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Ukraine's Law on National Minorities and 'Effective' Participation: Expanding or Diluting Standards?

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Abstract

This article provides a critique of *Law No. 2827-IX 'On National Minorities (Communities) of Ukraine'*, adopted in December 2022, with a focus on minority participation. Following an overview of Ukraine's international commitments and domestic legislation on minority protection, we consider some of the complexities of Ukraine's minority rights regime, particularly those linked to the enduring challenge in striking a balance between the promotion of Ukrainian as the sole state language and the use of Russian and other languages. These dynamics have frequently resulted in the politicisation of language issues, with polarising effects. Meanwhile, participation of national minorities in these debates – and more generally in devising law and policy on matters affecting them – has been limited. The Law on National Minorities represents a welcome attempt to bring about inclusive decision-making, and for the Ukrainian state to meet the requirement of guaranteeing opportunities for *effective* minority participation. However, the Law's provisions also reveal a clear preoccupation with national unity at a time of acute crisis, and over the instrumentalisation of national minorities by kin states for political ends. Hence the need for balancing out two

equally legitimate concerns. Placing the Law on National Minorities in the context of international standards on minority rights, the article points to an increasing emphasis, at the international level, on the substantive – rather than procedural – aspect of minority participation, through a new focus on outcomes and joint ownership of decisions. In this sense, the Law on National Minorities, and subsequent legal reform, can lay the foundations for a system that devises, implements, and evaluates concrete measures for *effective* participation. The article concludes that inclusive debates, and IGO's role in facilitating them, are more critical than ever in light of the severity of ongoing challenges.

Keywords

Ukraine – national minorities – effective participation – minority languages

1 Introduction

This article provides a critique of selected provisions of *Law No. 2827-IX 'On National Minorities (Communities) of Ukraine'* of 13 December 2022¹ (amended in September 2023²), with a focus on minority participation. Some considerations are added on other pieces of legislation affecting national

1 Available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2023\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2023)019-e) (English translation) and <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1999409> (original in Ukrainian).

2 Law of Ukraine of 21 September 2023 No. 3389 'On Amendments to the Law of Ukraine "On National Minorities (Communities) of Ukraine" on Certain Issues on Exercising the Rights and Freedoms of Persons Belonging to National Minorities (Communities) of Ukraine' [hereinafter 'Law 'On Amendments to the Law on National Minorities']'. The amendments followed comments by the European Commission for Democracy through Law (Venice Commission): *Ukraine: Opinion on the Law on National Minorities (Communities)*, CDL-AD(2023)021, 12 June 2023 [hereinafter 'Venice Commission Opinion (2023)']. The purpose of the amendments was alignment with the provisions of European Convention on Human Rights, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, in light of the Venice Commission's recommendations. See Explanatory Note, Law 'On Amendments to the Law on National Minorities', 13 August 2023, at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2023\)043-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2023)043-e) (English translation) and <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1928258> (original). The same English-language document also provides a translation for the draft version (August 2023) of the amending law. The final version, slightly altered, is available (in Ukrainian) at <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1999409>.

minorities in Ukraine, although we do not provide an analysis of the legal framework in its entirety.

This article proceeds as follows: first, we provide an overview of Ukraine's international commitments and domestic legislation on the protection of national minorities, highlighting existing challenges in law and practice. Second, we outline the circumstances surrounding participation of minorities in Ukraine, with reference to consultation, elected bodies and the consequences of administrative reform. Third, we provide an analysis of the Law on National Minorities, placing it in the context of international minority rights standards.

According to the last (2001) census,³ ethnic Ukrainians amounted to 77.8% of the population of Ukraine. Among the state's national minorities (22.2% of the population), Russians were the largest ethnic group (17.3%).⁴ Other minorities are Belarussians (0.6% of the population in 2001), Moldavians (0.5%), Crimean Tatars (0.5%), Bulgarians (0.4%), Hungarians (0.3%), Romanians (0.3%), Poles (0.3%), as well as smaller groups (including Jews, Armenians, Greeks, Tatars and Roma).⁵ The percentage of persons who considered Russian their 'native language' was as high as 29.6%, while 65.5% declared that Ukrainian was their native language.⁶ Since those who identified as ethnic Russians were 17.3% of the population, it is apparent that some persons belonging to (non-Russian) national minorities, as well as ethnic Ukrainians, regard Russian as their native language.

While the Soviet Union had no official language *de jure*, Russian was effectively employed as *lingua franca*. Russian has remained a widely spoken language in Ukraine, with some regions predominantly Russian-speaking. While the population is largely bilingual – as is the case for many other post-Soviet states – Ukraine chose the 'one-nation-one-state' model following independence from the Soviet Union in 1991: Article 10(1) of the 1996 Ukrainian Constitution stipulates that Ukrainian is the sole state language of Ukraine. In this sense, we may see Ukraine, as well as other post-Soviet states, as 'nationalizing

3 A new population census was planned for 2011, but was repeatedly rescheduled. ACFC, *Fourth Opinion on Ukraine*, ACFC/OP/IV(2017)002, adopted on 10 March 2017, published on 5 March 2018 [hereinafter 'ACFC, Fourth Opinion on Ukraine (2017)'], §36. The ACFC noted that these delays were 'very detrimental' as they hampered the development of a national minority policy based on accurate information on ethnicity and language (§36).

4 All-Ukrainian Population Census 2001, National Composition of the Population, <http://2001.ukrcensus.gov.ua/eng/results/general/nationality/>.

5 *Ibid.*

6 All-Ukrainian Population Census 2001, Linguistic Composition of the Population, <http://2001.ukrcensus.gov.ua/eng/results/general/language/>.

states': coined by Brubaker,⁷ the expression denotes the 'unfinished and ongoing nature of nationalist projects' of newly-independent states, which, in 1991, were effectively 'national in form, but not in substance'.⁸ Most of these states sought to actively promote national languages and symbols, while simultaneously attempting to shake off Soviet (and Russian) legacies.

As in other post-Soviet countries, this process has been far from smooth, given the diverse range of opinions over aspects of state- and nation-building as well as the political orientation of the country (whether primarily pro-Russia or pro-EU). *Inter alia*, debates on the possibility of declaring Russian a second official language in Ukraine have been heated as well as divisive. Language issues have often been politicised and employed as political capital during electoral campaigns. They have remained sources of tensions within Ukrainian society itself as well as in inter-state relations, as the kin-states of Ukraine's national minorities have joined the debate. Overall, Ukraine seems to have struggled to create a balance between the promotion of Ukraine as a state language, and the use of other languages spoken in Ukraine, including in the education system. One of the principal criticisms voiced by national minorities has related to the inadequacy of opportunities for involvement in devising policy and legislation that took their needs and concerns into account, as will be seen below.

Internal tensions within Ukraine have been overshadowed by Russia's military aggression, with the illegal annexation of Crimea (2014), military engagement in Eastern Ukraine, and the start of Russia's full-scale war against Ukraine in February 2022. In September 2022, Russia announced the illegal annexation of Ukrainian territory in the Donetsk, Luhansk, Zaporizhzhia and Kherson oblasts. These actions were widely condemned by the international community.⁹

7 Rogers Brubaker, 'Nationalizing States in the Old "New Europe" – and the New', *Ethnic and Racial Studies* 19, no. 2 (1996): 411–37; Rogers Brubaker, 'Nationalizing States Revisited: Projects and Processes of Nationalization in Post-Soviet States', *Ethnic and Racial Studies* 34, no. 11 (2011): 1785–1814.

8 Brubaker, 'Nationalizing States Revisited ...', p. 1786.

9 'Council of Europe leaders condemn the illegal annexation of occupied territories of Ukraine', 30 September 2022, <https://www.coe.int/en/web/portal/-/council-of-europe-leaders-condemn-the-illegal-annexation-of-occupied-territories-of-ukraine>; 'OSCE Chairman-in-Office Rau, Parliamentary Assembly President Cederfelt, OSCE Secretary General Schmid and OSCE PA Secretary General Montella condemn Russia's illegal annexation of Ukrainian territory', 30 September 2022, <https://www.osce.org/chairmanship/527109>.

2 International and Domestic Standards

Ukraine is a party to the International Covenant on Civil and Political Rights (ICCPR), as well as the two main Council of Europe instruments in the sphere of protection of national minorities and their languages: the Framework Convention for the Protection of National Minorities (FCNM), ratified in 1999, and the European Charter for Regional or Minority Languages (ECRML), ratified in 2005. Ukraine is also a party to the UNESCO Convention Against Discrimination in Education, ratified in 1962, and it has supported the United Nations (UN) Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007). Moreover, Ukraine is a participating state of the OSCE, whose High Commissioner on National Minorities issued instruments of soft law that relate to participation and integration. Of relevance to this article are: the *Lund Recommendations on the Effective Participation of National Minorities in Public Life* (1999); the *Ljubljana Guidelines on Integration of Diverse Societies* (2012); and the *Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations* (2008).

Several of these documents' provisions relate directly to participation. Article 15 FCNM requires that parties create the conditions for the effective participation of persons belonging to national minorities in public affairs,¹⁰ 'in particular those affecting them'. The Explanatory Report to the FCNM clarifies that the requirement to create conditions for effective participation encompasses consultation when states consider legislative or other measures likely to affect minorities directly. Persons belonging to minorities should also be involved in the assessment of the possible impact that planned measures might have on them.¹¹ Under Article 7(4) of the ECRML, Ukraine committed itself to consultation with speakers of minority and regional languages when devising relevant policies, taking into consideration speakers' needs and wishes.

With regard to domestic law, Article 53(5) of the 1996 Ukrainian Constitution provides general guarantees:

Citizens who belong to national minorities are guaranteed the right to receive instruction in their native language, or to study their native language in state and communal educational establishments and through national cultural societies in accordance with the law.

¹⁰ As well as participation in cultural, social and economic life.

¹¹ Council of Europe, *Explanatory Report on the Framework Convention for the Protection of National Minorities*, 1995, §80, <https://rm.coe.int/16800cb5eb>.

Despite the said international and domestic guarantees, Ukraine's legal framework on minority protection has been judged to be inadequate. In 1992 Ukraine adopted the Law 'On National Minorities in Ukraine'¹² (superseded by the 2022 Law), which, according to the Venice Commission, contained only general provisions that 'do not offer any adequate guarantees for the protection of minority rights'.¹³ Similarly, the Advisory Committee on the FCNM (ACFC), in its Fourth Opinion, labelled the Law 'out-dated', as well as 'badly focused and too vague to regulate complex issues connected to the protection of national minorities in contemporary Ukraine'.¹⁴ The ACFC further pointed to the lack of a coherent policy on national minorities at the state level more generally,¹⁵ and called for the legal framework to be equipped with 'effective implementation mechanisms'.¹⁶

Other legal provisions protecting minorities and their languages tend to be declarative. For example, Article 10(3) of the Constitution states:

In Ukraine, the *free development*, use and protection of Russian, and other languages of national minorities of Ukraine, is guaranteed.¹⁷ [italics added]

¹² No. 2494-XII.

¹³ Venice Commission, *Ukraine: Opinion on the Law on Supporting the Functioning of the Ukrainian Language as the State Language*, CDL-AD(2019)032, 9 December 2019 [hereinafter 'Venice Commission Opinion (2019)'], §14.

¹⁴ ACFC, Fourth Opinion on Ukraine (2017), §45.

¹⁵ *Ibid.* Interestingly, the Law also had a provision on national-cultural autonomy, although the exact scope was never clarified, and it was not implemented. Article 6 stated:

The state guarantees to all national minorities the rights to national-cultural autonomy: the usage and learning of their native languages and the usage and learning of their native languages in state educational establishments or in national-cultural societies; development of national-cultural traditions, usage of national symbols, celebration of their national holidays, exercising their religions, satisfying their needs for literature, art, mass media, establishing their national-cultural and educational institutions and any activity, which is not in conflict with this law.

Nationalities' historical and cultural heritage on the territory of Ukraine is protected by law.

¹⁶ ACFC, Fourth Opinion on Ukraine (2017), §48 and Committee of Ministers, *Resolution CM/ResCMN(2020)13 on the Implementation of the Framework Convention for the Protection of National Minorities by Ukraine*, 8 December 2020, p. 1, https://search.coe.int/cm/pages/result_details.aspx?ObjectId=0900001680a07742.

¹⁷ Translations of the Constitution at <https://rm.coe.int/constitution-of-ukraine/168071f58b> and (with amendments) at <https://www.refworld.org/pdfid/44a280124.pdf>. In Ukrainian with amendments at <https://ips.ligazakon.net/document/Z960254K>. Article 10(2) also refers to 'development' of Ukrainian: 'The State ensures the comprehensive *development* and functioning of the Ukrainian language in all spheres of social life throughout the entire territory of Ukraine.' [italics added]

References to 'development' of peoples (and their cultures and languages) were common in Soviet legislation and official texts.¹⁸ The Soviet Union recognised that ethnicities were 'bearers' of cultures that should be promoted and allowed to develop, including through cultural institutions (cultural 'development').¹⁹ These expressions have transitioned into the legislation of post-Soviet states.²⁰ They tend to be declarative, and not accompanied by clear legal obligations or implementation mechanisms.

Alongside issues of legal clarity, a thorny question has been the enduring difficulty in striking a balance between the protection of the state language and that of minority languages. This impasse has affected several spheres of language use, such as minority-language education.²¹ Different governments have *either* chosen to actively promote the Russian language *or* prioritised the consolidation of the Ukrainian language as state language (and Ukrainian nation-building more generally), marginalising other languages and identities. In the first case, it has been argued that the ECRML, ratified in 2005, was utilised primarily to promote Russian, employing the principle of protection of minority languages as a pretext, while eroding the status of Ukrainian as state language.²² The Yanukovich government (2010–2014), in its pro-Russia orientation, sought to advance the use of Russian: among the relevant measures was the adoption by the Verkhovna Rada (the Ukrainian Parliament), in 2012, of the Law 'On the Principles of the State Language Policy' (hereinafter '2012 State Language Law'). While confirming the status of Ukrainian as sole state language, it recognised the Russian language, together with other national minority languages, as regional languages to be protected in line with international obligations of Ukraine (primarily the ECRML), in regions where the number of speakers exceeded 10% of the population (as per the 2001

18 E.g. the 1924 and 1997 constitutions and Communist Party texts.

19 Alexander Osipov, 'Soviet Party of Nations or Western Non-Discrimination: Is There a Dilemma for Russia?', in *Institutional Legacies of Communism: Change and Continuities in Minority Protection*, eds. Karl Cordell, Timofey Agarin, and Alexander Osipov (London and New York: Routledge, 2013), 59–73, p. 64.

20 Writing about Russia, Osipov argues that such expressions are, in fact, empty of meaning in practice. *Ibid.*, p. 67.

21 For example, concerns that the amalgamation of territorial units (*hromadas*) would result in large hub schools, at the expense of small, minority-language-medium schools in villages. ACFC, Fourth Opinion on Ukraine (2017), §26.

22 Michael Moser, *Language Policy and Discourse on Languages in Ukraine Under President Viktor Yanukovich (25 February 2010–28 October 2012)* (Stuttgart: Ibidem-Verlag, 2014).

census).²³ The Venice Commission issued two opinions on the Law's drafts, which it found to disproportionately strengthen the position of the Russian language, while failing to elevate Ukrainian to sole state language *de facto*.²⁴ The ACFC noted the 'polarising effect of the law on Ukrainian society',²⁵ while also stressing the need for 'significantly more comprehensive consultation with representatives of all minorities'.²⁶

More recently (following Euromaidan,²⁷ Russia's illegal annexation of Crimea and involvement in Eastern Ukraine) there has been a new impetus over the promotion of Ukrainian, while the use of minority languages has been restricted. The 2012 State Language Law came under criticism, and was debated once again in early 2014, following the Euromaidan demonstrations. After the Verkhovna Rada voted to abrogate it,²⁸ the matter was referred to the Constitutional Court of Ukraine. Ultimately, on 28 February 2018, the Court declared unconstitutional the 2012 Law for procedural irregularities at the time of its adoption.²⁹

The balance tipped in favour of Ukrainian with the 2019 Law 'On Supporting the Functioning of the Ukrainian Language as the State Language' (hereinafter '2019 State Language Law').³⁰ It was hastily drafted and adopted to fill the legal

23 ACFC, Fourth Opinion on Ukraine (2017), §14. On the comments of the Committee of Experts of the European Charter for Regional or Minority Languages, see: *Third Report of the Committee of Experts in respect of Ukraine*, CM(2017)97, 24 August 2017 [hereinafter 'Committee of Experts, Third Report on Ukraine'], p. 8; and *Statement by the Committee of Experts on the legal framework for the implementation of the European Charter for Regional or Minority Languages in Ukraine*, MIN-LANG (2023) 15, 26 June 2023.

24 Venice Commission, *Opinion on the Draft Law on Languages in Ukraine*, CDL-AD(2011)008, 30 March 2011, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)008-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)008-e); Venice Commission, *Opinion on the Draft Law on Principles of the State Language Policy of Ukraine*, CDL-AD(2011)047, 19 December 2011, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)047-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)047-e).

25 ACFC, Fourth Opinion on Ukraine (2017), §15. See also ACFC, *Ad hoc Report on the Situation of National Minorities in Ukraine*, ACFC(2014)001, 2 April 2014, §16, at <https://rm.coe.int/16800c5d6f>.

26 ACFC, Fourth Opinion on Ukraine (2017), §15.

27 Demonstrations that started in November 2013 and continued until February 2014. They were triggered by President Viktor Yanukovich's U-turn on the signing of the EU-Ukraine Association Agreement, which the Rada had approved, choosing instead closer links to Russia and the Eurasian Economic Union.

28 The acting president vetoed on its abrogation, and the matter was referred to the Constitutional Court.

29 János Fiala-Butora, 'The Controversy Over Ukraine's New Law on Education: Conflict Prevention and Minority Rights Protection as Divergent Objectives?', *European Yearbook of Minority Issues* 17, no. 1 (2020): 233–61, p. 250.

30 Law No. 2704 of 25 April 2019.

vacuum resulting from the abrogation of the 2012 Law.³¹ However, by regulating solely the use of the state language, it effectively left minority languages in a condition of legal uncertainty. Commenting on a draft of the 2019 Law, the Venice Commission noted that it ‘exclusively focusse[d] on strengthening the use of Ukrainian, without simultaneously regulating in a systematic way the use of minority languages.’³² Thus, it ‘fail[ed] to strike a fair balance between the legitimate aim of strengthening and promoting the Ukrainian language and sufficiently safeguarding minorities’ linguistic rights.’³³ The Venice Commission further referred to the fact that, according to information received during a mission to Kyiv, persons belonging to national minorities were insufficiently consulted in the process of drafting and adoption.³⁴ It added:

As the State Language Law contains many provisions which clearly affect speakers of minority languages, representatives of the minorities and indigenous peoples of Ukraine *should have been sufficiently and adequately consulted* in order to ensure that their needs are understood and taken into consideration. Inadequate involvement could not be justified by the argument advanced by the authorities during the visit to Kyiv that national minorities would be consulted on the draft law on minorities.³⁵ [italics added]

An imbalance was also found to have been embedded in the 2017 Law on Education.³⁶ In this case, Russian, as well as other languages that are not official languages of the EU, were treated less favourably than EU languages.³⁷ The Venice Commission concluded that none of the four legal texts dealing with language issues assessed in the period 2011–2019 managed to adequately balance the aim of strengthening the state language with guarantees for

31 Fiala-Butora, ‘The Controversy Over Ukraine’s New Law on Education’, pp. 250–1.

32 Venice Commission Opinion (2019), §33.

33 *Ibid.*, §137.

34 *Ibid.*, §27.

35 *Ibid.*, §28.

36 Law No 2145-VIII of 5 September 2017 ‘On Education’.

37 Venice Commission, *Ukraine: Opinion on the Provisions of the Law on Education of 5 September 2017, which concern the use of the State Language and Minority and other Languages in Education*, CDL-AD(2017)030, 11 December 2017, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)030-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)030-e). See also Venice Commission Opinion (2019), §136.

the protection of the linguistic rights of Ukraine's minorities.³⁸ In its 2023 Opinion, the Venice Commission noted the enduring distinction between EU and non-EU languages, although it suggested that under martial law (see below) the Russian language (protected by the Constitution) should not be given preferential treatment.³⁹ Meanwhile, Article 7 of the Law on Education created a situation of uncertainty as to the minimum amount of time for teaching in minority languages, the effect of which was to afford the Ukrainian authorities broad discretionary powers to make decisions in this area,⁴⁰ rather than devising policies for minority-language education on the basis of minority consultation and inclusive decision-making. Representatives of various minority communities expressed concerns on the new provisions, along with the Hungarian Minister of Foreign Affairs, and Members of the European Parliament (in an open letter).⁴¹ Concerns were also voiced by the Parliamentary Assembly of the Council of Europe (PACE),⁴² including on the issue of consultation: PACE noted that 'there was no real consultation with representatives of national minorities in Ukraine on the new version of Article 7 of the act adopted by the Verkhovna Rada', and stressed the importance of constructive dialogue between all parties involved.⁴³

³⁸ Venice Commission Opinion (2019), §136.

³⁹ Venice Commission Opinion (2023), §41.

⁴⁰ Venice Commission Opinion (2019), §75. This same issue was raised with reference to the 2019 draft law, which 'continues to treat minority languages which are also official EU languages more favourably than those which are not.' It also prolonged the uncertainty regarding education in minority languages stemming from Article 7 of the Education Law, which 'may lead to arbitrary decisions and amount to a situation where some languages which are widely used in the country or in certain areas are allocated insignificant amount of time and/or where only one subject is taught in a minority language.' (§75).

⁴¹ Fiala-Butora, 'The Controversy Over Ukraine's New Law on Education', p. 251.

⁴² It stated that 'the new legislation does not appear to strike an appropriate balance between the official language and the languages of national minorities', adding:

In particular, the new law entails a strong reduction in the rights previously conferred on "national minorities" concerning their own language of education. These national minorities, who were previously entitled to have monolingual schools and fully fledged curricula in their own language, now find themselves in a situation where education in their own languages can be provided (along with education in Ukrainian) only until the end of primary education. For the Assembly, this is not conducive to "living together".

PACE, 'The new Ukrainian law on education: a major impediment to the teaching of national minorities' mother tongues', *Resolution 2189* (2017), 12 October 2017, §8–9 <https://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=24218&lang=en>.

⁴³ *Ibid.*, §2–3.

3 Striking the 'Right' Balance: Ongoing Challenges

The issue of consultation is particularly important in light of distinctive historical and political factors that complicate the striking of a balance between the promotion of Ukrainian and the protection of other languages, particularly Russian. These difficulties were highlighted by the Venice Commission in 2019 as follows:

In view of the *particular place of the Russian language* in Ukraine (which is the most used language of all of Ukraine's regional or minority languages and the main language of communication for many persons belonging to non-Russian minorities) as well as the *oppression of the Ukrainian language in the past*, the Venice Commission fully understands the need for the Ukrainian legislator to adopt measures to promote the use of Ukrainian as the State language. The Venice Commission itself urged in its previous opinions the Ukrainian legislator to take necessary measures with a view to strengthening the role of Ukrainian in society [...].⁴⁴ [italics added]

Of relevance here is the (already noted) concept of 'nationalizing states', which Brubaker has applied, *inter alia*, to the successor states of the Soviet Union.⁴⁵ The concept involves the idea that the state contains a 'core nation', which is 'understood in ethnocultural terms', and finds itself in a weak position: state action is needed to strengthen it, by promoting its language and culture (alongside its political hegemony). Importantly, such action is seen as 'remedial or compensatory, needed to redress previous *discrimination or oppression* suffered by the core nation.'⁴⁶ [italics added]

In devising language policies, governments need to take into account possible inequalities among a society's ethnic or linguistic groups. These complexities are exacerbated when particular ethnolinguistic groups have been disfavoured vis-à-vis others, as in postcolonial or postsocialist contexts. In the Soviet era, Russian was employed routinely by government bodies and in higher education in all Union republics, while ethnic Russians residing outside the

44 Venice Commission Opinion (2019), §134.

45 Brubaker, 'Nationalizing States Revisited: Projects and Processes of Nationalization in Post-Soviet States', p. 1786.

46 *Ibid.* Along these lines, and specifically in relation to the Ukrainian language in Ukraine, Kuzio argues that '[a]ffirmative action in favour of a formerly discriminated-against language and culture is a perfectly reasonable policy'. Taras Kuzio, *Ukraine: State and Nation Building* (London and New York: Routledge, 1998), p. 170.

Russian Soviet Federative Socialist Republic (RSFSR) tended not to learn other languages. This created a linguistic asymmetry – and, in some cases, perceptions of linguistic injustice – which continued in the post-Soviet period.⁴⁷ Indeed, the association of the Russian language with prestige, education and power, as well as its function as language of ‘inter-ethnic communication’ by default, has persisted. In this sense, Russian in post-Soviet states has been referred to as a ‘majorized minority language’, and state languages of the newly-independent states as ‘minoritized majority languages’.⁴⁸ The latter refers to the language of a numerical majority which, despite its recognition as a country’s sole state language, finds itself in a disadvantaged position: it requires protection and promotion normally reserved to vulnerable languages. This applied to Ukrainian following Ukraine’s independence: measures to promote the state language, providing all residing in Ukraine with the opportunity to master it, have been judged by the Venice Commission as responding to an ‘urgent need for Ukrainian society’.⁴⁹ Russian, by contrast, has occupied the position of a ‘majorized minority language’ – the language of a numerical minority, but with the prestige and reach of a *de facto* majority language. Ukrainisation could be seen as a way of addressing the anomaly of this imbalance.

At the same time, Russian is not only the native language of ethnic Russians, but also of persons belonging to several national minorities in Ukraine, as well as some ethnic Ukrainians themselves. The establishment of an appropriate balance in language policy is, then, not only in the interests of national minorities and Russian-speakers in Ukraine, but also a crucial factor in the pre-emption of inter-ethnic tensions.⁵⁰ A complicating factor has been a lack of consensus on the role of the Ukrainian language in constructing a post-Soviet identity and in nation-building, as well as the status of the Russian language in Ukraine.⁵¹

47 See also Federica Prina, ‘Linguistic Justice, Soviet Legacies and Post-Soviet Realpolitik: The Ethnolinguistic Cleavage in Moldova’, *Ethnopolitics* 14, no. 1 (2015): 52–71.

48 Tove Skutnabb-Kangas, *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Berlin: Mouton de Gruyter, 1994), p. 178. Skutnabb-Kangas was writing about Russian and titular languages in the Baltic states.

49 Venice Commission Opinion (2019), §135.

50 A point also made by the Venice Commission. It went on to state that ‘[u]nfortunately, none of the four Ukrainian texts assessed hitherto by the Commission fully satisfied this criterion’. *Ibid.*, §136.

51 István Cserniczkó and Réka Máté, ‘Bilingualism in Ukraine: Value or Challenge?’, *Sustainable Multilingualism/Darnioji Daugiakalbystė* 10, no. 1 (2017): 14–35; Abel Polese, ‘Language and Identity in Ukraine: Was It Really Nation-Building?’, *Studies of Transition States and Societies* 3, no. 3 (2011): 36–50.

The majority of Ukraine's population is, in fact, bilingual;⁵² however, bilingualism has generally not been judged a viable option for Ukraine,⁵³ while the Ukrainian language has been elevated to symbol of a free and independent Ukrainian nation.⁵⁴ Moreover, the Russian language has, in recent years, been presented as 'the language of the enemy' and of 'the aggressor', and closely linked to security concerns.⁵⁵ The war has significantly incentivised a shift towards the use of the Ukrainian language among Ukrainian citizens, trends highlighted by both qualitative studies and surveys of the Kyiv International Institute of Sociology (КИИС).⁵⁶ Meanwhile, the fact that Kyiv has lost control over regions that are largely Russian-speaking (primarily Donetsk, Luhansk and Crimea), and that refugees have left Crimea and the eastern regions of Ukraine, means that Ukraine is becoming more linguistically homogeneous.⁵⁷

Ongoing socio-political challenges do not only stem from the war, but also from sudden and far-reaching political shifts triggered by the Orange Revolution and Euromaidan. On the one hand, post-Euromaidan Ukraine has been presented as promoting an inclusive civic nation, unifying 'Western' and 'Eastern' Ukrainians. Indeed, the West of the country has long been associated with the Ukrainian language and with lower levels of Russian influence, while the East has historically and geographically been closer to Russia (this dichotomised view has been partially due to the political manipulation of

52 Bill Bowring, 'The Russian Language in Ukraine: Complicit in Genocide, or Victim of State-Building?', in *The Russian Language Outside the Nation*, ed. Lara Ryazanova-Clarce (Edinburgh: Edinburgh University Press, 2014), 56–78, p. 70; Laada Bilaniuk, 'Language in the Balance: The Politics of Non-Accommodation on Bilingual Ukrainian–Russian Television Shows', *International Journal of the Sociology of Language* 210 (2010): 105–33, p. 109; Csernicskó and Máté, 'Bilingualism in Ukraine: Value or Challenge?'

53 Historical circumstances have led to bilingualism being 'stigmatized' in Ukraine, and thus rejected. Csernicskó and Máté, 'Bilingualism in Ukraine: Value or Challenge?', p. 15. Meanwhile, language policies that robustly promote Ukrainian – even when they might have adverse effects on speakers of other languages – have been justified by Ukrainian policy-makers on the grounds of historical injustice and linguistic normalisation. Aneta Pavlenko, 'Language Rights versus Speakers' Rights: On the Applicability of Western Language Rights Approaches in Eastern European Contexts', *Language Policy* 10 (2011): 37–58, p. 52.

54 Csernicskó and Máté, 'Bilingualism in Ukraine: Value or Challenge?', pp. 28–29.

55 *Ibid.* Also see 'Integration through Participation: Facing Challenges to Minority Consultation', 17–18 March 2022, University of Glasgow & Liverpool John Moores University – *Conference Proceedings*. https://www.gla.ac.uk/media/Media_989509_smx.pdf.

56 See Volodymyr Kulyk, 'National Identity in Time of War: Ukraine after the Russian Aggressions of 2014 and 2022', *Problems of Post-Communism* (2023): 1–13, DOI: 10.1080/10758216.2023.2224571; and Natalia Kudriavtseva, 'Motivations for Embracing the Ukrainian Language in Wartime Ukraine', *Ukrainian Analytical Digest* 1 (2023): 12–15.

57 Csernicskó and Máté, 'Bilingualism in Ukraine: Value or Challenge?', p. 29.

regional and linguistic identities, while the reality is in fact more complex⁵⁸). On the other hand, as argued by Zhuravlev and Ishchenko, Euromaidan was also accompanied by polarising trends: it reinforced the distinction between 'active, progressive citizens and passive, obedient' ones, who 'did not wish to break with their allegedly "Soviet" paternalism and habits'.⁵⁹ Thus, it consolidated the perception of a gulf between 'pro-Russian' and 'pro-Western' narratives and actors, which has been highly polarising and exclusionist. In fact, Euromaidan civic nationalism might have legitimised ethnocultural nationalism: while offering an opportunity to transcend differences between Ukraine's regions and ethno-linguistic groups, it paradoxically became interwoven with ethnic nationalism. With the annexation of Crimea and the start of the war in Donbas, 'true' Ukrainian identity has been increasingly linked to support for Ukraine's EU integration and the rejection of Russia (and its demands on Ukraine), as well as to the 'Ukrainization' of the public sphere.⁶⁰ Zhuravlev and Ishchenko conclude:

Instead of recognizing political and cultural diversity within the Ukrainian nation and integrating the opposing positions into an inclusive dialogue about civic national identity, the imagined post-Euromaidan unity helped to ignore and downplay political and historical divisions, producing an exclusionary effect.⁶¹

In line with the objective of 'Ukrainisation' of the public sphere, Petro Poroshenko (president in 2014–2019) increasingly pursued a nationalist agenda. Before the 2019 elections, he campaigned on the language issue and promoted legislation restricting the use of Russian in the public sphere and education. He presented himself as the leader of the nationalist cause – a choice that was more instrumental rather heartfelt. Ishchenko argues:

Following Euromaidan, Poroshenko was trapped between two opposing agendas: on the one hand, increasingly popular, though disorganized and

58 David J. Smith and Mariana Semenyshyn, 'Territorial-Administrative Decentralisation and Ethno-Cultural Diversity in Ukraine: Addressing Hungarian Autonomy Claims in Zakarpattya, ECMI: Working Paper #95, November 2016, p. 3, https://www.ecmi.de/fileadmin/redakteure/publications/pdf/Working_Paper_95.pdf.

59 Oleg Zhuravlev and Volodymyr Ishchenko, 'Exclusiveness of Civic Nationalism: Euromaidan Eventful Nationalism in Ukraine', *Post-Soviet Affairs* 36, no. 3 (2020): 226–45, p. 240.

60 *Ibid.*

61 *Ibid.*, p. 241.

inarticulate, expectations of postrevolutionary change; on the other, unpopular yet articulate and powerful demands from national-liberal civil society. Nationalist radicalization of the ideological sphere was, for Poroshenko, an easier way of delivering some 'revolutionary' change than proceeding with reforms that would have undermined the competitive advantages of his own faction among the political capitalist class. Appeals to nationalism also served to silence 'unpatriotic' criticism and to divide the opposition.⁶²

This agenda was of limited public appeal, as – among other things – Poroshenko could hardly be seen as a committed nationalist.⁶³ He lost the elections to Volodymyr Zelensky, who received 73% of the votes.

The trend towards ethnonationalism seems to have continued since the beginning of the war. Kulyk argues that, while a civic approach to national identity has grown more salient, it has been accompanied by a 'radicalization' of the ethnocultural aspect of identity;⁶⁴ he adds: 'More than ever before, Ukrainian identity is now based on accepted bonds rather than inherited traits, but the inclusive membership in the national community is combined with the majority cultural baggage that the minorities are expected to share.'⁶⁵ Thus, expectations are created for both the majority and minorities, with a potential for conflictual dynamics among the population, heightened by the war.

4 Participation of Minorities in Ukraine

In such complex socio-political scenario, public debates and consultation are clearly critical for societal stability and to negotiate a way forward. However, in the last (Fourth, 2017) ACFC Opinion, levels of participation of national minorities were judged to be generally low. Among other things, the ACFC pointed to the fact that, when consultation does take place, it is routinely confined to cultural issues. The Opinion also referred to the fact

62 Volodymyr Ishchenko, 'Towards the Abyss', *New Left Review*, no. 133–134 (April 2022): 17–39, p. 25.

63 *Ibid.*, pp. 24–25. Ishchenko notes: 'Poroshenko has never been an ideologically committed nationalist. He co-founded the Party of Regions and served as a minister in Yanukovych's government; there have been scandals that his family speaks Russian at home, that he continued to do business in Russia after 2014.' *Ibid.*, p. 25.

64 Kulyk, 'National Identity in Time of War: Ukraine after the Russian Aggressions', p. 11.

65 *Ibid.*

that participation was adversely affected by administrative reform in Ukraine: it split regions compactly inhabited by minorities, reducing the chances that persons belonging to national minorities would be represented in the Verkhovna Rada and other state bodies.

The Fourth (2016) and Fifth (2022) Reports by the Ukrainian government to the ACFC, like reports under the ECRML, are vague on details of participation. They refer to discussions in advisory bodies, but they provide no information on outcomes. Participation is treated primarily as *descriptive* representation, while the promotion of a wide representative basis for minority communities (and representation of their diverse interests in *substance*) are not addressed in the reports.⁶⁶

Below we outline complexities in the area of consultation and representation in elected bodies, including in matters of administrative reform.

4.1 Consultation

A number of consultative bodies exist in Ukraine, as well as state bodies responsible for implementing minority policies, including through liaison with minority organisations. The main advisory bodies are two dedicated bodies under the auspices of the Ministry of Culture (the *Council of Representatives of All-Ukrainian Minority Associations*) and the Ministry of Education and Science (the *Council of Representatives of Public Associations of Indigenous Peoples and National Minorities*). On the former, the ACFC noted in its Fourth Opinion that it was 'composed exclusively of men, thus offering no gender perspective on national minority issues'.⁶⁷ Of the bodies under the two ministries, it added that: 'both of these bodies, according to national minority representatives, meet at irregular intervals but do not constitute adequate consultation mechanisms'.⁶⁸ Similarly, the Committee of Experts urged the Ukrainian authorities to allow the Council under the auspices of the Ministry of Culture 'to play a more active role in legislative and policy work carried out by the Ukrainian authorities in the field of minority languages'.⁶⁹

In its Fifth Report, the Ukrainian government details the functions of the *ad hoc* advisory body under the Ministry of Education and Science, the Council

66 See below on descriptive and substantive representation ('The Law on National Minorities and International Standards').

67 ACFC, Fourth Opinion on Ukraine (2017), §174.

68 *Ibid.*

69 Committee of Experts of the European Charter for Regional or Minority Languages, Application of the Charter in Ukraine, *Application of the Charter in Ukraine: 2nd monitoring cycle*, ECRML (2014) 3, 15 January 2014, §99.

of Representatives of Public Associations of Indigenous Peoples and National Minorities of Ukraine.⁷⁰ It stated that:

The body performs a representative and communicative function in cooperation between the Ministry of Education and Science of Ukraine and public associations of national minorities and indigenous peoples aimed at *developing state policy* in the field of education. The Council develops proposals for draft state educational policies on ensuring the rights of national minorities and indigenous peoples in the field of education, as well as examines [sic] respective decisions and monitors their implementation.⁷¹ [italics added]

While the report refers generally to ‘cooperation’ between the Ministry and minority associations in devising state policies, there is no specific information on collaborative policy-making, on the outcomes of the discussions, and on how minorities (may) influence policy in practice. The report only refers to the fact that the Council had 32 representatives (at the time of the submission of the report). The report includes a list of the minorities that are represented and some of their associations,⁷² but no details on the procedures followed by the body – including on the way in which minority representatives are selected to serve in that capacity on the body. A few more details are included in Ukraine’s Fourth Report under the ECRML, which states that ‘[r]epresentatives of ethnic communities are involved in the discussion of bills, programs, textbooks.’⁷³ The report refers to consultative meetings with public associations of ethnic minorities, local authorities, heads of schools, and teachers regarding the implementation of Article 7 of the Law on Education, as well as visits to regions densely populated by minorities.

⁷⁰ ACFC, *Fifth Report submitted by Ukraine on the Implementation of the Framework Convention for the Protection of National Minorities*, ACFC/SR/V(2022)001, 10 January 2022 [hereinafter ‘ACFC, Fifth Report by Ukraine (2022)’], p. 95.

⁷¹ *Ibid.*

⁷² The 32 public associations include: Crimean Tatar (2), Hungarian (6) Polish (4), Romanian (3), Jewish (2), Armenian (2), Moldavian (1), Slovak (1), Bulgarian (1), Russian (1), German (1), Gagauz (1), Greek (1), and Roma (1) minorities, as well as one representative each from: the Union of Uralic Peoples of Ukraine, the Association of Ethnic Artists, the Congress of National Communities of Ukraine, the All-Ukrainian Assembly of Tatars and the Tugan-Tel All-Ukrainian Tatar Cultural Centre. ACFC, *Fifth Report by Ukraine (2022)*, pp. 95–96.

⁷³ On the Council, see also Ukraine’s Fourth Report under the ECRML: *Fourth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter*, MIN-LANG (2019) PR 7, 4 September 2019, p. 19.

The report contains a brief reference to the results of consultation on Article 7, by which the 'road map of implementation of Article 7' will provide 'a new direction' designed to preserve the identity of ethnic communities as part of a 'unified Ukrainian society'.⁷⁴ At the same time, the details on the outcomes of consultation remain, overall, scarce. The Committee of Experts urged, in its Third Report, to take a more proactive approach in implementing the Charter 'in cooperation with representatives of minority language speakers': it recommended consultation between Ukrainian authorities at all levels and associations representing the national minorities concerned, 'with a view to drawing up a mid-term strategy on the implementation of the Charter' for each language, defining 'concrete steps'.⁷⁵

The data in the Ukrainian government's reports suggests a form of representation based on the idea of external pluralism (i.e. representation of a range of minority communities). There may also be a form of internal pluralism (i.e. the representation of a range of interests within a particular minority community – for example, six Hungarian organisations are represented).⁷⁶ However, one cannot gauge with any accuracy the levels of internal pluralism from the data provided by the Ukrainian government. In the case of the body under the Ministry of Culture's auspices, the fact that the representatives are 'all men' (as per the ACFC's Opinion) suggests limited efforts to ensure broad representation.

The institutional framework on minority protection has been modified without appropriate consultation. For example, a coordinating body was introduced in 2014, the Office of the Governmental Plenipotentiary on the Issues of Ethno-National Policy, coinciding with the establishment of the post of the Government Plenipotentiary on Interethnic Issues. However, the post and the Office were abolished the following year, reportedly without consultation with minorities.⁷⁷

In its Fourth Opinion, the ACFC commented on the Division for National Minorities and Ukrainian Expatriate Community of the Department for Religions and Nationalities (also under the auspices of the Ministry of

74 *Ibid.*, p. 20. The report to the Committee of Experts also refer to two other, more recently established, specialised bodies within the Ministry of Culture. *Ibid.*, p. 21.

75 Committee of Experts, *Third Report of the Committee of Experts in respect of Ukraine*, CM(2017)97, 24 August 2017, p. 9.

76 On 'external' and 'internal' pluralism, see Gaetano Pentassuglia, 'Effective Minority Participation as a Balancing Act: What Role for the OSCE High Commissioner on National Minorities?', OSCE *Insights*, 6 (2021), pp. 6–7. See also below ('The Law on National Minorities and International Standards').

77 ACFC, Fourth Opinion on Ukraine (2017), §18, 172.

Culture), the main body responsible for coordination and implementation of state programmes relating to national minorities. It stated that:

Regrettably, this structure, which is inadequately resourced and financed, cannot develop a fully-fledged action for the benefit of persons belonging to national minorities. The fact that the division, in addition to national minorities, is also responsible for the Ukrainian expatriate community (with the overwhelming part of its budget being devoted to the latter) seriously hampers the authorities' scope for conducting a coherent, co-ordinated and long-term policy towards national minorities.⁷⁸ [...] As its field of competence is *limited to culture*, it is also not in a position to be an interlocutor of minority communities in other fields.⁷⁹ [italics added]

Its recommendation was expanding consultation 'beyond the cultural and educational spheres', so as to enable minorities to 'play an active part in all decision-making processes affecting them'.⁸⁰ Also in the Fourth Opinion, the ACFC had called on the authorities 'to re-establish a specialised and stable government body' to coordinate issues on minority protection, equipped with adequate financial and human resources.⁸¹ A new coordinating body is provided for in the new Law on National Minorities (see below).

Besides the principal coordinating organ, Ukraine's Fifth Report refers to a range of specialised advisory bodies. According to the report, in January 2021, there were: 17 specialised advisory bodies at oblast state administrations, one council at the regional level, and four other advisory bodies at government level. The report states that 'all these bodies ensur[e] representation of various national minorities of Ukraine'.⁸² It adds that representatives of national minority public associations were involved in the work on the draft Strategy for Promoting the Empowerment of Persons Belonging to the Roma National Minority in Ukrainian Society through 2030,⁸³ however, it merely refers to a public discussion on the draft that took place in October 2020, and a report on the discussion,⁸⁴ while, once again, no details are provided on the exact input by minority associations.

78 *Ibid.*, §18.

79 *Ibid.*, §173.

80 *Ibid.*, §177.

81 *Ibid.*, §176.

82 ACFC, Fifth Report by Ukraine (2022), p. 96.

83 Approved by the Cabinet of Ministers of Ukraine Order No. 866-r of 28 July 2021.

84 Posted on the website of the State Service for Ethnic Policy and Freedom of Conscience. ACFC, Fifth Report by Ukraine (2022), p. 96. A link to the report was provided but it no longer worked at the time of writing.

The Fifth Report refers to pilot projects supported by the Council of Europe (*Multi-ethnic Odesa Oblast Communication Platform*, and *Multi-ethnic Family of Zaporizhzhia Region Communication Platform of National Communities*). The report notes that: 'The implementation of these pilot projects aims to further improve communication mechanisms and involve national minorities in Ukraine in decision-making processes at the regional level.'⁸⁵ This type of pilot projects may indeed facilitate consultation, but the report does not provide information on the process followed, and whether there is indeed a direct correlation between 'communication' and effective consultation.

A shadow report on the FCNM compiled by Hungarian researchers and NGOs from Transcarpathia does not refer at all to consultative bodies, and instead primarily evaluates the significance of administrative reform for minority representatives in elected bodies. This may suggest that consultative bodies are considered ineffective, and national minorities aim at actual presence in the Rada, or other official bodies, for greater impact.⁸⁶

4.2 *Elected Bodies and Administrative Reform*

In its Fifth Report, the Ukrainian government noted that, in areas of compact settlement, persons belonging to national minorities are represented at the local and regional levels. It gave as an example the Hungarian national minority in Zakarpattia Oblast, represented in the oblast council by eight members, all belonging to Hungarian Party of Ukraine, and making up 12.5% of body's membership.⁸⁷ The Ukrainian government further declared that it 'makes efforts and provides all the necessary legal framework to enable the proper

85 It states:

Ukraine is implementing new mechanisms for the interaction of national minority representatives with government bodies at the regional level. For example, the Multi-ethnic Odesa Oblast Communication Platform was developed and implemented at the initiative of the Odesa Regional State Administration during 2019–2020 [...]. Also, on 19 September 2020, the Multi-ethnic Family of Zaporizhzhia Region Communication Platform of National Communities of Zaporizhzhia Oblast was introduced to the public, having been created with the assistance of the Zaporizhzhia Oblast State Administration, Department of Culture, Tourism, Nationalities and Religions, and the Council of Europe project Protecting National Minorities, Including Roma, and Minority Languages in Ukraine.

ACFC, Fifth Report by Ukraine (2022), pp. 96–97.

86 *Written Comments by Hungarian Researchers and NGOs in Transcarpathia (Ukraine) on the Fourth Periodic Report of Ukraine on the Implementation of the Framework Convention for the Protection of National Minorities*, 20 January 2017, https://hodinkaintezet.uz.ua/wp-content/uploads/2020/01/Written-Comments-Framework-Convention_2017.pdf.

87 ACFC, Fifth Report by Ukraine (2022), p. 97.

representation of national minorities of Ukraine in elected bodies at all levels and their full participation in public affairs in accordance with Article 15 of the Framework Convention.⁸⁸ However, no evidence is supplied to show that participation is indeed *effective*: presence of persons belonging to minorities in a state body is not necessarily conducive to representation of their interests.⁸⁹ On participation in *elected bodies*, the ACFC's Fourth Opinion states that '[o]verall, the system of national minority protection in Ukraine *lacks any guaranteed and effective participation* of minorities in elected bodies'.⁹⁰ [italics added]

The Ukrainian government, also in the Fifth Report, responded to the Committee of Ministers' recommendation to 'ensure that the legislative framework contains effective means for persons belonging to national minorities to be adequately represented in elected bodies at all levels so that they may participate fully in public affairs', in line with Article 15 FCNM. Surprisingly, the first measure towards effective participation that is mentioned in the report under the discussion on Article 15, is the promotion of state language proficiency for persons belonging to minorities. The report argues that the adoption of the 2019 State Language Law 'aims to ensure the necessary conditions for the effective participation of persons belonging to national minorities in cultural, social, economic and public affairs, in particular those relating to their activities and the protection of their rights, by increasing their state language proficiency'.⁹¹ While international law foresees no specific right to use minority languages in elected bodies, and knowledge of the state language is certainly a significant factor towards integration, Ukraine's approach fails to indicate ways in which 'effective' participation may be achieved. Rather, it seems to suggest that the principal means to access opportunities for participation is knowledge of the state language, indirectly placing the onus on minorities themselves to master it.

Another highly complex and divisive issue has been the administrative reform of Ukraine's regions. The post-Euromaidan government declared administrative-territorial reform integral to closer links with the EU and to a new programme of democratisation. The latter was associated with the dismantling of a highly centralised state system (largely inherited from the Soviet period) and promoting decision-making at the local level.⁹² A reform of the territorial

88 *Ibid.*

89 See below ('The Law on National Minorities and International Standards').

90 ACFC, Fourth Opinion on Ukraine (2017), §169.

91 ACFC, Fifth Report by Ukraine (2022), p. 94.

92 Smith and Semenyshyn, 'Territorial-Administrative Decentralisation and Ethnocultural Diversity in Ukraine: Addressing Hungarian Autonomy Claims'.

structure was implemented following the adoption of legislation in 2014 and 2015 to amalgamate local administrative units (*hromadas*), thereby creating larger regions. The authorities initiated a process of voluntary amalgamation designed to reduce the number of *hromadas* from 12,000 to 1,200–1,500, to be followed by the reduction of the number of rayons by about a fifth.⁹³ The ACFC considered these reforms to have ‘the potential to affect – both positively and negatively – the access to rights by persons belonging to national minorities.’ However, minority representatives reported to the ACFC that voluntary amalgamation was accompanied by insufficient awareness-raising campaigns and absence of consultation.⁹⁴ The importance of participation in the context of administrative reform was stressed by the Committee of Ministers in 2020:

When redrawing administrative boundaries, ensure that the rights and freedoms which flow from the Framework Convention are not restricted through the alteration of the proportions of the population in a given area, and that effective participation of persons belonging to national minorities in discussions at local level is guaranteed.⁹⁵

Administrative reform processes in Ukraine have been principally guided by the principles of economic revitalisation and effective local government, not taking into account the country's ethnic composition.⁹⁶ In its Fifth Report, the Ukrainian government conceded that the administrative-territorial re-organisation ‘led to some changes in the ethnic composition of the local population, in particular, in regions and newly created territorial communities’; however, the report maintained that such changes ‘have not had a negative impact on the ability of national minorities to be represented in local self-government bodies and to receive public services.’⁹⁷ Rather, it was argued, the reforms provided national minorities with more opportunities for effective participation in addressing issues affecting them.⁹⁸ This was explained as follows:

93 ACFC, Fourth Opinion on Ukraine (2017), §11–12.

94 *Ibid.*, §12–13.

95 Committee of Ministers, *Resolution CM/ResCMN(2020)13 on the Implementation of the Framework Convention for the Protection of National Minorities by Ukraine*, 8 December 2020, p. 2.

96 Smith and Semenyshyn, ‘Territorial-Administrative Decentralisation and Ethnocultural Diversity in Ukraine: Addressing Hungarian Autonomy Claims’, pp. 14–15.

97 ACFC, Fifth Report by Ukraine (2022), pp. 94–95.

98 *Ibid.*, p. 95.

[A]s most powers and financial resources are transferred to the level of territorial communities, this creates the necessary conditions for active participation of national minorities in the cultural and social affairs of territorial communities and expands their opportunities to influence improvements in the quality of public services provided locally.⁹⁹

Local initiatives, the administration of funding at the local level, and attention to local needs, may indeed facilitate participation. At the same time, this is by no means guaranteed: assertions contained on the Fifth Report seem to be based on a presumption that decentralisation will automatically lead to enhanced participation.

5 The Law on National Minorities

Law No. 2827-IX 'On National Minorities (Communities) of Ukraine' (hereinafter 'Law on National Minorities') was adopted by the Verkhovna Rada of Ukraine on 13 December 2022, by 324 votes out of 450. It repealed the previous (1992) Law 'On National Minorities in Ukraine'.¹⁰⁰ The ACFC and the Committee of Ministers had been calling on Ukraine for a number of years to adopt a *lex specialis* on national minorities to replace the 1992 Law, which was deemed to be unequipped to address the needs of national minorities given its overly general provisions.¹⁰¹ Already in 2008 the ACFC pointed to an 'urgent need' to amend legislation on national minorities, in accordance with international standards, including the FCNM.¹⁰²

In the ACFC's Fourth Opinion, the first recommendation listed 'for immediate action' was to adopt 'an adequate and comprehensive legal framework for the protection of national minorities', 'without delay and *in close consultation* with the groups concerned'¹⁰³ [italics added]. A draft Law 'On Amending the Law on National Minorities' was submitted and considered by the Verkhovna Rada in 2014, but progress by 2017 had been 'negligible';¹⁰⁴ in addition, national

99 *Ibid.*

100 No. 2494-XII, adopted on 25 June 1992. Available in English at: https://www.minelres.lv/NationalLegislation/Ukraine/Ukraine_Minorities_English.htm.

101 See above (Striking the 'Right' Balance: Ongoing Challenges).

102 ACFC, *Second Opinion on Ukraine*, ACFC/OP/11(2008)004, adopted on 30 May 2008, published on 30 March 2011, §246.

103 ACFC, Fourth Opinion on Ukraine (2017), §188; see also §48 and Committee of Ministers, *Resolution CM/ResCMN(2020)13 on the Implementation of the Framework Convention for the Protection of National Minorities by Ukraine*, 8 December 2020.

104 ACFC, Fourth Opinion on Ukraine (2017), §47.

minority representatives communicated to the ACFC that 'they were neither involved in any adequate consultation on this bill nor informed about the discussions and proposed amendments discussed in the Verkhovna Rada.'¹⁰⁵

References to the new Law on National Minorities had been included in the 2019 State Language Law. While the 2019 Law focused on the strengthening of Ukrainian as the state language, it also listed exceptions to the general obligation to use the state language, in line with other legislation. Referring to these exceptions, it used expressions such as 'according to the law' (Art. 28(2)), and, in some cases, referred to the Law on National Minorities. However, the Law on National Minorities had not been adopted yet, clearly raising issues of legal clarity.¹⁰⁶ Effectively, provisions on the state language (concomitantly restricting the use of minority languages) were adopted in 2019, over three years before the Law on National Minorities.¹⁰⁷

Thus, the Law on National Minorities was adopted following numerous delays. At the same time, the process leading to its adoption in 2022 occurred quickly. The Venice Commission did not have the opportunity to express an opinion on the law before its adoption and declared it would instead engage in a retrospective assessment in 2023.¹⁰⁸ EU accession seems to have been an important trigger for its adoption (and for completing the process swiftly). Indeed, MP Yaroslav Zhelezniak stated that the 2022 Law signalled the fulfilment of one of the main requirements for Ukraine's candidacy in EU (Ukraine received candidate status for EU membership on 23 June 2022).¹⁰⁹ As part of the accession process, Ukraine had pledged to uphold European standards for the protection of the rights of national communities.¹¹⁰

¹⁰⁵ *Ibid.*

¹⁰⁶ Venice Commission Opinion (2019), §33.

¹⁰⁷ The Venice Commission recommended postponing the implementation of the State Language Law until the Law on National Minorities was also adopted. The Venice Commission also stated:

[T]he Law on Minorities should have been prepared simultaneously with the State Language Law in order to secure from the outset a balance between the protection of Ukrainian and the language-related rights of persons belonging to national minorities. This would have been more advisable due to the close link between these two pieces of legislation, which should complement each other. (§34)

¹⁰⁸ The PACE Monitoring Committee requested on 30 January 2023 an opinion to be submitted for adoption at the 135th Plenary Sessions of the Venice Commission (9–10 June 2023) <https://www.venice.coe.int/webforms/events/?id=3462>.

¹⁰⁹ Tanya Gerasimova, 'Rada Adopts New Law On National Minorities', *Ukrainian News*, 13 December 2022, <https://ukranews.com/en/news/901757-rada-adopts-new-law-on-national-minorities>.

¹¹⁰ *Ibid.*

5.1 *Criticism of Ukraine's Minorities and Kin-States*

The very process of adoption of the Law on National Minorities was criticised for a lack of consultation with Ukraine's national minorities. The Cultural Alliance of Hungarians in Sub-Carpathia (KMKSZ) and the Democratic Alliance of Hungarians in Ukraine (UMDSZ) argued in a statement that 'Legislators completely ignored the constructive proposals that were made earlier by Hungarian and other minority group organizations.'¹¹¹ They added:

The legislation not only strengthens all the restrictions that were previously codified in the Education and State Language Acts, but implements new ones as well. [...] The law interprets minority rights exclusively as rights that can be exercised individually by persons belonging to a minority group, which deprives national minorities (their communities, organizations) of any institutionally exercisable political, educational, and language rights, and therefore the ability to influence their own destiny. [...] The adopted law does not guarantee adequate institutional foundations or legal mechanisms for the implementation and protection of the rights of national minorities.

The Law was also criticised by the governments of Romania and Hungary. For example, Romania's President Klaus Iohannis and Foreign Ministry pointed to the absence of consultation with members of the Romanian minority in Ukraine and the Venice Commission.¹¹² In its June 2023 Opinion on the Law, the Venice Commission importantly noted that it was unable to determine the extent to which consultations with national stakeholders had generated consensus.¹¹³ The governments of kin-states expressed concerns on the Law more generally, particularly on the lack of clear provisions on the use of minority languages in education and in official documents.¹¹⁴ Similar concerns had been voiced with

¹¹¹ Joint statement of the Cultural Alliance of Hungarians in Sub-Carpathia (KMKSZ) and the Democratic Alliance of Hungarians in Ukraine (UMDSZ) Regarding the Law on National Minorities (Communities) of Ukraine, 14 December 2022, <https://kmksz.com.ua/2022/12/22/joint-statement-of-the-cultural-alliance-of-hungarians-in-sub-carpathia-and-the-democratic-alliance-of-hungarians-in-ukraine-regarding-the-law-on-national-minorities-communities-of-ukraine/>.

¹¹² 'Romanian president urges Zelensky to review law on minorities', *Interfax*, 10 January 2023, <https://interfax.com/newsroom/top-stories/86763/>.

¹¹³ Venice Commission Opinion (2023), §24.

¹¹⁴ Iohannis and Zelensky pledged that the foreign ministers of the two countries would bilateral talks to address the concerns of Romanian government and the Romanian minority in Ukraine. 'Zelensky assured Iohannis that the issue of the Romanian minority in Ukraine will be resolved', 7 January 2023, <https://nethuszar.ro/eng>

reference to previous legislation, particularly the 2017 Law on Education, and the impact on the rights of persons belonging to national minorities.¹¹⁵

5.2 *General Provisions*

Article 1 (as slightly amended in September 2023)¹¹⁶ defines a 'national minority' as follows:

A national minority (community) of Ukraine (hereinafter – national minority (community)) is a stable group of citizens of Ukraine who are not ethnic Ukrainians, residing on the territory of Ukraine within its internationally recognized borders, united by common ethnic, cultural, historical, linguistic and/or religious characteristics, who are aware of their belonging to it, and who express a desire to preserve and develop their linguistic, cultural, religious identity.

National minorities (communities) are integral, integrated and organic parts of Ukrainian society.

The first notable fact is that, throughout the Law, the expression 'national minority' is followed by 'community' in brackets. This appears to be linked to reservations on the use of the expression 'minority'. In a tweet of July 2021, President Zelensky noted:

Active work is underway on the law on national communities of Ukraine. *Not minorities, but communities.* Because no nationality in Ukraine should feel less important, less protected, less happy. No one can be in the minority, because *we are all equal.* And we are all kin.¹¹⁷ [*italics added*]

/zelensky-assured-iohannis-that-the-issue-of-the-romanian-minority-in-ukraine-will-be-resolved/.

115 PACE, 'The new Ukrainian law on education: a major impediment to the teaching of national minorities' mother tongues', *Resolution 2189* (2017), 12 October 2017, §2.

116 See Article 1, Law 'On Amendments to the Law on National Minorities'.

117 Author's translation. The tweet is available at https://twitter.com/ZelenskyyUa/status/1414877040021495808?ref_src=twsrc%5Etfw%67Ctwcamp%5Etwteemembed%67Ctwterm%5E1414877040021495808%67Ctwgr%5E958bc429488aa9365211b17fc393c81a1ec2e06e%67Ctwcon%5Esi_&ref_url=https%3A%2F%2Fwww.dw.com%2Fuk%2Fzelenskyi-vystupaie-proty-termina-natsionalni-menshyny%2Fa-58251071.

MP Dmytro Lubinets¹¹⁸ further elaborated on this in 2021, when the draft Law was being discussed:

We have constantly raised the question of a definition that *degrades dignity*. “National minority”: why a minority? Are we [not] all equal, all the same? There are villages in the Donetsk region where the vast majority of Greeks live – 80%. By decision of the committee, we created a working group to develop a new version of the law. Now we are finally introducing the definition of “national community” at the level of law. [italics added]

“National community” is a unifying term and factor, which includes indigenous peoples, national minorities, nationalities that have mother states, and ethnic groups that are similar to national minorities but very few in number.¹¹⁹

The understanding of ‘minority’ as ‘unequal’ and implying inferior status or dignity – as opposed to simply a numerically smaller national group in relation to the majority population – reflects an understanding of the concept solely in terms of power relations rather than a factual representation of a distinct range of nationalities. Others have pointed to the fact that the expression might be misconstrued as negative. There have been recommendations to substitute it with, for example, ‘co-nation’ – which better renders the notion of equality in status and dignity for all national groups residing in a state, rather than distinguishing between dominant and non-dominant ethnicities.¹²⁰ This is certainly a legitimate concern, and some discrepancy has emerged over the interpretation of the term ‘national minority’ both internationally and domestically, with reference to Ukraine’s legal framework. That said, the *core* meaning of a ‘national minority’ in international law is undoubtedly articulated by reference to the group’s size and lesser dominance within the territory of the state where it has (historically) lived, its distinctive cultural

118 Head of the Committee of the Verkhovna Rada of Ukraine on Human Rights, De-occupation and Reintegration of Temporarily Occupied Territories in Donetsk, Luhansk Oblasts and the Autonomous Republic of Crimea, the City of Sevastopol, National Minorities and Inter-ethnic Relations (established in 2019); Lubinets was appointed Verkhovna Rada Human Rights Ombudsman in June 2022.

119 «Національна спільнота» є об’єднавчим терміном і чинником – Дмитро Лубинець [‘National Community’ is a unifying term and a factor], Gromads’ke Radio, 14 July 2021, <https://hromadske.radio/podcasts/hromadska-hvylya/natsional-na-spil-nota-ie-ob-iednavchym-terminom-i-chynnykom-dmytro-lubinets/amp>.

120 Tove Malloy, *National Minority Rights in Europe* (Oxford: Oxford University Press, 2005), p. 38.

traits, and its active sense of identity and agency in the public sphere.¹²¹ Although overly restrictive approaches should be avoided, as confirmed by the Venice Commission's June Opinion¹²² and the subsequent deletion of 'traditionally' next to 'residing' in the revised Article 1 definition, the Law's core concept reflects this understanding of national minorities as stable groups, and is broadly in line with Recommendation 1201 (1993) of the Council of Europe's Parliamentary Assembly (Art. 1).¹²³ A dislike for the term 'minority' might partially stem from its being considered 'alien' or 'imported'.¹²⁴ Among other things, it was mostly excluded from the Soviet discourse, and used only on rare occasions, to designate communities without a 'homeland' (territorial formations associated with a particular ethnicity), or residing outside it.¹²⁵ Thus, the term has been applied to groups that have been generally seen as having lower ranking compared to titular groups (with 'their own' territories).¹²⁶ The expression 'nationality' (*natsional'nost'*), instead, was employed to refer to ethnic communities (and one's ethnic background), and applied equally to both titular and non-titular groups. It is also the case that recent constitutional iterations in divided societies such as the Western Balkans have increasingly referenced national 'communities' in the context of legislation nominally designed to implement international minority rights standards. They all reflect a range of terminological and conceptual variations that point (at least symbolically) towards a more equalising language vis-à-vis the dominant national group(s) and are somehow tailored to the *sui*

121 Gaetano Pentassuglia, *Minorities in International Law* (Strasbourg: Council of Europe Publishing, 2003), chap. 3.

122 Venice Commission Opinion (2023), §28.

123 PACE, Recommendation 1201 (1993), *Additional Protocol on the Rights of Minorities to the European Convention on Human Rights*, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15235>. It should also be noted that the adverb 'traditionally' qualifies the scope of certain provisions in Articles 10 and 19 of the Law involving minority settlements. In general, the above-mentioned core meaning of a national minority (endorsed by the Law) does not encompass economic migrants or recent arrivals as opposed to long-established groups.

124 With regard to the common rejection of the expression in the Russian Federation, when designating titular groups (e.g. Tatars in Tatarstan), see Federica Prina, *National Minorities in Putin's Russia: Diversity and Assimilation* (London: Routledge, 2016), pp. 66–70. See also Vladimir Malakhov and Alexander Osipov, 'The Category of Minorities in the Russian Federation: A Reflection on Uses and Misuses', in *International Obligations and National Debates: Minorities Around the Baltic Sea*, ed. Sia S Åkermark (Marienhamn: The Åland Islands Peace Institute, 2006), 497–544, p. 510.

125 Malakhov and Osipov, 'The Category of Minorities in the Russian Federation: A Reflection on Uses and Misuses', pp. 509–11.

126 *Ibid.*

generis internalisation dynamics of each case.¹²⁷ At the same time, in line with common international practice, the term ‘national minorities’ was included in Ukrainian legislation already in 1992 with the first Law on National Minorities, and then reconfirmed in the 1996 Constitution. While there is nothing in international law that prohibits terminological variations perceived to be ameliorative at country level, they must at the very least be consistent with the minimum concept of a ‘national minority’ sketched out above. Unsurprisingly, the Venice Commission’s Opinion understands the two terms as synonyms for the purposes of the Law.¹²⁸ At the same time, the purportedly unifying connotation of ‘community’ makes it even more compelling for the Law to be in principle applicable to indigenous peoples, despite the additional (expanded) protection that the latter are entitled to under a law specific to them adopted in 2021 (Law of Ukraine No. 1616-IX on Indigenous People of Ukraine).¹²⁹

The Law on National Minorities states that in case of conflict between the Law itself and an international treaty ratified by Ukraine, the latter will take precedence (Art. 2).¹³⁰ The same principle is enshrined in Article 9(1) of the Ukrainian Constitution.¹³¹ However, Article 9(2) states that: ‘The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.’ In line with the latter, Article 8 states that ‘The Constitution of Ukraine has

127 Elizabeth Craig, ‘The Framework Convention for the Protection of National Minorities and Internalization: Lessons from the Western Balkans’, *Review of Central and East European Law* 46, no. 1 (2021): 1–40; see also Ljubica Djordjević, ‘Conceptual Disputes over the Notions of Nation and National Minority in the Western Balkan Countries’, ECMI: Research Paper #126, April 2021, https://www.ecmi.de/fileadmin/user_upload/Research_Paper_126_final.pdf.

128 Venice Commission Opinion (2023), §25.

129 See also Venice Commission Opinion (2023), §28. Law No. 1616-IX broadly echoes the 2007 UNDRIP and recognises Crimean Tatars, Crimean Karaites, and Krymchaks as indigenous peoples of Ukraine (Art. 1(2)). An analysis of this Law (or indeed indigenous standards in general) falls beyond the scope of this article, yet one should note that such legislation includes specific forms of representation of such groups in: the Verkhovna Rada of Ukraine, the Verkhovna Rada of the Autonomous Republic of Crimea and local self-governmental bodies of the Autonomous Republic of Crimea, and the city of Sevastopol (Art. 2(4)). Apart from Law No. 1616-IX, all references in official Ukrainian statements or policies to ‘indigenous peoples’, alongside ‘national minorities’, should be taken to imply common baselines from which, however, differing degrees of protection are permitted in accordance with international law.

130 It states: ‘If an international treaty of Ukraine, ratified by the Verkhovna Rada of Ukraine, establishes rules other than those provided for by this Law, the rules of the international treaty shall apply.’

131 Article 9(1) states: ‘International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.’

the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it.' [italics added] The Venice Commission summarises it by stating that '[i]nternational treaties [...] come [...] *immediately after* the Constitution and prevail over ordinary laws.'¹³² At the same time, all domestic laws, including those relating to minority issues, must be consistent with the relevant international treaties.

The Law on National Minorities establishes that the aims of the state policy in the field of national minorities include 'strengthening national unity and ensuring multiculturalism of Ukrainian society' (Art. 13(1)(4)) – effectively, striking the balance referred to above. Several rights are worded in the Law in a way that imply a *negative* responsibility on the part of the state. For example, Article 10(1) states that '[a] person belonging to a national minority (community) *has the right to free and unimpeded use of the language* of his/her national minority (community) privately and in public, in oral and written forms *within the limits not contrary to the law*' [italics added]. Similarly, Article 10(2) states that public events '*may* be held' in the languages of national minorities [italics added]. This implies that the state will refrain from interfering with the enjoyment of particular rights, rather than creating the conditions for their enjoyment. Amendments to the Law, adopted in 2023, added some details on the implementation of the rights enshrined in Article 10,¹³³ yet the new wording retains a degree of vagueness, overall reconfirming the 'negative responsibility' approach.¹³⁴ Besides, Article 10(1) encompasses the wording 'within the limits not contrary to the law', which seems redundant and potentially problematic. In fact, the right to use minority languages in private and public contexts (*other than* specific institutional settings, such as courts and other public bodies, unless so permitted) is a minimum standard under international law.¹³⁵ One should assume that the space for any restrictions on such very basic standard would be exceptionally narrow.

132 Venice Commission Opinion (2019), §16.

133 They involve specialised minority bookstores (§5), provision of care in minority languages (§6), and a methodology for determining the 'the specifics of the use of languages of national minorities', including in communication with the state authorities in minority settlements (§10). Article 4, Law 'On Amendments to the Law on National Minorities'.

134 Article 10 (§6), for example, states that care '*may* be provided' in minority languages, while the methodology '*should be enabling*' the use of minority languages in the said areas (§10). [italics added].

135 See, for example, Human Rights Committee, *General Comment No. 23: The Rights of Minorities (Article 27)*, UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, §5(3); see also Gaetano Pentassuglia, 'Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee', *German Yearbook of International Law* 46 (2003): 401–451, p. 423.

The Law stipulates that ‘the state facilitates and supports’ the study of the history and culture of national minorities and that private education institutions ‘have the right to freely choose the language of the educational process’.¹³⁶ By contrast, the state ‘shall *ensure*’ that minorities study the history and culture of Ukraine and private schools are ‘are *obliged to ensure* that students master the state language in accordance with state standards.’¹³⁷ [italics added].

The learning of the state language is required under international instruments,¹³⁸ but so is adequate support for minority language and education. In essence, the Law on National Minorities allows private schools to exist, but it is non-committal when it comes to active measures to promote minority languages. Moreover, the Law does not explain in detail how to implement rights, and instead cross-references to other legislation. In the provision on the ‘right to education’, for example, it is stated that the peculiarities of the use of the languages of national minorities in the educational process ‘are defined by the Law ‘On Education’’. However, details of minority language rights are not set out in the latter law.

5.2 *Provisions on Participation*

Article 5(2) lists a set of rights held by persons belonging to national minorities, including freedom of public association and assembly (§2), and the right to participation in political, economic and social life (§4). These rights are reiterated in Articles 7 and 9 respectively. Article 7(2) clarifies that:

Participation or non-participation of a person belonging to a national minority (community) in a public association of a national minority (community) may not be a ground for restricting his or her rights and freedoms provided for by the Constitution and laws of Ukraine.

This implies, once again, only a negative responsibility for the state (a person belonging to a national minority ‘has the right’, rather than ‘is guaranteed the right’). Moreover, the lack of specific monitoring mechanisms due to the ‘framework’ nature of the Law means that the provision is rather vague about its practical application.

¹³⁶ Articles 12(2)(2) and 11(4), following the 2023 Law ‘On Amendments to the Law on National Minorities’. The amending law added a new paragraph (Art. 11(3)), containing a guarantee on free provision of textbooks for students belonging to national minorities.

¹³⁷ Articles 12(3) and 11(4).

¹³⁸ See, for example, UNESCO, *Convention Against Discrimination in Education*, 14 December 1960, Article 5(1)(c).

Article 9(1) states:

Persons belonging to national minorities (communities) have the right to participate in elections and referendums, freely elect and be elected to state and local self-government bodies, and have *equal access* to public service and service in local self-government bodies, as well as the right to *equal participation* in the economic and social life of the country, including in matters related to the preservation and popularization of the culture, traditions and identity of the national minority (community) to which they belong. [italics added]

A second paragraph was added to Article 9 in 2023:

The state creates the necessary conditions for the effective participation of persons belonging to national minorities (communities), in social and economic life, as well as in the management of state affairs.¹³⁹

'Equal access' and 'equal participation' are not defined in Article 9: it is unclear whether the provision relates to protection from discrimination, or substantive equality (i.e. special measures to guarantee equality in substance, even in the presence of difference). The point was also made by the Venice Commission in relation to Article 9, recommending that states 'act positively to *'create the conditions necessary for effective participation ... in cultural, social and economic life and in public affairs [...]'* [italics in original].¹⁴⁰ Following the Venice Commission's Opinion, a paragraph was added to Article 3,¹⁴¹ mandating that the state 'shall take measures to achieve *full and genuine equality* in the spheres of economic, social, political and cultural life between persons belonging to national minorities (communities) and persons belonging to the majority of the population.'¹⁴² [italics added] The new wording aligns the Law on National Minorities with the FCNM and thus implies a proactive approach to equality dimensions in general. The text has been further improved by the addition of a specific paragraph to Article 9 which requires the state to generate 'the necessary conditions' for 'effective' minority participation, broadly in line with Article 15 FCNM. However, the language is not entirely consistent across the

139 Article 4, Law 'On Amendments to the Law on National Minorities'.

140 Venice Commission Opinion (2023), §35.

141 Article 2, Law 'On Amendments to the Law on National Minorities'.

142 (New) Article 3(4), Law on National Minorities.

two paragraphs, and the Article 9(2) focus is essentially on social and economic life and/or general aspects of ‘state affairs’.

In fact, Article 9(1) notes that minorities have a right to equal participation ‘including in matters related to’ their culture, traditions and identity [italics added]. International law affords minorities a higher level of protection, by requiring states parties to ‘create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, *in particular those affecting them*.’¹⁴³ [italics added]

It should be added that, aside from freedom of expression issues,¹⁴⁴ ‘effective’ participation ordinarily requires states to facilitate access to electoral materials in minority languages.¹⁴⁵

Article 13(2) provides that:

State policy in the field of national minorities (communities) is based on the principles of: [...]

- 5) *inclusive involvement* of persons belonging to national minorities (communities), including through their public associations, in the formation and implementation of state policy in the field of national minorities (communities) at all levels of government;
- 6) *integration* of persons belonging to national minorities (communities) into Ukrainian society *on the basis of recognition of human and civil rights and freedoms* [italics added].

The Law refers to the involvement of minorities in policy-making and policy-implementation, but it does not outline specific mechanisms or processes. In this regard, it can also be argued that ‘inclusive involvement’ is not entirely consistent with the notion of ‘effective participation’ in minority affairs employed by international instruments, suggesting a lower standard of participation that simply enables public associations to exercise general associative freedoms.

‘Integration’ is also left vague, stating that it should occur ‘on the basis of recognition of human and civil rights and freedoms’. Successful integration requires positive efforts and implementation of measures conducive to

143 Article 15 FCNM; see also OSCE, *Lund Recommendations on the Effective Participation of National Minorities in Public Life*, §13, 16 and 19.

144 *Ibid.*, §57.

145 See, for example, Gaetano Pentassuglia, ‘Assessing the Consistency of Kurdish Democratic Autonomy with International Human Rights Law’, *Nordic Journal of International Law* 89, No. 2 (2020), 168–208, p. 189.

inclusion and participation, rather than simply the recognition of human rights for all regardless of ethnic origin, which may potentially translate into an assimilationist idea. The Venice Commission has also reminded Ukraine of its duty to facilitate 'full and effective equality' under Article 4 (2–3) of the FCNM¹⁴⁶ which is now endorsed in the revised Article 3 mentioned above.

Article 13(3) is similarly declarative. It contains a reference to 'implementing measures', although the specifics are not outlined in the Law:

The state guarantees the protection and ensures the realization of the rights and freedoms of persons belonging to national minorities (communities) *by implementing measures* in the field of state policy aimed at preserving, supporting and developing their unique identity [*самобутність*], and integration into Ukrainian society. [italics added]

Some institutions for consultation and participation are outlined in the subsequent articles. Article 15 refers to a *central executive body*, which 'ensures the formation and implementation of state policy in the field of national minorities'. Article 15(2) states that this central executive body 'will establish an advisory body, which includes representatives of public associations of national minorities (communities), as well as, if necessary, other permanent or temporary consultative and advisory bodies.' The body functions in line with the Law of Ukraine 'On Central Executive Bodies', referred to in the same paragraph. The rules for membership in the body, or guidelines to ensure both internal and external representation, are not outlined in the Law.

The tasks performed by this body are listed in Article 15(1).¹⁴⁷ Such a coordinating mechanism can be regarded as a positive feature of the Law

146 Venice Commission Opinion (2023), §29.

147 The provision states that the body:

- 1) summarises the practice of applying legislation on national minorities (communities), develops proposals for improving legislative and other regulatory acts;
- 2) provides regulatory and legal support in the field of national minorities (communities) within the powers defined by law;
- 3) supervises observance of legislation in the field of national minorities (communities), including monitoring the fulfilment of Ukraine's international obligations in the field of national minorities (communities); [...]
- 6) interacts with central and local bodies of executive power, local self-government bodies in the field of national minorities (communities);
- 7) conducts consultations with representatives of public associations of national minorities (communities) on issues related to the rights and freedoms of persons belonging to national minorities (communities) as defined by law;
- 8) monitors the activities of public associations of national minorities (communities).

and a reasonable response to a targeted recommendation from the ACFC in its Fourth Opinion.¹⁴⁸ However, this body's role should be understood as a mechanism to improve the overall operational capacity in the field and the effective representation of national minority interests, not as a tool for vetting minority concerns. Of potential concern is the function of 'monitor[ing] the activities of public associations of national minorities' (Art. 15(1)(8)).

5.2.1 Advisory Bodies

Article 18 relates to advisory bodies: such bodies are established to promote the exercise of the rights and freedoms of persons belonging to national minorities provided for by this Law. When dealing with issues within the competences of local state administrations and local self-government, such bodies, '*at the initiative of public associations of national minorities (communities)*', '*may form consultative, advisory, other auxiliary bodies (hereinafter referred to as advisory bodies on issues of national minorities (communities), which include representatives of public associations of national minorities (communities)*.' [italics added] Thus, the initiative must originate from public associations, rather than it being a form of *proactive consultation* on the part of state bodies.

The following paragraph (Art. 18(2)) states:

Draft decisions of local state administrations, local self-government bodies, their officials on issues related to the realisation of the rights and freedoms of persons belonging to national minorities (communities) provided for by this Law *shall be submitted for discussion to advisory bodies on national minorities (communities), if they are established.* [italics added]

Proposals and comments of advisory bodies of national minorities (communities) are *advisory in nature* and are *mandatory for consideration* by relevant bodies and officials. Local state administrations, local self-government bodies, and their officials are obliged to inform the relevant advisory bodies on issues of national minorities (communities) of the results of consideration of the submitted proposals within ten days from the date of their receipt. [italics added]

Positive features of this provision include the requirement to submit any relevant draft decisions of local public authorities to the national minority advisory bodies for discussion, thereby making the consideration of any minority input 'mandatory' for those bodies. However, the potential impact of the provision presupposes only the very existence of such advisory bodies

¹⁴⁸ ACFC, Fourth Opinion on Ukraine (2017), §176. See also above ('4.1 *Consultation*').

(‘if they are established’), whose role is exclusively ‘advisory in nature’. This approach is thus doubly restrictive: consultation can only happen when persons belonging to national minorities themselves initiate the process, and the outcome is non-binding.¹⁴⁹ The ACFC has been clear that states parties to the FCNM are required to entrench minority consultation in law and to consistently undertake such consultation:¹⁵⁰ the ‘if’ language arguably falls short of these obligations.

Finally, the last paragraph of this article (Art. 18(3)) states that:

The order for the formation, main directions and forms of activity of advisory bodies on national minorities (communities) are determined by the Regulation on advisory bodies on national minorities (communities), which is *approved by the relevant local state administrations and local self-government bodies*. [italics added]

Of concern in this article is the statement that the advisory bodies’ activities and procedures are determined by a Regulation approved by state authorities, without reference to consultation and engagement with minority associations in relation to the content of this Regulation.

Article 16 relates to Crimea’s institutions: the Council of Ministers of the Autonomous Republic of Crimea and local state administrations. The article only provides very general provisions, stating that such Crimean institutions ‘ensure the implementation of the legislation of Ukraine in the field of national minorities’, and, in order to fulfil this task, they, ‘if necessary, may establish structural subdivisions on national minorities’.

5.2.2 State Bodies

Article 17 relates to so-called ‘local self-government bodies’ and their competences in implementing state policy in the field of national minorities. These bodies will ‘promote the preservation and development of the cultural and ethnic identity of national minorities (communities) by *supporting the activities*’ of minority organisations.¹⁵¹ (Art. 17(1)(1)) [italics added]

149 On outcomes, see below (‘The Law on National Minorities and International Standards’).

150 ACFC, *Thematic Commentary No. 2: The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, adopted on 27 February 2008 [hereinafter ‘ACFC, *Thematic Commentary No. 2*’]. See, for example, §107, which references a requirement to entrench an obligation to consult in law, and states that the relevant regulations must be ‘detailed enough to provide for efficient and consistent consultation’.

151 ‘[P]ublic associations of national minorities’ and ‘national-cultural societies’.

Self-government bodies are also to carry out their functions in light of the needs of minorities, as well as acting to protect their rights and freedoms (Art. 17(1)(2)).¹⁵² It is unclear, from the reports to the ACFC and Committee of Experts, in what way these bodies may assess the needs of minorities and support the activities of minority organisations. Unless effective consultation takes place on such needs, and on strategies to address them, there is a risk that local state bodies' interventions be based on speculative assumptions, be delivered in a top-down fashion, and without evaluation of impact.

Article 19 refers to the establishment of a Centre of National Minorities, a state body whose objective is addressing the interests of national minorities and promoting the activities of minority public associations. The Centre is established by the Council of Ministers of the Autonomous Republic of Crimea, as well as the regional, Kyiv and Sevastopol city state administrations within the relevant territorial unit. The procedure for the establishment and functioning of the Centre is determined by the central executive body (noted above) (Art. 19(1)). Similar bodies can also be established at the local level (village, settlement, and city councils) 'in settlements traditionally inhabited by persons belonging to national minorities (communities) or where such persons constitute a significant part of the population',¹⁵³ at the initiative of minority communities (Art. 19(2)). Article 19(2) further states that the meetings of minority advisory bodies 'may' be held at the Centre. It is unclear what additional, specific function the Centre (or local centres) would serve. They may act as liaison offices with consultative bodies and, as such, might offer additional opportunities for fruitful consultation. At the same time, the functions of the various bodies should be clarified, to ensure they all act in a coordinated fashion and operate as part of a coherent whole.

152 The Law states that they 'carry out planning of the socio-economic and cultural development of territorial communities, districts, regions, taking into account the ethnic, cultural and other needs of such persons and the need to preserve and develop their identity, protect and realize rights and freedoms' (Art. 17(1)(2)).

153 New Article 10(12), added in 2023 (Art. 5(6), Law 'On Amendments to the Law on National Minorities') states that the procedure for determining the list of relevant settlements (traditionally inhabited by persons belonging to national minorities or where such persons constitute a significant part of the population) is to be approved by the Cabinet of Ministers of Ukraine. Presumably this provision may be taken in conjunction with Article 19(2), where the same wording is employed with reference to minority settlements, implying that the Cabinet would determine the areas in which the provisions laid out in Article 19(2) may be applied. This, however, remains unclear, together with the details of the procedure referred to in Article 10(12).

Article 14 refers to funding for measures designed to implement the rights of national minorities, to be covered by the State Budget of Ukraine and local budget funds (Art. 14(1)). However, funding for public associations is not earmarked or guaranteed:

Public associations of national minorities (communities) *may be provided with competitive financial support* for the implementation of programs (projects, events) at the expense of the State Budget of Ukraine, funds of local budgets in accordance with the procedure established by the Cabinet of Ministers of Ukraine. (Art. 14(2)) [italics added]

These organisations are referred to as 'public associations' in the sense that they are (non-profit) associations 'serving' a community of people. They are, however, established by private individuals and, like all such associations, are expected to raise funds for their own activities. At the same time, it is generally accepted that positive measures are ordinarily required to protect the identity of minority groups, including the provision of financial resources to support minority institutions on a non-discriminatory basis. While the possibility of accessing public funding is a notable feature of the provision, the wording employed here does not seem to guarantee financial support and, to that extent, appears to be in line with the same tentative language used elsewhere in the Law. The expression 'competitive' indicates that minority organisations need to regularly apply for funds for individual projects or events, which creates discontinuity and uncertainty in the delivery of activities, and potential imbalances in the level of financial assistance. The Venice Commission generally welcomed the provision, although it referenced (more vaguely) the 'principle of proportionality' in providing such financial support.¹⁵⁴

Article 19(2) relates to the operations of the Centre for National Minorities, for which state organs are to provide premises as well as 'organisational support'.¹⁵⁵ It is unclear here whether 'organisational support' relates to funding, and if the funding would be regular or subject to periodic applications.

5.3 A 'Requirement of Loyalty'

The Law includes provisions that set out a number of duties for national minorities. Article 5(5) stipulates:

¹⁵⁴ Venice Commission Opinion (2023), §44, 68.

¹⁵⁵ *Організаційне забезпечення*.

A person belonging to a national minority (community) is obliged to comply with the Constitution and laws of Ukraine, to *defend state sovereignty and territorial integrity of Ukraine*, to *respect the language, culture, traditions, customs, and religious identity of the Ukrainian nation and all national minorities (communities) and indigenous peoples of Ukraine*, as well as to *promote the integration of the national minority (community) into Ukrainian society*. [italics added]

The provision appears unusual in this context: the article effectively suggests that minorities, if not kept in check, may corrupt the language and identity of the majority or of other minorities, fuelling suspicion towards them. This is hardly consistent with typical standard final clauses in international minority-related instruments whose focus is essentially on respecting the rights of others and affirming that nothing in the text can be taken to authorise activities that go against the sovereignty and territorial integrity of the state. The articulation of a duty upon national minority members to promote the integration of their group into Ukrainian society reflects security and political dynamics in the country yet is equally at odds with international standards in that it problematically blurs the lines amongst state, community, and individual responsibilities.

Subsequent articles single out the Russian minority and ‘warnings’ against it feature prominently. Article 5(6) states that the rights of persons belonging to national minorities ‘may be restricted in accordance with the law’ and ‘if such restriction is necessary in a democratic society’, thereby echoing provisions of the European Convention of Human Rights.¹⁵⁶ However, the article goes further by stating that:

When exercising and/or protecting the rights and freedoms of persons belonging to national minorities (communities), it is prohibited to popularize or propagandize the terrorist state (aggressor state) and its bodies, the Russian Nazi totalitarian regime, symbols of the military invasion of Ukraine by the Russian Nazi totalitarian regime, representatives of the authorities of the terrorist state (aggressor state) and their actions that create a positive image of the terrorist state (aggressor state), justify or

¹⁵⁶ 2023 amendments added ‘in the interests of national security, territorial integrity and public order, for the prevention of disorder or crime, for the protection of public health, protection of the rights and freedoms of other persons’. The wording fully reflects that of the European Convention on Human Rights. See Article 3, Law ‘On Amendments to the Law on National Minorities’.

recognise the legitimacy of the armed aggression of the Russian Federation as a terrorist state against Ukraine, the occupation of the territory of Ukraine.

This language, including the use of the term 'Nazi', mirrors that used by the Russian political elite to describe the Ukrainian leadership, and indeed to justify military intervention in Ukraine. While politically significant, one can argue that none of this language is relevant for the purposes of the Law and can in fact be harmful to Russian(-speaking) minorities in Ukraine.¹⁵⁷

This article does not refer specifically to the Russian minority, but this reference seems implied. It is generally minorities themselves who exercise and/or protect minority rights and freedoms, and non-Russian minorities are unlikely to wish to 'create a positive image' of Russia. This article is manifestly a warning to persons identifying with the Russian minority *not to* act as agents of the Russian government within Ukraine. By suggesting that these persons may be disloyal to the Ukrainian state, the provision effectively amounts to a securitising move against the Russian minority.

Section v (Final and Transitional Provisions) seems to confirm this approach when making the exercise of specific rights subject to temporary restrictions in the case of particular minorities:

To establish that for the period of martial law [...] and for six months after its termination (abolition), the rights of national minorities (communities) defined in Article 7 in terms of the right to peaceful assembly, Articles 14, 18, 19 and part three of Article 20 of this Law are subject to temporary restrictions in the implementation and protection; [these restrictions apply to minorities] who identify their affiliation *by ethnic origin* with a state recognised in Ukraine and/or by international organisations as a terrorist state (aggressor state) that commits acts of aggression against Ukraine.¹⁵⁸ [italics added]

Derogations due to a state of emergency are clearly permitted under international law. However, they must be consistent with other existing international obligations (e.g., under Article 15 ECHR and Article 4 ICCPR). On the one hand, any restrictions on key civil and political rights such as the right to association and peaceful assembly must meet such requirements, including the principle of non-discrimination. On the other hand, targeting

¹⁵⁷ In a similar vein, see also Venice Commission Opinion (2023), §31.

¹⁵⁸ Section v, §3(1).

solely minorities, and solely on grounds of ethnic origin (*de facto* affecting ethnic Russians) is likely to constitute discrimination and thus can hardly offer a proper legal basis for derogation.¹⁵⁹

The 2023 amendments¹⁶⁰ have created further restrictions by adding a new provision to the Law's Section v.¹⁶¹ It states that three paragraphs of Article 10 (§2, 3 and 11) shall not apply to 'the state (official) language of a state recognised by the Verkhovna Rada as an aggressor or occupying state', for a period of five years from the cancellation of such status by the Rada. Article 10 concerns the use of minority languages and has been expanded through the 2023 amendments in relation to public events,¹⁶² cultural events,¹⁶³ and advertising.¹⁶⁴ Although the new paragraph refers to a 'state (official) language', the article nevertheless benefits sub-state groups, especially (though not exclusively) in areas of traditional minority settlement or where minority members constitute a 'significant part' of the population. Presumably intended (as per the Venice Commission's 2023 suggestion) to deny the Russian language preferential treatment, the new provision problematically goes further by effectively equating the language of one of Ukraine's national minorities to that of the aggressor and entrenching that status for at least a period of five years. The Explanatory Note¹⁶⁵ makes it clear that the amendments 'take into account the objective circumstances which Ukraine is facing due to the armed aggression of the Russian Federation.' Moreover, Article 13(2) stipulates that the state minority policy is based on the principles of 'preventing inter-ethnic conflicts, the use of national minorities (communities) by other states for the autonomisation of their regions of residence and the disintegration of Ukraine' (Art. 13(2)(9)).

Article 20 states that 'Ukraine promotes international cooperation on ensuring and protecting the rights and interests of national minorities

159 See also Venice Commission Opinion (2023), §74.

160 Article 9, Law 'On Amendments to the Law on National Minorities'.

161 Section v, §3(2).

162 Including meetings, conferences and rallies among others. Article 10(2), amended by Article 5(1), Law 'On Amendments to the Law on National Minorities'. The amended article expanded the provision's application by referring to events 'organised for persons belonging to national minorities' rather than 'organised and held by persons belonging to national minorities' in the old version.

163 Article 10(3), amended by Article 5(2), Law 'On Amendments to the Law on National Minorities'.

164 Article 10(11), relating to advertising in Ukrainian that may be dubbed in minority settlements. The provision was added by Article 5(6), Law 'On Amendments to the Law on National Minorities'.

165 See note 2.

(communities), particularly by concluding and implementing multilateral and bilateral agreements in this area.' Article 21 restricts the scope of Article 20. It starts by stating that national minorities and their associations 'may maintain relations with representatives of countries of ethnic kinship'; they may receive assistance from foreign states and institutions, as well as private individuals, in accordance with the law (§1). However, §2 goes on to say:

Persons belonging to national minorities (communities) and public associations of national minorities (communities) *are prohibited from cooperating with and receiving assistance from foreign states and private individuals, non-governmental organisations of other states, international non-governmental organisations, foundations and other foreign institutions, whose activities are aimed at eliminating Ukraine's independence, change of the constitutional order by force, violation of the sovereignty and territorial integrity of the state, undermining its security, illegal seizure of state power, propaganda of war, violence, inciting inter-ethnic, racial, religious enmity, encroachment on human rights and freedoms, public health.* [italics added]

These provisions reveal a drive by the Ukrainian government to pre-empt the instrumentalisation of kin minority communities, and of minority rights, by a kin state. This reflects an understandable concern given that the 'protection' of Russian-speakers in Ukraine was invoked as a justification for the war. At the same time, the language used is very strong, while legislation on threats to the constitutional order and territorial integrity of the state should be included in laws of general application rather than a law on national minorities. At the very least, the formulation of the clause should have been streamlined and better coordinated with Article 5(5) (above), with a possible cross-reference to relevant legislation. The Venice Commission suggests that the provision should be included in criminal legislation or transitional provisions in the context of the martial law.¹⁶⁶ To the extent that the activities in question are intrinsically illegal (indirect aggression, propaganda of war, racial hatred, etc.), justifying such restrictions as 'derogations' appears inappropriate. The provisions incorporated in Articles 13 and 21 reflect the notion of minorities as a potential threat, at a time when society is already polarised. In this context, already in 2017, the ACFC noted the following:

166 Venice Commission Opinion (2023), §71.

Notwithstanding this crisis [the conflict in Eastern Ukraine and illegal annexation of Crimea], Ukrainian society continues in the main, to be tolerant and open, respectful of multiple identities of persons making up its population. Nonetheless, the Advisory Committee [ACFC] observed that the conflict has had a catalysing effect on society as a whole, in particular by creating an atmosphere in which persons who hitherto felt comfortable with complex, layered and multiple identities, *feel the obligation to choose sides and to show loyalty to the state. The persons most impacted in this regard are those who identify as ethnic Russians or those who identify with the Ukrainian majority but communicate in the Russian language.* A perception that the conflict in the east of the country has been exacerbated, artificially or not, by issues of culture and language, has prompted the promotion of the Ukrainian language in all fields of life and to reduce the role of the Russian language in the public sphere. *Political radicalisation and a rise in national fervour are detrimental to harmonious community relations* in the country and endanger its perspectives for peaceful coexistence and prosperity. Persons belonging to other minorities are also affected, as they for the most part, feel the compulsion to demonstrate solidarity with the state and the Ukrainian majority, at a time of need. In short, the space for individuals to self-identify freely and to express publicly their ethnicity has been significantly affected by the conflict.¹⁶⁷ [italics added]

6 The Law on National Minorities and International Standards

The Law on National Minorities should be considered in light of the meaning of 'effective' participation. The starting point is a vision of a shared future encompassing the majority and minority/ies. Interaction should be based on respectful dialogue, with minorities being listened to and taken seriously (Article 15 FCNM, taken in conjunction with Article 6¹⁶⁸).

'Effectiveness' is explained in ACFC's 2008 *Thematic Commentary No. 2: The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*. The *Commentary* notes that it is not sufficient for states parties to formally provide for the participation

167 ACFC, Fourth Opinion on Ukraine (2017), §10.

168 It says: 'states shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and cooperation among all persons living on their territory.'

(representation) of persons belonging to national minorities in decision-making processes: states should also ensure that minority participation can generate *substantial* influence on decisions,¹⁶⁹ leading to a sense of a shared ownership of the process and its outcomes.

A number of principles are thus linked to effective participation, namely:

- effective participation requires effective organisations representing persons belonging to national minorities¹⁷⁰ (*capacity*);
- effective participation requires that persons belonging to national minorities feel that they and their issues are represented by members of Parliament, consultative bodies and organisations claiming to represent them,¹⁷¹ to reflect a variety of views within the national minority (*representation of interests* – internal pluralism);
- effectiveness of participation means real and substantial influence on decisions taken with a view to a shared ownership of the decisions to be taken¹⁷² (*substantive influence*).

6.1 *Capacity*

Participation of minorities is affected by their capacity to engage with state actors (as well as their willingness to do so).¹⁷³ The ACFC's *Thematic Commentary No. 2* states that:

It may be a challenge for representatives of national minorities to participate effectively in decision-making. It implies the allocation of time and resources, not only to participate, but also to try to reflect accurately the variety of views among persons belonging to their national minority. Consequently, national minorities require both *capacity building and resources* to ensure that their representatives can contribute effectively. (§21) [*italics added*]

In many cases minorities may not interact with state authorities on an even level due to a paucity of capacity-building initiatives and limited resources. At the same time, when minority organisations have the capacity to engage effectively, they can become good partners for the authorities in building inclusive and diverse societies.

169 ACFC, *Thematic Commentary No. 2*, §71.

170 *Ibid.*, §21.

171 *Ibid.*

172 *Ibid.*, §19 and 71.

173 Pentassuglia, 'Effective Minority Participation as a Balancing Act', p. 7.

The Law of National Minorities does not provide guaranteed funding for minority organisations, which is likely to impact on the work of minority organisations. In addition, the Law does not refer to capacity-building and neither do the reports to the ACFC or Committee of Experts.

Building capacity encompasses raising awareness and knowledge of minority rights themselves, including clarifying the meaning of concepts such as ‘effective equality’ or ‘effective participation’, among minority representatives and state officials alike, as these are fundamental principles on which state policy on minorities should hinge. Follow-up meetings to discuss ACFC Opinions can be important in consolidating the understanding of these concepts, and to reflect on how to translate ACFC recommendations into practice.

Another factor of crucial importance in protecting minority rights is the recognition of the legitimacy of minority interests. This may involve challenging views that link minority claims to disloyalty and possible sources of instability. The inclusion in the Law on National Minorities of explicit warnings to minorities not to threaten the Ukrainian state is likely to add to the atmosphere of distrust that the Russian war of aggression has already caused. The Law effectively carries the message that Russian minorities in Ukraine may side with the enemy.

6.2 *Representation of Interests*

Effective participation requires mechanisms enabling persons belonging to national minorities to feel confident that their interests are represented, and taken into account, in elected and consultative bodies. A confidence deficit will likely result in persons belonging to minorities disengaging from these institutions and impair the bodies’ capacity to operate effectively.

A focus on *descriptive* representation would imply that that it is sufficient to involve in consultation one organisation per minority; *substantive* representation would require inviting all minority organisations to participate in consultation. Clearly, a state should aim at substantive representation as the state has a responsibility of inclusivity in managing consultative processes. As noted, in the case of the advisory body under the Ministry of Education, several organisations representing the same minority are included. However, it is unclear from the reports to the ACFC whether the system is fully inclusive, or whether substantive representation is recognised as a desirable goal. While fostering unlimited fragmentation in minority representation may not prove conducive to tangible results when it comes to negotiating with state bodies, aiming only at descriptive representation can potentially fuel internal divisions

and consolidate cleavages if the group lacks robust internal representation procedures. This may also result in some minority concerns not being met.

Mainstream parties could intensify their efforts to accommodate national minorities and gain their trust. At the same time, international minority standards, including the *Lund Recommendations*, do not provide clear guidance on the incorporation of national minority concerns into mainstream parties that can meet the test of effective participation. One can also argue that the outcome-driven 'effective' participation of national minorities (see below) could hardly result primarily (let alone exclusively) from general party structures.¹⁷⁴

6.3 *Substantive Influence*

Substantive influence involves focusing on practical outcomes rather than simply the process of consultation. It leads to shared ownership of decisions, through the close cooperation of state bodies and minority organisations. Measures towards substantive influence should entail the fleshing out of parameters of consultation as part of *ad hoc* legislation (aside from the generic entrenchment of consultation in law) or specific guidelines. The establishment of advisory bodies, and discussions within such bodies, are not per se sufficient for substantive influence. The process should produce tangible outcomes in terms of policy, reflecting the wishes and needs of minorities, for consultation not to merely remain at a symbolic level.

In its early opinions, the ACFC stressed the *procedural* aspect of consultation rather than the substantive aspect. However, more recently, the importance of outcomes – understood in terms of influence or co-decision – has increasingly come to the fore. *Thematic Commentary No. 2*, while focusing on process, also speaks about results and the outcome linked to procedures:

Whatever the mechanisms chosen, persons belonging to national minorities should be given real opportunities to *influence* decision-making, the outcome of which should adequately reflect their needs. According to the Advisory Committee, mere consultation is, as such, not a sufficient means to be considered effective participation. (§71) [*italics added*]

This approach is consistent with the general understanding of 'effective participation of minorities' as involving an 'obligation of result' upon states parties (§10). Some ACFC Opinions of the past few years reflect §71 and §19

¹⁷⁴ *Ibid*, pp. 3–4.

(shared ownership of decisions)¹⁷⁵ of *Thematic Commentary No. 2*. Thus, there is a clear sense that consultation must be effective and designed to yield results.

This was also recognised in the biannual report submitted to the Committee of Ministers for the years 2018–2020.¹⁷⁶ The report makes it clear that the adoption of laws and the establishment of consultative bodies is no longer sufficient, while one ought to focus on practical *outcomes* of relevant processes:¹⁷⁷

In the last biennium, the Advisory Committee observed that the formal structures for participation in public affairs are generally in place: in many states, national minorities are afforded institutionalised participation in decision-making [...]. This is an important step forward compared to the earlier days of the Framework Convention, where the Advisory Committee frequently found that the lack of dedicated legislation was a major obstacle to the enjoyment of minority rights.

Having said this, it is also clear that the legislation in place does not in all cases enable all persons belonging to national minorities to effectively participate in decision-making. [...] *Only rarely is legislation on effective participation evaluated as to whether it has the desired effect.*¹⁷⁸ [italics added]

The ACFC further noted that the requirement of participation having a ‘substantial influence on decisions’, resulting in, as far as possible, ‘a shared ownership of the decisions taken’ (§19, *Thematic Commentary No. 2*) is ‘in practice [...] not always met’. Practical measures to successfully transition from ‘processes’ to ‘outcomes’ that are highlighted in the report include proper evaluation of law and practice through independent research, and follow-up

175 §19 reads:

[I]t is not sufficient for State Parties to formally provide for the participation of persons belonging to national minorities. They should also ensure that their participation has a *substantial* influence on decisions which are taken, and that there is, as far as possible, a *shared ownership* of the decisions taken. [italics added]

176 ACFC, *Twelfth Activity Report Covering the Period from 1 June 2018 to 31 May 2020*, September 2020, <https://rm.coe.int/12th-acfc-biennial-activity-report-en-final/1680a07db8>.

177 See ‘Integration through Participation: Facing Challenges to Minority Consultation’, 17–18 March 2022, University of Glasgow & Liverpool John Moores University – *Conference Proceedings*.

178 ACFC, *Twelfth Activity Report Covering the Period from 1 June 2018 to 31 May 2020*, September 2020, p. 15.

activities, with the participation of persons belonging to national minorities. Particular challenges exist in the case of vulnerable and marginalised communities: in such instances, states must address basic obstacles such as poverty and social exclusion, but also, importantly, provide capacity-building to facilitate negotiations with the authorities.¹⁷⁹

That said, it is equally the case that 'consultation' does not involve any decision-making powers, let alone veto rights over particular proposals or measures. That raises the question of how to measure 'influence' or distinguish satisfactory from unsatisfactory 'outcomes' in the context of consultation. At the very least, 'consultation' should be assessed against the effectiveness criterion. That means generating solid indicators of 'effective' consultation, including timescales, representation, accessibility, the level of state engagement, and/or any social impact assessments.

7 Conclusion

Ukraine has struggled to strike a balance between strengthening the state language and protecting minority languages. Over the years, the balance has oscillated, and tipped either towards the promotion of Ukrainian (with a marginalisation of other languages, including Russian), *or* the promotion of Russian to the detriment of Ukrainian.

These issues have been exceedingly challenging due to a convergence of factors, including Soviet legacies, the politicisation of language issues since 1991, gulfs within Ukrainian society, and, more recently, Russia's military aggression. As a 'nationalizing state', Ukraine has sought to divest itself of Soviet legacies (and Russian influence) and address previous imbalances in both the linguistic and (geo)political spheres. At the same time, the Russian language has occupied a unique position in Ukrainian society. On the one hand, it has been widely spoken by many persons belonging to national minorities, including non-Russians as well as ethnic Ukrainians, often as a first language. On the other, it is now a language associated with foreign aggression, and there has been a significant shift towards the use of Ukrainian among much of the population.¹⁸⁰ Russia's actions since 2014, and particularly since 2022, and the resulting loss of Ukraine's sovereignty over certain regions, have led to acute concerns over the instrumentalisation of Ukraine's national minorities for

¹⁷⁹ *Ibid.*

¹⁸⁰ See above ('Striking the 'Right' Balance: Ongoing Challenges').

political ends. It can be argued that all the said complexities make minority participation and open dialogue even *more* crucial.

Worryingly, some of the wordings employed in the Law on National Minorities read as a warning to persons belonging to minorities, treated as potentially disloyal. In several other instances, the Law is declarative and general, prolonging a legal opacity that has deprived national minorities of clear rights, as well as effective mechanisms to uphold them. Thus, the Law does not create the conditions for the realisation of the declared aim of state policy in the field of national minorities – that of simultaneously ‘strengthening national unity and ensuring multiculturalism of Ukrainian society’ (Art. 13(1)(4)). Processes for the enjoyment of minority rights, and for guaranteeing effective participation, need to be clarified in *ad hoc* legal and policy documents.

More generally, levels of effectiveness of minority participation in Ukraine remain unclear, as reports by the Ukrainian government to the Council of Europe contain hardly any detail on consultative processes, while mere declarations that participation takes place are not buttressed by evidence. These reports only provide information on (some) legal provisions and policies, names of relevant bodies and references to instances of dialogue. However, if basic levels of participation are foreseen through law and policy, they will not necessarily be *effective*, and the data by the Ukrainian government does not enable the evaluation of the concrete impact of exchanges between the state and minority organisations. The new Law on National Minorities is an opportunity to provide more specific, clearer provisions through future legal reform, but is in itself insufficient. The addition of a paragraph in Article 9 to formally incorporate the concept of effective participation is undoubtedly promising, yet a great of detail is missing as to the nature and extent of such participation, specifically in matters of vital concern to national minorities, and the type of commitment required of Ukraine.

Difficulties in assessing the degree of ‘real’ participation are not only an issue in Ukraine, but are linked to a widespread uncertainty as to the exact scope of ‘effective participation’. States parties to the FCNM, in their reports to the Council of Europe, tend to list instances in which discussions take place, while not assessing their actual impact. As such, participation often remains elusive.

At the same time, as noted in this article, the evolution of international standards relating to minority protection reflects an increasing emphasis on the substantive, rather than procedural, aspect of participation, on outcomes and joint ownership of decisions rather than the mere representation on relevant mechanisms. In line with this, and with reference to participation in

devising linguistic policies, Kymlicka and Grin have argued that the 'real world test' in legitimising such policies is whether the various linguistic groups were involved in decision-making and *agreed* upon them.¹⁸¹ The Law on National Minorities, and its aftermath, can lay the foundations of a system that devises, implements, and evaluates concrete measures for *effective* participation.

Minority legislation that marginalises minority communities, neglecting their rights to participation in dialogue, can create distrust.¹⁸² It can also create fertile ground for the instrumentalisation of kin minorities – a scenario that has in fact materialised in the case of Russian(-speaking) communities in Ukraine. Even beyond such extreme occurrences, the marginalisation of minority communities can be highly divisive at the domestic level, as well as creating inter-state tensions, linked to kin-states' concerns over the treatment of their co-ethnics abroad.

Following the war, language rights of minorities are likely to be a very sensitive, and highly emotional, issue. One can expect discussions to centre around the primacy of national unity over minority rights, and the need to contain threats emanating from Russia.¹⁸³ Some of the provisions contained in the Law on National Minorities reflect these priorities. The political sensitivity of some minority issues may even cause minority representatives to refrain from articulating some of their claims, particularly if there is a concern they might be seen as disloyal and harmful to the state. The war places Russian and Russian-speaking minorities, who are often associated with the aggression, in a highly vulnerable position, including by making them targets of hate speech. This concerning phenomenon was highlighted by the UN Special Rapporteur on Minority Issues in March 2022, who also stressed that: 'Hate speech and calls to restrict the rights of Russian or Russian speaking minorities doesn't contribute to peace and must be addressed in line with international human rights standards'.¹⁸⁴

181 Will Kymlicka and François Grin, 'Assessing the Politics of Diversity in Transition Countries', in *Nation-Building, Ethnicity and Language Politics in Transition Countries*, eds. Fahrma Daftary and François Grin (Budapest: Open Society Institute, 2003), 1–27, p. 14.

182 In 2015, for example, the UN Special Rapporteur on Minority Issues noted that 'it [was] evident that dialogue between the Government and ethnic-Russian groups in eastern and southern Ukraine [was] weak' and that more needed to be done to restore confidence in minority rights guarantees. Report of the Special Rapporteur on Minority Issues, Addendum, Mission to Ukraine, A/HRC/28/64/Add.1, 27 January 2015, §22.

183 'Integration through Participation: Facing Challenges to Minority Consultation' – *Conference Proceedings*.

184 United Nations, Office of the High Commissioner, 'Ukraine: UN expert says war against multi-ethnic population must stop, calls for protection of all minorities',

Commentators and analysts have stressed the importance, both during and after the war, to transcend the Russian-Ukrainian divide and identify solutions that accommodate all communities in Ukraine as a multi-ethnic state. What is certainly needed is an active engagement with the concerns of all national minorities¹⁸⁵ while also seeking to develop over time an overarching and inclusive sense of social cohesion and national (state-wide) belonging. Such an approach should help achieve a balance between the excesses of an ethnocentric view of national identity and those involved in a vision of civic identity that is driven by assimilationist priorities.¹⁸⁶ International IGOs (the HCNM, Council of Europe and the European Union) ought to present a common message to the Ukrainian government to this effect. At the same time, IGOs can and should fulfil the vital function of facilitating dialogue between the state and its minorities in ways that are balanced and fully consistent with international law, including respect for Ukraine's independence and territorial integrity and its related, wholly legitimate concerns. As part of this approach in the short term, IGOs can and should support forms of genuine bilateral cooperation and collaboration across the broader region, for example with the Hungarian and Romanian governments, as constructive kin-states of Ukraine's national minorities. This may involve cooperation in the monitoring of implementation of the Law on National Minorities (and future, related, legal reform) including through joint inter-state commissions.

Press Release, 16 March 2022, at <https://www.ohchr.org/en/press-releases/2022/03/ukraine-un-expert-says-war-against-multi-ethnic-population-must-stop-calls>.

185 'Integration through Participation: Facing Challenges to Minority Consultation' – *Conference Proceedings*.

186 For a broader perspective, see Gaetano Pentassuglia, 'Conceptualising National Identity in Self-Determination Practice: A Cross-Cutting International Law Analysis', *Hungarian Yearbook of International Law and European Law* 11, no. 1 (2023): 238–270.