights and minority rights policy. It should not be ignored by policy-makers in Ukraine.

Article 6<sup>38</sup> is of great interest in the present context:

<sup>32</sup> [http://www.servat.unibe.ch/icl/pl00000\\_.html](http://www.servat.unibe.ch/icl/pl00000_.html)

<sup>33</sup> <http://www.president.ee/en/estonia/constitution.php?gid=81906>

<sup>34</sup> [http://www.servat.unibe.ch/icl/lg00000\\_.html](http://www.servat.unibe.ch/icl/lg00000_.html)

<sup>35</sup> <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>

<sup>36</sup> [http://www.servat.unibe.ch/icl/ro00000\\_.html](http://www.servat.unibe.ch/icl/ro00000_.html)

<sup>37</sup> <http://www.info.gov.za/documents/constitution/index.htm>

<sup>38</sup> <http://www.info.gov.za/documents/constitution/1996/96cons1.htm#6>

## “6. Languages

1. The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
2. Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
3.
  - a. The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; **but the national government and each provincial government must use at least two official languages.**
  - b. Municipalities must take into account the language usage and preferences of their residents.
4. The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
5. A Pan South African Language Board established by national legislation must
  - a. promote, and create conditions for, the development and use of
    - i. all official languages;
    - ii. the Khoi, Nama and San languages; and
    - iii. sign language ; and
  - b. promote and ensure respect for
    - i. all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
    - ii. Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.”

The country’s information site reports:

“English is generally understood across the country, being the language of business, politics and the media, and the country's lingua franca. But it only ranks joint fifth out of 11 as a home language.”<sup>39</sup>

That is, English is (unofficially) the language of inter-ethnic communication.

I have highlighted the provision that the national government and each provincial government must use at least two languages out of the 11 official languages. The author has visited South Africa on several occasions, and once met a taxi driver who claimed to speak all 11 official languages. This must be rare indeed.

Switzerland, which, on the contrary, is one of the oldest independent states, has four state (“national”) languages - German (spoken by 74% of the population), French (20%), Italian (4%) and Romansh (1%). The Swiss Constitution, in force since 2000 (a revised version of the 1874 Constitution)<sup>40</sup> provides:

“Article 4 National Languages

The National Languages are German, French, Italian, and Romansh.

Article 70 Languages

(1) The official languages of the Federation are German, French, and Italian. In communication with persons of Romansh language, the Romansh is also an official language.

(2) The Cantons designate their official languages. In order to preserve harmony between linguistic communities, they respect the traditional territorial distribution of languages, and consider the indigenous linguistic minorities.

...

<sup>39</sup> [http://www.southafrica.info/ess\\_info/sa\\_glance/demographics/language.htm](http://www.southafrica.info/ess_info/sa_glance/demographics/language.htm)

<sup>40</sup> [http://www.servat.unibe.ch/icl/sz00000\\_.html](http://www.servat.unibe.ch/icl/sz00000_.html)

(4) The Federation supports the plurilingual Cantons in the fulfilment of their particular tasks.

Romansh is in fact a “dead language”, only spoken in a few villages. It may be of interest to Ukrainian colleagues to note that the Cantons decide which language will be their official language.

There is no requirement that any Swiss citizen should speak or use more than one official language. School-children are obliged to learn a second language spoken in Switzerland, although there is currently a debate as to whether pupils should learn English rather than German, French, Italian or Romansh as a second language. The border between the German and the French speaking part of Switzerland is popularly known as the “*Röstigraben*” (literally translated: “hashed potatoes ditch”). It stands not only for the separation of the languages, but also for the separation of the cultures and the ideologies. The linguistic minorities sometimes feel out-voted by the majority of the German speaking fellow citizen on political issues.

Finally, since “devolution”<sup>41</sup>, the Welsh language has become the second “official language” in Wales. For example, the Government of Wales Act 1998<sup>42</sup> provides

47 Equal treatment of English and Welsh languages

- (1) The Assembly shall in the conduct of its business give effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that the English and Welsh languages should be treated on a basis of equality.
- (2) In determining how to comply with subsection (1), the Assembly shall have regard to the spirit of any guidelines under section 9 of the [1993 c. 38.] Welsh Language Act 1993.
- (3) The standing orders shall be made in both English and Welsh.

## Laws of Ukraine

The laws which are the main subject-matter of this Report (and are referred to by Ukraine in its Report to the FCNM, and its First Periodical Report to the Languages Charter) are as follows

- 1989 Law “On Languages in the Ukrainian Soviet Socialist Republic”<sup>43</sup>
- 1992 Law “On National Minorities”<sup>44</sup>
- 1992 Law “On Print Media (the Press) in Ukraine”<sup>45</sup>
- 1994 Law “On Television and Radio Broadcasting”, amended with a completely new text in 2006<sup>46</sup>
- Constitution of Ukraine 1996<sup>47</sup>
- 1997 Law “On Publishing”<sup>48</sup>

<sup>41</sup> The referendum held in September 1997 saw a narrow vote in favour of devolution. Two years later the National Assembly for Wales was created. The Assembly took over responsibility from the (Westminster) Secretary of State for Wales for many areas of public life, including education and the arts, where language is an issue. Welsh is now a language of government in Wales.

<sup>42</sup> [http://www.opsi.gov.uk/acts/acts1998/ukpga\\_19980038\\_en\\_1](http://www.opsi.gov.uk/acts/acts1998/ukpga_19980038_en_1)

<sup>43</sup> Vidomosti Verkhovnoyi Rady Ukrayiny (VVR), 1989, issue 45, page 631; Carried into effect by Resolution of the Supreme Council (Parliament) of Ukraine #8313-11 of 28 October 1989, VVR 1989, issue 45, page 632; Changed and amended according to Law of Ukraine #75/95-VR of 28 February 1995, VVR 1995, issue 13, page 85

<sup>44</sup> In the wording of the Law no. 2494-12 of June 25th, 1992. (Supreme Executive Council, No. 36, Art. 529).

<sup>45</sup> No 2782-XII November 16, 1992 Amended according to Laws of Ukraine #3582-12 of November 11, 1993 #70/97-VR of February 14, 1997

<sup>46</sup> No 3759-XII 21 December 1993 Enacted under Resolution #3760-12 of the Supreme Council of Ukraine, of 12.21.93, VVR, 1994, #10, p. 44) ; and The *Vidomosti Verkhovnoi Rady Ukrainy* (VVR), 2006, No. 18, p. 155)

<sup>47</sup> Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996

- 1999 Law “On General Secondary Education”<sup>49</sup>
- 2001 Law “On Ukrainian Citizenship”<sup>50</sup>
- 2002 Law “On the Judicial System of Ukraine”<sup>51</sup>
- 1960 Criminal Procedure Code, amended many times, most recently in 2005<sup>52</sup>
- 2006 Amendments to the Civil Procedural Code<sup>53</sup>
- 2006 Amendments to the Code of Administrative Legal Procedure<sup>54</sup>

Also of importance is:

- December 1996 Decree of the President “On publishing legislative acts of Ukraine”<sup>55</sup>

This Decree ordered that all laws be published also in the Russian language

It may immediately be seen that the key laws on Languages and on National Minorities pre-date the Constitution, and also pre-date ratification by Ukraine of the FCNM in 1997 and of the Languages Charter in 2003.

The Public Report prepared by Messrs Kolesnichenko and Bortnik also asserts that “the status of regional and minority languages in Ukraine is absolutely undermined in the Constitutional Law of Ukraine, as well as in the codes of practice and laws...”, and they then list no less than 46 laws, including the laws mentioned above. I do not have the remaining laws in Russian, and in the space of this Chapter I cannot comment on them in detail. I attach the list as Annex 1.

## **The 1989 Law “On Languages”**

### **The background to the law**

At first glance, it is surprising that the 1989 Law “On Languages” is still in force. Nevertheless, it has set the boundaries and the tone for all subsequent developments. As Kulyk observes, its apparent ambiguity, analysed below, is the direct result of Soviet policy, which while promoting Russian as the accepted language of public and private communication, at the same time ensured that “... the Ukrainian language was by no means illegitimate. Not only was its existence as a separate language unequivocally accepted, which in itself constituted a tremendous change in comparison with the Tsarist policy of treating it as a dialect of Russian and banning its use in most public domains.”<sup>56</sup> Kulyk also points out that Ukrainian was seen as a natural “native language” of ethnic Ukrainians.

His own conclusion is that this provided the “common-sense” basis for “highly contradictory ideological messages” with regard to the relationship between Ukrainian nation-building and the continued presence of the Russian language in so many spheres of life, which in turn “discouraged the perception of ethnolinguistic matters in terms of human rights and adherence to the law”.<sup>57</sup>

<sup>48</sup> No 318/97-VR of 5 June 1997

<sup>49</sup> No. 651-XIV, Vidomosti Verkhovnoyi Rady Ukrayiny, 1999, issue 28, page 230; Changed and amended according to Law of Ukraine #1642-III (1642-14) of 06 April 2000

<sup>50</sup> No 2235-III of January 18, 2001

<sup>51</sup> No 3018-III of 7 February 2002

<sup>52</sup> In Ukrainian only at

<http://www.legislationline.org/upload/legislations/b8/96/573df3ccfe73a97311785d575f13.htm>

<sup>53</sup> Law of Ukraine of 16.03.2006 № 3551-IV

<sup>54</sup> Law of Ukraine of 16.03.2006 № 3550-IV

<sup>55</sup> No.1207/96, to ensure publication of laws in Russian and Crimean Tatar

<sup>56</sup> Kulyk (2006), p.291

<sup>57</sup> Kulyk (2006) p.310

Professor Volodymyr Vassilenko, the leading expert on international law at Kyiv-Mohylka Academy, who was engaged in drafting the 1989 and subsequent laws, and represents Ukraine on various international bodies, takes a different view. He considers that Kulyk is mistaken in emphasising human rights and the rule of law. For him, Kulyk does not wish to understand that the question of language – that is, the status of the state language – is part of the constitutional order, designed to preserve the rights of the Ukrainian nation. Russian cannot be given any status other than the language of a national minority.<sup>58</sup> The survival of Ukraine as a nation is, he says, at stake.

These are two strongly contrasting positions by experts from political science and law respectively, which accurately indicate the deep divisions between Ukrainian experts on the questions of the nature and purpose of legislation.

### **Analysis of the 1989 Law**

I have used the unofficial translation into English of the Law of 1989 as amended by the Law of Ukraine No.75/85-VR of 28 February 1995<sup>59</sup>

I have also used the English translation of the 1996 Constitution posted on the web-site of the Verkhovna Rada<sup>60</sup> at <http://www.rada.gov.ua/const/conengl.htm>

This law, which is still in force, despite its great age, has a number of defects. Most important, as I show below, is that it is underpinned by a conception which is highly dubious, and in fact contradicts the Constitution, that is the notion of Ukrainian as the language of the “Ukrainian people”.

#### *Preamble*

The first paragraph of the Preamble refers to “all national languages” and to “free development and equal standing of national languages”. These formulations are not at all clear. If the word “national” is used with the same sense as in the phrase “national minority”, then I presume that “national” in this context means “ethnic”. What it should mean is “all the languages actually spoken on the territory of Ukraine.”

The second paragraph of the Preamble contains a phrase not often used in a legal context: “The Ukrainian language is one of the important factors of the national originality of the Ukrainian people.”

This formulation directly contradicts the first sentence of the preamble of the Constitution, which refers to “the Ukrainian people — citizens of Ukraine of all nationalities”. The preamble to the 1989 Law therefore refers only to a part of the “Ukrainian people” as defined in the Constitution.

As to the reference to “originality”, I assume this is “samobytnost” in Russian. This is also highly questionable, since it tends to essentialise both ethnic Ukrainians and the Ukrainian language. It also places an extraordinary burden on the preservation of the Ukrainian language.

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<sup>58</sup> Interview with the author, Kyiv, 26 February 2008.

<sup>59</sup> VVR 1995, issue 13, page 98, at

[http://www.minelres.lv/NationalLegislation/Ukraine/Ukraine\\_Language\\_English.htm](http://www.minelres.lv/NationalLegislation/Ukraine/Ukraine_Language_English.htm)

<sup>60</sup> at <http://www.rada.gov.ua/const/conengl.htm>

If “the Ukrainian people” has the same meaning as in the Constitution, then the third paragraph of the Preamble also violates the Constitution, or it is self-contradictory. The development of the spiritual creative forces of citizens of Ukraine of all nationalities cannot be supported by vesting just one language with the status of the state language.

It is very hard to make any juridical sense of the fourth sentence of the Preamble. I am not sure what is meant by the “social value” of Ukrainian and Russian. And the formulation concerning Russian as “the language of interethnic communication of peoples of the USSR” is not only redundant but also hard to understand. I note that Article 36 of the 1977 USSR Constitution made rather different provision:

Citizens of the USSR of different races and nationalities have equal rights.

Exercise of these rights is ensured by a policy of all-round development and drawing together of all the nations and nationalities of the USSR, by educating citizens in the spirit of Soviet patriotism and socialist internationalism, and by the possibility to use their native language and the languages of other peoples in the USSR.<sup>61</sup>

### **Article 1**

I note that this article refers to “Ukrainian and other languages used by the population of the Republic”, rather than to ethnicity or mother tongue. In this regard it is fully compliant with international standards. The reference to the USSR is of course redundant.

### **Article 2**

This article declares that the Ukrainian language is the state language of Ukraine, and this, as I have shown, is entirely proper. Ukraine’s right to decide on its state language is its right in international law.

The third paragraph states, commendably, that all citizens will have the means to learn Ukrainian; hopefully free of charge. Every Ukrainian citizen must of course learn Ukrainian.

### **Article 3**

This article deals with the “use of languages of other nations” in Ukraine, and to use of the “national languages”, as well as “citizens of another nationality”. This appears to assume that there are distinct “nations” (on an ethnic basis) in Ukraine and that each has its own language. This contradicts the Constitution and the international commitments of Ukraine. I note the scheme of the FCNM and the Languages Charter, as well as the OSCE commitments, is that there are “national minorities”, membership of which is a matter of individual choice rather than an ethno-political decision; and that members of national minorities may use their languages. This of course does not exclude that several languages may be used by one person.

### **Article 4**

This article specifies that in the Ukrainian SSR, Ukrainian, Russian and other languages will be the languages of inter-ethnic communication. Furthermore, the state will provide for the free use of the Russian language as the language of inter-ethnic communication for the peoples of the USSR!

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<sup>61</sup> <http://www.departments.bucknell.edu/russian/const/1977toc.html>

**Article 5**

This provides for the right of citizens to “use” their “national” or any other languages. Citizens are entitled to address state and other public bodies in Ukrainian or Russian; and decisions must be issued in Russian if a citizen so decides. This provision must have been superseded by the Languages Charter, and the specific level of implementation of Article 10 upon which Ukraine decides.

**Article 6**

This requires all public officials as well as officials of “institutions and organisations” to be or to become fluent in both Ukrainian and Russian, and, if necessary, in another “national” language. This too should be superseded by implementation of the Languages Charter.

**Article 10**

This requires that normative acts should be adopted in Ukrainian and published in Ukrainian and Russian. Russian is given a superior status to other minority languages; publication in these, where necessary, applies only to secondary organs of state power.

**Article 11**

This specifies that Ukrainian will be the language of record, save where a majority of the population of a “certain area” are not fluent in Ukrainian, when their language may be used as well. This is perfectly acceptable.

**Article 14**

This article concerning citizenship status privileges Russian in a way which is not compatible with the FCNM or Languages Charter.

**Article 15**

Ukrainian is to be the language of congresses, conferences and forums, except in areas where a majority is not fluent in Ukrainian. Again, this should be superseded by implementation of the Languages Charter.

**Article 16**

The language of elections is to be Ukrainian.

**Articles 18 to 23**

This article on the language of court procedures makes no mention of Russian, specifies that the language of the courts shall be Ukrainian, but makes the standard proviso for the circumstance in which a majority of the population in a “certain area” are not fluent in Ukrainian. The Languages Charter should also displace this.

**Article 25**

This is a very important provision, declaring that the “free choice of the language of education shall be the inalienable right” of Ukrainian citizens. It goes on that the right of each child to upbringing and education in the national language shall be guaranteed, and protected by the establishment of state schools with upbringing and teaching in Ukrainian and “other national languages”. This right is further explained in the following articles. For example, Article 27 provides that “in places of compact residence of citizens of other nationalities” the state will establish secondary schools for children “in their national or another language” Furthermore, the study of Ukrainian and Russian is mandatory.

Implementation of this provision would mean a substantially higher level of implementation of Article 8 of the Languages Charter than presently appears in Ukraine’s Instrument of Ratification. It is a splendid aspiration, but requires detail as to the level of demand required to trigger minority language or bi-lingual education. Furthermore, attention should be given to the proven cognitive and educational advantages of bi-lingual education.

I also note that in his letter of 12 January 2001 to the Minister of Foreign Affairs, following his visits to Ukraine in 2000 in which I took part as his expert, Mr van der Stoel, the HCNM, recommended as follows:

3. It is desirable to ensure more clarity regarding the right of parents to request the setting up of a Ukrainian language class in a Russian language school or of a Russian language class in a Ukrainian language school, provided that the parents of at least 8 to 10 children apply. School boards would have to be obliged to inform parents annually that such possibilities exist, and would also have to indicate by which date applications will have to be received. In order to help to overcome the frequently occurring problem of lack of communication between potentially interested parents, school boards ought also to be obliged to inform parents if one or more parents have taken the initiative to apply for a separate class.

Kulyk interprets the 1989 law in the following way. On the one hand, therefore “Russian was to retain its legitimacy in virtually all social practices as the language of inter-ethnic communication”; on the other hand proclamation of Ukrainian as the state language, to be enshrined in the 1996 Constitution, instituted a “nation-state programme”, supported by Galicia and similar regions.

### **The 1992 Law “On National Minorities”<sup>62</sup>**

The other crucial law is the 1992 Law “On National Minorities”, which, like the other subsequent laws “while providing for a broad scope of ethnocultural rights... were oriented towards the nation-state model. In particular, they treated Russians as an ordinary minority and did not provide any privileged status for the Russian language...” as Kulyk has pointed out.<sup>63</sup>

Thus, Article 3 of the 1992 law defines “national minority” as follows:

“To national minorities belong groups of Ukrainian citizens, who are not of Ukrainian nationality, but show feeling of national self-awareness and affinity.”

However, the Law does not specify which national minorities are present in Ukraine, and this was a matter for comment by the FCNM’s Advisory Committee:

<sup>62</sup> In the wording of the Law no. 2494-12 of June 25th, 1992. (Supreme Executive Council, No. 36, Art. 529). English-language version prepared by Abraham Korin & Michail Chevrichenko, Copenhagen, at: [http://www.minelres.lv/NationalLegislation/Ukraine/Ukraine\\_Minorities\\_English.htm](http://www.minelres.lv/NationalLegislation/Ukraine/Ukraine_Minorities_English.htm)

<sup>63</sup> Kulyk (2006), p.295

16. The Advisory Committee notes that Ukraine has not established a list of national minorities. The State Report implies that all 130 “nationalities” residing in Ukraine, except the Ukrainians, are covered by the Framework Convention. At the same time, the State Report employs the term “ethnographic (sub-ethnic) groups of the Ukrainian people” - a term that is not defined in any legislation pertaining to national minorities - to describe e.g. the Boikos, Hutsuls and Rusyns, without giving comprehensive information on their situation and without indicating whether it considers that persons belonging to these groups are protected by the Framework Convention. ... The Advisory Committee nevertheless expects that the numerical data concerning various “ethnic origin” categories will also be made public and that, thereby, the results of the census will provide a basis for an improved dialogue between persons belonging to the groups concerned and the authorities, covering also issues pertaining to the implementation of the Framework Convention.

#### And 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...”

The phrase “national-cultural autonomy” has a very specific historical meaning<sup>64</sup>, and is not otherwise defined in this law or, to date, in other Ukrainian legislation.<sup>65</sup> The FCNM Advisory Committee said:

“Article 6 of the Law on National Minorities guarantees cultural autonomy for national minorities. This is however formulated only in an extremely general fashion, and the Advisory Committee considers that the content and the reach of this concept would merit being defined and developed in more detail.”

Article 8 provides that in places where “a majority of the population is made up by a national minority”, the native language may be used as well as Ukrainian in public and private institutions. This provision is entirely unclear as to how the question is to be determined. According to international law, this can only mean a majority of those individuals identifying themselves as belonging to a national minority; and furthermore, ought in fact to be those persons identifying themselves as using a language other than Ukrainian. Would this be determined by an opinion poll? By a referendum? Or how? In its present form, this provision is unworkable, and must be superseded by implementation of the Languages Charter.

The FCNM Advisory Committee were concerned at this:

At the same time, Article 8 of the Law on National Minorities and Article 3 of the Law on Languages provide that, as a rule, a minority language can be used as a working language of various public bodies in the localities where a minority constitutes a majority. It follows that the legal threshold for the right to use a minority language other than Russian in contacts with administrative authorities is too high from the

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<sup>64</sup> See my work on NCA in Russia: Bill Bowring (2007) “The Tatars of the Russian Federation and National-Cultural Autonomy: A Contradiction in Terms?” in Karl Cordell and David Smith (eds) *The Theory and Practice of Cultural Autonomy in Central and Eastern Europe: Historical and Contemporary Perspectives* Special Issue of *Ethnopolitics* Vol. 6. n.3, pp.417-435; Bill Bowring “Burial and Resurrection: Karl Renner’s controversial influence on the ‘National Question’ in Russia” in Ephraim Nimni (ed) *National-Cultural Autonomy and its Contemporary Critics* (Routledge, 2005) pp.191-206; Bill Bowring “Austro-Marxism’s Last Laugh?: The Struggle for Recognition of National-Cultural Autonomy for Rossians and Russians” (March 2002) v.54, n.2 *Europe-Asia Studies* pp.229-250

<sup>65</sup> In 2006 I was asked by the Council of Europe to provide expertise on a draft Law “On national-cultural autonomy” presented to the Verkhovna Rada by a Deputy representing ethnic Hungarians. This draft made no progress.

point of Article 10 of the Framework Convention and that it depends largely on the decision of the authorities/bodies concerned.

There is a further, very serious, criticism of this Law, which is that it refers to “citizens”. Restriction of such rights to citizens is contrary to the general trend of international law. The FCNM Advisory Committee stated as follows:

17. The Advisory Committee notes that certain legislation pertaining to national minorities, notably the 1992 Law on National Minorities, applies only to citizens of Ukraine. The Advisory Committee notes that this limitation affects also persons belonging to groups addressed in the State Report, bearing in mind the difficulties that the formerly deported people have had in obtaining the citizenship of Ukraine (see also related comments under Article 15).

18. With a view to the preceding paragraphs, the Advisory Committee considers that there remains scope for covering further groups within the scope of the Framework Convention. The Advisory Committee is of the opinion that it would be possible to consider the inclusion of persons belonging to these groups, including non-citizens as appropriate, in the application of the Framework Convention on an article-by-article basis, and the Advisory Committee takes the view that the Ukraine authorities should consider this issue in consultation with those concerned.

19. The Advisory Committee further notes that the State Report deals with persons belonging to groups whose representatives have certain hesitations about the use of the term “national minorities” to describe the population concerned. This is the case in particular for the Crimean Tatars, whose representatives prefer the term “indigenous people”. ...

20. The Advisory Committee also notes that amongst persons belonging to the Russian minority in Ukraine there is a certain reluctance to employ the term national minority. **Furthermore, it needs to be noted that, in addition to the ethnic Russians, there is a large number of ethnic Ukrainians whose mother tongue is Russian. These factors need to be taken into account when the authorities take measures to implement the Framework Convention and they also need to be reflected in the terminology used.** (my emphasis)

Any future legislation on this topic should expressly include non-citizens as well as citizens. It should be noted that in its General Comment the UN Human Rights Committee has expressly ruled that article 27 of the ICCPR applies to non-citizens as well as to citizens.

### **The 1992 Law on the print media**

The 1992 law on the press states that “Print media in Ukraine shall be edited in the official language and in any other language.” – thus, Russian, and Crimean Tatar, the indigenous language of Crimea, becomes “any other language”, which is not acceptable.

### **The 1994 law on broadcasting**

This provided in Article 9 that “TV/radio companies shall broadcast in the national [official] language”, while “programmes beamed at certain regions may be in the language of the numerically prevalent local ethnic minority.”

The FCNM Advisory Committee expressed specific concerns in relation to this provision, as follows:

43. With respect to the electronic media, the Advisory Committee notes that Article 6 the Law on National Minorities provides for the right of persons belonging to national minorities to “satisfy their needs in the field of mass media”. At the same time, Article 9 of the Law on Television and Radio Broadcasting stipulates that TV/radio organisations shall broadcast in the official language but that “programs beamed on certain regions may be in the language of the numerically prevalent local ethnic minority in the regions where national minorities live compactly”. While recognising that Ukraine can legitimately demand broadcasting licensing of broadcasting enterprises and that the need to promote the official language can

be one of the factors to be taken into account in that context, an overall exclusion of the use of the languages of national minorities in the nation-wide public service and private broadcasting sectors is not compatible with Article 9 of the Framework Convention, bearing in mind inter alia the size of the population concerned and the fact that a large number of persons belonging to national minorities reside outside areas of compact residency.

44. ... The Advisory Committee considers it important that a maximum level of flexibility is maintained pending amendments to the relevant legislation.

45. The fact that licenses can be granted for broadcasting in a minority language in regions where national minorities live compactly is in itself positive, although the provision falls short of encouraging such broadcasting. The Advisory Committee further notes that the term “compactly” is not defined in any manner in the legislation, and this fact has caused a level of legal uncertainty and, as a result, this crucial matter is largely at the discretion of the authority responsible for licensing decisions, namely the National Television and Radio Council.

46. The Advisory Committee further notes that, when taking its licensing decisions, the National Television and Radio Council has imposed specific language-related quota for broadcasting in various regions, indicating what percentage of the programming must be in the Ukrainian language. The Advisory Committee considers that, bearing in mind its implications for persons belonging to national minorities and the fact that excessive quotas may impair the implementation of the rights contained in Article 9 of Framework Convention, this practice needs to be implemented with caution. Furthermore, it would need to be rooted in a more precise legislative basis than what is contained in the above-quoted provision of Article 9 of the Law on Television and Radio Broadcasting.

47. In the light of the foregoing, the Advisory Committee considers that Ukraine should review the provisions pertaining to the use of the languages of national minorities in nation-wide and regional broadcasting in its Law on Television and Radio Broadcasting, with a view to clarifying them and to ensuring that they are fully compatible with the principles contained in Article 9 of the Framework Convention.

The Law as re-enacted in 2006 now provides:

Article 10. Use of languages in the informational activity of broadcasting organisations

1. Broadcasting organisations shall broadcast in the state language.
2. Broadcasting to specific regions may also proceed in the languages of ethnic minorities residing in such region as distinct communities.
3. In the event that the original language (or that of dubbing) of a film and/or other programme (broadcast) is not Ukrainian, showing of such films and/or programmes (broadcasts) shall be conditional upon their dubbing into the state language.
4. For nationwide broadcasting, the share of air-time when broadcasting is carried out in the Ukrainian language may not be less than 75 % of the total daily broadcasting time.
5. Broadcasting to a foreign audience shall be carried out in Ukrainian and the corresponding foreign language.
6. The language (languages) of a broadcasting organisation's programmes and broadcasts shall be defined in its broadcasting license terms.

With a view to the operation of multichannel television networks, the above rules apply to re-transmission of programmes and broadcasts of businesses licensed by the National Broadcasting Council of Ukraine.

As noted below, this new provision, upheld by the Constitutional Court, is the subject of considerable controversy.

### **The 1996 Constitution**

The Constitution of 28 June 1996 sought to settle the language issue as follows in Article 10:

“The state language of Ukraine is the Ukrainian language.

The State ensures the comprehensive development and functioning of the Ukrainian language in all spheres of social life throughout the entire territory of Ukraine.

In Ukraine, the free development, use and protection of Russian, and other languages of national minorities of Ukraine, is guaranteed.

The State promotes the learning of languages of international communication.

The use of languages in Ukraine is guaranteed by the Constitution of Ukraine and is determined by law.”

The Constitution also provides in Article 53 in respect of education that “Citizens who belong to national minorities are guaranteed in accordance with the law 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.”

Thus, the status of Ukrainian as the state language was preserved, and Russian, although specifically mentioned, was given no status other than that of the language of a national minority. Kulyk notes that “... the central place of the titular group in society was fixed in the 1996 Constitution and laws dealing with ethnopolitical issues... were patterned on the nation-state norm.”<sup>66</sup>

The advisory decision of the Ukrainian Constitutional Court, delivered on 14 December 1999, sought further to clarify Article 10. The majority of judges held that the Ukrainian language was the “compulsory means of communication for officials of government bodies and local self-government structures, and in all spheres of public life” including education. They also stated that “local government bodies, bodies of Crimean Autonomous Republic and local self-government bodies may use Russian and other languages of national minorities along with the state language”. There was one strong dissent, by Judge Mironenko. According to the dissenting judge, the Court paid too little attention to the third sentence of Article 10: “In Ukraine, the free development, use and protection of Russian, other languages of national minorities of Ukraine, is guaranteed”.

### **The 1997 law on publishing**

This states, in Article 3, that the purposes of publishing include: “Assisting the national-cultural growth of the Ukrainian people by increasing the overall circulation of printed matter and expanding the range of subjects covered by Ukrainian book-printing;... Printing books in Russian to satisfy cultural needs of Ukraine's Russian-speaking residents, with due regard to imported printed matter; Printing books in languages spoken by other ethnic minorities in Ukraine;...”. Article 8 of this law provides that: “Languages in the publishing domain shall be used in keeping with Article 10, Constitution of Ukraine, Law of Ukraine *On Languages in Ukraine* (8312-11), and other legislative acts of Ukraine. All printed matter meant for official and consumer use (e.g., blanks, receipts, tickets, certificates, diplomas, etc.) and distributed via government-run enterprises, institutions, and organizations shall be in the official language. The state shall encourage the preparation, production, and dissemination of printed matter in the official language and those spoken by ethnic minorities inhabiting Ukraine...”

### **The 1999 law on secondary education,**

This law, enacted with Article 10 of the Constitution in mind, simply provides, in Article 7, that “The language (languages) of teaching and education in general education institutions shall be determined according to the Constitution of Ukraine and the Law of Ukraine “On Languages in the Ukrainian Soviet Socialist Republic”.”

### **The 2002 law on the judicial system**

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<sup>66</sup> Kulyk (2006) p.300

This went further. By Article 10, “Judicial procedure in Ukraine shall be carried out in the official national language... Other languages may also be applied in cases provided for by the law and pursuant to the procedure stipulated thereby.” By Article 59, professional judges must have “a proper command of the national language”, while by Article 67 peoples’ assessors as well as jurors may be discharged if they “do not know the official national language”  
**procedural laws** Finally, Article 9(5) of the 2001 law on citizenship provides that a condition for the grant of citizenship is “command of the official language or understanding it to a degree sufficient for adequate communication using that language.”

Furthermore, I have been informed that Article 19 of the Criminal Procedure Code provides that legal proceedings shall be carried out in the Ukrainian language or in a language spoken by the majority of people living in a locality.

From 1 September 2005 (as reported to me) legal proceedings may be carried out in the Ukrainian language only pursuant to the new Civil Procedure Code and Administrative Procedure Code.<sup>67</sup> I have been unable so far to find these laws in Russian or in English. This, if true, runs totally counter to the spirit of the FCNM and the Languages Charter.

The firm position of representatives of the present governing parties<sup>68</sup> is that the 1989 Law is obsolete by virtue of appearing to concede a special status to the Russian language, while Article 10 of the 1996 Constitution and the 1999 advisory opinion of the Constitutional Court have simply never been implemented.

### Government policy and recent events

There is so far no state organ with responsibility for language policy despite discussion for many years. This may well change in the near future, witness the Letter of the President of Ukraine Viktor Yushchenko to the Cabinet of Ministers 15 January 2008, instructing them to consider the question of creating the necessary central organ for working out state language policy.<sup>69</sup> This has (very unusually) been followed by a Presidential Decree of 20 February 2008 – it appears that the Letter was ignored.<sup>70</sup>

It is noteworthy that this initiative by the President received very little attention, and with one exception was not discussed in the mass media. The exception was the long article by Stanislav Shumlyanskii which appeared in *Ukrainskaya Pravda* on 6 February 2008<sup>71</sup>. He identified a number of issues. First, the name of the new body and its affiliation will be of the greatest importance. He advised (and I agree) that particular attention should be paid to the *Bwrdd Yr Iaith Gymraeg* (Welsh Language Board), founded in 1993<sup>72</sup>, and *L'Office québécois de la langue française* (Quebec office of the French language) founded in 1961<sup>73</sup>.

On 27 February 2008 there was a partial strike of cinemas to protest against the decree of the Ministry of Culture dated 18 January 2008 forbidding the showing of films not dubbed into Ukrainian; that is, foreign films dubbed into Russian. There were counter-protests by “followers

<sup>67</sup> Kolesnichenko and Bortnik, Public Report, p.39

<sup>68</sup> Pavel Movchan (BYut) and Ivan Zayets (NUNS), interviewed by the author on 25 February 2008.

<sup>69</sup> Sergei Ponomaryov “Mother tongue – the spirit of the nation”, interview with Lesya Stavitskaya, Head of the Department of Sociolinguistics at the Institute of Ukrainian Language, Ukrainian Academy of Science *Kievskoye Slovo* No.8 (44) 21 February 2008, p.4; 21 February 2008 was the International Day of the Mother Tongue, the result of the decision of UNESCO in 1999.

<sup>70</sup> Decree No. 146/2008, at <http://www.president.gov.ua/documents/7482.html>

<sup>71</sup> At [http://pravda.com.ua/ru/news\\_print/2008/2/6/71017.htm](http://pravda.com.ua/ru/news_print/2008/2/6/71017.htm)

<sup>72</sup> <http://www.bwrdd-yr-iaith.org.uk/>

<sup>73</sup> <http://www.oqlf.gouv.qc.ca/>

of Stepan Bandera".<sup>74</sup> This followed the decision of the Ukrainian Constitutional Court of 20 December 2007 (into force on 24 December). This decision confirmed the new Law on Broadcasting noted above and made it compulsory for all films being released on the Ukrainian market (including those in Russian) to have subtitles or dubbing in the State language ( i.e. Ukrainian). Halya Coynash of the Kharkiv Human Rights Protection Group commented:

"A journey by public transport in Kyiv for example, Ukraine's capital city, will assuage all concerns about the threatened position of the Russian language. It is much more disturbing how seldom one hears Ukrainian being spoken. The history of the film situation provides a vivid example of the situation. In late 2006, film distributors refused to fulfil quotas for dubbing in Ukrainian rather than Russian, claiming that it was not financially viable for them. After the Cabinet of Ministers failed to take any measures to ensure that the laws were adhered to, a civic initiative arose. Within months a very large number of people had pledged to boycott any films dubbed in Russian rather than Ukrainian."<sup>75</sup>

She also referred to the remarks of Hassan Bermek, of the Language Charter's Secretariat<sup>76</sup>:

"According to the provisions of the Charter, only central state bodies have the authority to grant a language any particular status. ... Only the central authorities of a state which has ratified the Charter are empowered to determine which language are to be deemed regional or minority and on what territory."

These are words which should be recalled by those drafting any future legislation.

### **New draft laws**

A number of draft laws have been presented to the Verkhovna Rada between November 2007 and the present. These drafts have received no comment either in the mass media or more scholarly sources as far as I could discover.

During my visit in February 2008, my various interlocutors were unanimous in insisting that these drafts represent no more than the taking of political positions on the language issue by politicians on the two opposing sides. None of them is likely to provide the basis for the new draft to be considered by the body now established by the President. If, indeed, that body ever comes into concrete existence, which many doubt.

The drafts are:

- 1) draft law on amendments to the Law of Ukrainian SSR on Languages in Ukraine of 23 November 2007<sup>77</sup> proposed by N. Shufrych (Party of the Regions)
- 2) draft law on Languages of Ukraine of 29 November 2007<sup>78</sup> proposed by L. Grach (The Communist Party of Ukraine)
- 3) draft law on amendments to the Law on Ratification of the Languages Charter of 29 November 2007<sup>79</sup> proposed by V. Kolesnichenko (PoR)

<sup>74</sup> See Aleksandr Chalenko "Cinema operators carry out an action against Ukrainisation, and the followers of Stepan Bandera, against Russification", *Sevodnya* 27 February 2008, No.46 (2882) p.2

<sup>75</sup> Halya Coynash "No Tower of Babel" 14 January 2008 Kharkiv Human Rights Protection Group, at <http://www.unian.net/eng/news/news-230732.html>

<sup>76</sup> Volodymyr Kravchenko, Oksana Prikhodko "Hassan Bermek - 'The Charter does not diminish the significance of the State Language'" № 28 (607) 22 — 28 липня 2006, at <http://www.dt.ua/1000/1030/54048/>

<sup>77</sup> [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=30700](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=30700)

<sup>78</sup> [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=30795](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=30795)

<sup>79</sup> [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=30834](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=30834)

- 4) draft law on Regional Languages and Minority Languages of 29 November 2007<sup>80</sup> proposed by V. Kolesnichenko (PoR)
- 5) draft law on State Language of Ukraine of 21 January 2008<sup>81</sup> proposed by P. Movchan (Yulia Tymoshenko Bloc - BYuT) and V. Yavorivskii (BYuT)
- 6) draft Law on Language of 25 January 2008<sup>82</sup> proposed by P. Movchan (BYuT) and V. Yavorivskii (BYuT)

In view of the fact that none of these drafts will ever be enacted, I restrict my self to brief comments on each. I must also point out that it was not possible for me to obtain translations into Russian save for automated computer programme translations, which are far from ideal

The Shufrych draft, which has 45 articles is based on the assertion, according to its explanatory note, that the Law of 1989 contradicts the Languages Charter. It is centred on a concept of “the right of linguistic self-determination”. This is contained in the Preamble and in Article 2, which specifies that each person has the right to choose the language which s/he considers to be the mother tongue, to choose the language of communication, and to decide whether s/he is bilingual or multilingual. Article 3 defines “linguistic groups” using a regional or minority language, membership of which is to be based on self-identification. Article 6 deals with regional or minority languages, and provides for the assumption of the status of a regional or minority language in a particular territory on the basis either of a local referendum or on the basis of official statistics as to mother tongue. Such a language can then (Article 7) receive the status of broadly distributed (not less than 20%), distributed (10-20%), or less distributed (less than 10%) language.

The Grach draft has 32 articles, and also seeks to amend the laws on education, pre-school education, general secondary education, out of school education, on the judicial system, the code of administrative justice, the criminal procedural code, on notaries, on elections, on referenda, on registration, on culture, on information and information agencies, on local government, on postal services, on telecommunications, on medicines, and on national minorities. According to its explanatory note, it seeks (as do the other drafts) to implement the Constitution and the Languages Charter. Its basic principle is that every citizen of Ukraine, regardless of ethnicity, national-cultural self-identification, place of residence etc should have the right freely to use any language, to study and support any language, and to consider themselves a member of one or more linguistic groups. This is described as free linguistic self-determination.

This is the only draft I have seem accompanied by a Conclusion prepared by the Verkhovna Rada staff, signed by V. Bordenyuk, head of the Main Scientific Expert Administration, calling for the rejection of this draft at first reading. In their view the draft is inconsistent with the Constitution and other laws of Ukraine. They strongly criticise the use throughout the draft of the phrase “regional language”, when that phrase is nowhere to be found in the Constitution. The Administration insist that language is not a territorial phenomenon but ethno-national. They refer to Article 11 of the Constitution, which refers to state participation in the development of linguistic “originality” (*samobytnost*) of *all indigenous peoples and national minorities* (their emphasis), and not the population of a territory or linguistic group. They also complain that the draft does not give a concise answer to the question: is the Russian language one of the regional languages or the language of one of the national minorities? They draw attention to the fact that

<sup>80</sup> [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=30835](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=30835)

<sup>81</sup> [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=31410](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=31410)

<sup>82</sup> [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=31504](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=31504)

no definition is given to words used in the draft such as “mother tongue”, “language which is traditionally used in Ukraine”, “bi-lingual”, “multi-lingualism”, “change of language preference”, etc. Most of all, the term “regional language” is illogical in relation to territorial administrative units such as hamlet, village, town and so on.

This Conclusion (which contains a great deal more criticism) gives a clear idea of the likely reaction of the expert staff of the Verkhovna Rada to the other drafts, especially those of the Party of the Regions.

The Kolesnichenko draft for a law “On regional languages and languages of minorities” seeks to set up a procedure for defining those administrative and territorial units on the territory of which 13 languages are distributed to the extent necessary for applying to them the provisions of the Languages Charter. By article 2, “territorial communities” are to have the right to initiate the process of recognition of languages, and the decision is to be taken by a majority of local deputies. This is to depend on use of a language by 17% of the population of the territory. According to the explanatory note, this is the result of the fact that according to statistics 17% of the population are “Russians” (I presume that he means “ethnic Russians”). I do not entirely follow his logic when he explains that this is to be the criterion in a particular territory.

The Kolesnichenko draft for a law amending the law on ratification of the Languages Charter. First it seeks to introduce a list of 13 languages: Belarussian, Bulgarian, Gagauz, Greek, Hebrew, Crimean Tatar, Moldovan, German, Polish, Russian, Romanian, Slovakian and Hungarian. It also proposes a higher level of implementation for Part III.

The Movchan and Yavorivskii draft for a law “On languages” has 34 articles, as well as proposed amendments to the laws on education, general secondary education, the administrative procedural code, and the law on notaries. The draft is intended, according to its explanatory note, to further define the status of the Ukrainian language as the state language, and to specify the norms of the state language. Article 2 states “By state language is understood that language which the state has specified as the obligatory language of communication in public spheres of social life. The state language in Ukraine is Ukrainian.” Article 2(3) provides that “The state language is obligatory for use in the activities of organs of state power and organs of local government, associations of citizens, institutions, organisations, and enterprises whatever the form of property.” Article 3 specifies that languages of national minorities can be used in the cultural, educational and informational spheres and in others defined by law. Strangely, Article 4 specifies that the “languages of international communication” for Ukraine are English, Spanish, Chinese, German, Russian and French.

It is plain that the underlying purpose of the draft is to implement what Mr Movchan and his colleagues believe to have been the purpose of Article 10 of the Constitution, namely that the Ukrainian language must be the only language used in all but purely private communication. This is also what Mr Movchan and his colleague Mr Zaets (Our Ukraine – People’s Self-Defence) told me when I met them in February 2008.

The Movchan and Yavorivskii draft law “On the state language of Ukraine” is along very similar lines, and is also intended to complete the implementation of Article 10 of the Constitution.

It will now be apparent why I take the view that none of these drafts will form the basis for a new official draft law “On languages of Ukraine”. This was also confirmed to me by senior officials in the President’s Secretariat.

## Results

The results of this investigation are as follows:

- 1) The starting point for any proposed new legislation should be a thorough study of the international obligations undertaken by Ukraine, and of the comments and views of the various expert and advisory bodies for the proper interpretation of the international provisions. There is a wealth of experience reflected in these reports, and Ukraine is not so unique that it cannot benefit.
- 2) In particular, no definitions should be adopted which depart significantly from the letter and spirit of these texts and their explanatory materials and comments, and reference should always be made to languages “used” or “spoken”.
- 3) A new Law “On languages of Ukraine” should be based on the intention to provide the fullest possible implementation of Part III of the Languages Charter, compatible with Ukraine’s economic and administrative resources.
- 4) Ukraine should consider revising its Instrument of Ratification (that is, the relevant Law) in the light of the above, so as to bring implementation of Part III, with regard to Russian and other minority or regional languages into line with the actual practice of Ukraine, and, further, to the maximum extent possible
- 5) Ukraine has every right to establish and promote Ukrainian as the state (official) of Ukraine.
- 6) There is no need at present to give a special constitutional status to Russian; on the other hand, several states have more than one official language and this may in future be a good solution, though not at the present time in Ukraine.
- 7) Particular attention should be given to the Crimean Tatar language, as the language of an indigenous people of a part of Ukraine, which suffered actual genocide in 1944 and even now suffers significant discrimination and deprivation.
- 8) Every public official should have a good command of Ukrainian; and in the appropriate administrative and judicial districts, a good command of the language(s) used there, as a condition for employment. Ukraine will have to think carefully about threshold.
- 9) Ukraine should maintain its admirable policy of a right to education both in and of the minority languages, including Russian. Careful thought must be given to the question of threshold of demand, which should be set as low as possible consistent with good education administration and the extent of resources.
- 10) In my view, a good command of the Ukrainian language should be a condition for entry to higher education.<sup>83</sup>

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<sup>83</sup> This recommendation is based on my experience as an expert in the Council of Europe’s project “Education and Minority Rights”, which covered Ukraine, Azerbaijan, Belarus, Georgia, Moldova, Russia. I wrote the report on Azerbaijan, where the failure to implement such a rule has led to serious problems.

## Annex 1

1. Criminal Procedure Code of Ukraine 1960.12.28;
2. Economic Procedure Code of Ukraine #1798-XII 1991.11.06;
3. Civil Procedure Code of Ukraine #1618-IV 2004.03.18;
4. Judicial Procedure Code of Ukraine #2747-IV 2005.07.06;
5. Law of Ukraine "On the Status of Judges" # 330-XIV 1998.12.22;
6. Law of Ukraine "On Election of President of Ukraine" # 474-XIV 1999.03.05;
7. Law of Ukraine "On Service in the local self-governance bodies" #2493-III 2001.06.07;
8. Law of Ukraine "On Education" # 1060-XII 1991.05.23;
9. Law of Ukraine "On Out-of-school Education" # 1841-III 2000.06.22;
10. Law of Ukraine "On Preschool Education" # 2628-III 2001.07.11;
11. Law of Ukraine "On General Secondary Education" # 651-XIV 1999.05.13;
12. Law of Ukraine "On Higher Education" # 2984-III 2002.01.17;
13. Law of Ukraine "On Languages in the Ukrainian SSR" # 8312-XI 1989.10.28;
14. Law of Ukraine "On TV and Radio Broadcasting" # 3759-XII 1993.12.21;
15. Law of Ukraine "On Procurement of Goods, Works and Services at the State Expense" # 1490-III 2000.02.22;
16. Law of Ukraine "On Notariat" # 3425-XII 1993.09.02;
17. Law of Ukraine "On Banks and Banking Activity" # 2121-III 2000.12.07;
18. Law of Ukraine "On Arbitration Courts" # 1701-IV 2004.05.11;
19. Law of Ukraine "On Compulsory State Retirement Insurance" # 1058-IV 2003.07.09;
20. Law of Ukraine "On State Registration of Legal Entities and Individuals – Entrepreneurs" # 755-IV 2003.05.15;
21. Law of Ukraine "On Election of Deputies to the Parliament of the Autonomous Republic of the Crimea, local councils and village, settlement and city mayors" # 1667-IV 2004.04.06;
22. Law of Ukraine "On Election of National Deputies of Ukraine" # 1665-IV 2004.03.25;
23. Law of Ukraine "On Geographical Names" # 2604-IV 2005.05.31;
24. Law of Ukraine "On Standards, Technical Regulations and Procedures of Conformance Evaluation" # 3164-IV 2005.12.01;
25. Law of Ukraine "On Topographic, Geodetic and Cartographic Activity" # 353-XIV 1998.12.23;
26. Law of Ukraine "On Production Distribution Agreements" #1039-XIV 1999.09.14;
27. Law of Ukraine "On Protection of Rights to Integrated Circuits Designs" # 621/97-VR 1997.11.05;
28. Law of Ukraine "On Protection of Rights to Indication of Goods Origin" #752-XIV 1999.06.16;
29. Law of Ukraine "On Protection of Rights to Industrial Designs" # 3688-XII 1993.12.15;
30. Law of Ukraine "On Distribution of Copies of Audiovisual Works, Phonograms, Videograms, Computer Software, Databases" # 1587-III 2000.03.23;
31. Law of Ukraine "On National Minorities in Ukraine" #2494-XII 1992.06.25;
32. Law of Ukraine "On Protection of Rights to Trademarks for Goods and Services" #3689-XII 1993.12.15;
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34. Law of Ukraine "On Protection of rights to Plant Varieties" # 3116-XII 1993.04.21;
35. Law of Ukraine "On State Regulation of Imported Agricultural Products" # 468/97-VR 1997.07.17;
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39. Law of Ukraine "On the Armed Forces of Ukraine" #1934-XII 1991.12.06;
40. Law of Ukraine "On Forwarding Entrepot" #1955-IV 2004.07.01;
41. Law of Ukraine "On Circulation of Notes in Ukraine" #2374-III 2001.04.05;
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43. Law of Ukraine "On National Manufacturer Defense from Subsidize Import" #331-XIV 1998.12.22;
44. Law of Ukraine "On Safety and Quality of Food Products" #771/97-VR 1997.12.23;
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