

The European Model of National Minorities Protection in the Case of Ukraine

- Romania as a Kin-State

Prof. Radu Carp, PhD

University of Bucharest

The issue of national minorities has been, since 1991, one of the most difficult that Ukraine was confronted with. The difficulty of applying the Minsk agreements shows that the issue of the Russian minority in Ukraine is, right now, without a viable solution. The start of the Russian aggression on 24th of February 2022 is, among others, the result of unsolved identity problems. The Hungarian and the Romanian minorities were long perceived as the Russian minority, having the support of a kin-state, but the war has changed this interpretation, national minorities rallying around Kyiv objectives. The protection of national minorities in Ukraine is regulated by the Constitution, by different laws and Ukraine is part of the Council of Europe instruments in this area. The Venice Commission expressed its opinion on Ukrainian legislation in 2011 and 2017. The CoE Council of Ministers adopted a Resolution in 2020 regarding national minorities in Ukraine, The European Commission refers to this issue in its Opinion on the application of Ukraine to become an EU Member State in June 2022. Because Ukraine wants to start accession negotiations very fast, the Supreme Rada adopted in December 2022 a new law on national minorities. This law is not in line with previous recommendations addressed to Ukraine by the European bodies in this area. Romania criticized this law, having a special status as kin-state, according to the OSCE Bolzano Recommendations. Ukraine needs to adopt the European model on the protection of national minorities, as a proof that is opposing the Russian Federation perspective that neglects all the basic instruments of human rights.

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To write about the Romanian minority from Ukraine and the international instruments of national minorities protection is not an easy task, in the context of the war in Ukraine. Ever since Ukraine gained its independence, more than three decades ago, the issue of national minorities has been one of the most difficult issues. There was a need of affirming a national identity, in contrast with the Russian one. Any claim of the Russian minority from Ukraine has been supported by the Russian Federation, in its role of kin-state. The Russian Federation did not play according to the rules that kin-states are applying regarding national minorities in other states,

but has used the Russophone people as a tool to neglect the very existence of the Ukrainian state. This exacerbated role, unique in the larger context of kin-states, resulted in the fact that the issue of national minorities from Ukraine has never been discussed, as it is discussed in a state like Romania, for example. No special instruments were created for a special case. Retroactively, one may put the question if in the case of the Russian Federation involvement in Ukraine, with the purpose of protecting a national minority, special instruments would have been imagined. The issue is a little more complicated, because these instruments would have been agreed upon also by Ukraine. The difficulty of applying the Minsk Agreements shows that the issue of the Russian minority in Ukraine is, for the moment, without a viable solution. Even if it was agreed that Ukraine shall give special rights to this minority, especially in Donbas, Ukraine has constantly stated that giving supplementary rights would put into question even the existence of Ukraine as a state.

The start of the war, as a result among others of the unsolved dispute on the Donbas region statute, the independence of the Donetsk and Lugansk republics, followed by fake referenda in order to include these republics into the Russian Federation - all these events being accompanied by fierce fighting for the control of these territories - shows the consequences of the lack of solutions for identity related problems for a long period. The Russian Federation was and still is in a permanent dilemma related to Donbas: while these regions were under Kyiv control, national minorities rights protection instruments could be invoked; while they were proclaimed as being part of the Russian Federation, this argument disappears in a natural way. The Russian Federation did not give an answer to the question that it generated: what the situation is from this perspective, to be a kin-state or a state (but in this case it shall give rights to a new minority, the Ukrainian one).

The Russian Federation's dilemma is equally Ukraine's dilemma but, of course, related to other national minorities. The treatment of the Russian minority - that could be a threat even to the existence of the state itself - may be translated in the relationship with other national minorities and that option would not be necessarily a threat to the statehood. A number of political leaders that were in power in Kyiv seems to give an affirmative answer to this question. Especially the Hungarian and the Romanian Minorities were perceived as the Russian minority, having the support of a kin-state – Hungary, respectively Romania. Constantly, Ukraine was

afraid of an alignment of other national minorities with the Russian one. In fact, the national minorities from Ukraine made only point alliances, limited as a purpose and sometimes their perspectives did coincide, even in the absence of formal alliances. The pro-Russian parties were voted in Transcarpathia by other minorities, besides the Russian one, being perceived as a balance to the attempts of „ukrainization” or, more exactly, affirmation attempt of a national identity that was suppressed for a long time and that in 1991 transformed itself from a minority inside USSR into a majority in a new national state, Ukraine.

These conjunctural alliances were and still are politically exploited: the Russian federation exaggerate their existence, kin-states neglected them, Ukraine look suspiciously the discourse of its neighbors, applying the same scheme of interpretation to decrypt the will of the Russian Federation, Hungary and Romania.

The war in Ukraine has changed this pattern of interpretation, in the sense that national minorities rallied to the Kyiv perspective. From outside, this transition has not been observed and, even if observed, its role has been downplayed, because it did not correspond to a narrative of identity political orientations from both countries. Ukraine did not change the way it looks at the issue of national minorities on its territory, still considering that they are influenced more by their kin-states than by Ukraine. The war could be - and there are still chances to play this role very effectively - the item that shall favor the formation of a new civic identity, less based on the affirmation of national identities.

At the declarative level, Ukraine has this purpose for the post-conflict period. The reality contradicts nevertheless this purpose. There is a gap consistently large between the optimistic statements of President Zelensky on the fate of national minorities after the war and the concrete steps in the direction of harmonizing the legislation of Ukraine with the European model on the protection of national minorities. Of course, it is premature to draw conclusions, but the existence of this gap cannot be neglected. The premise that shall underlie any analysis on this matter is the good faith: good faith of Ukraine in its Europeanization efforts, the good faith of national minorities, proved by the solidarity with the Ukrainian majority during the war, the good faith of kin-states like Romania that never stopped the sustained rhythm of help for Ukraine - for refugees and also for the people still living in Ukraine and highly affected by the armed aggression of the Russian Federation.

According to the Ukraine Constitution, “The free development, the use and the protection of the Russian language and other national minorities languages is guaranteed in Ukraine” (Article 10). According to another provision, “citizens that belongs to the national minorities have guaranteed the right to education in their mother tongue, in educational institutions at the local or central level or by national cultural societies” (Article 53, paragraph 5). According to Article 22, paragraph 3, “the content and the purpose of the rights and freedoms cannot be diminished by new laws or by amendments to the laws that are in force”.

Based on this constitutional framework, Ukraine has adopted the Law on national minorities in 1992 and the Law on the principles related to the linguistic state policy in 2012, the latest being repealed in February 2014, after the EuroMaidan revolution, the attack on Crimea by the Russian Federation and the change of power in Kyiv.

Ukraine is part to the Council of Europe instruments related to the protection of national minorities - the Framework Convention for the protection of national minorities and the European Charter of regional or minority languages. As a member state to the Framework Convention, Ukraine periodically writes reports on the status of the national minorities’ protection and the Committee of Ministries of the Council of Europe periodically adopts Resolutions in order to evaluate these reports and draw recommendations - the last resolution of this kind dates back from 2020.

On the occasion of the Charter ratification, Ukraine stated that its provisions refer to the “Belarussian, Bulgarian, Gagauz, Greek, Jewish, Tatar, Moldavian, German, Polish, Romanian, Slovak and Hungarian” minorities. To notice that even at the beginning of its relationship with the European institutions in charge with the national minorities’ protection, Hungary affirmed the existence of two separate minorities, Romanian and Moldavian.

The Venice Commission expressed themselves repeatedly on the Ukrainian legislation related to the protection of national minorities. The first time it was in 2011, on what became in the end the 2012 law, mentioned above. Second time in 2017, on the Education law. In its 2011 Opinion, the Venice Commission considered that “the protection of languages is and remain in

Ukraine a complex and extremely sensitive issue” and the necessary balance between the use of Russian and Ukrainian languages is “a serious challenge” for the Ukraine authorities¹.

In 2017, when the second Opinion has been released, in Ukraine there were approximately 400.000 students belonging to national minorities in 735 schools where the language of instruction was different from Ukrainian.

In the 2017 Education Law one may find a provision, Article 7, that was constantly and vigorously challenged by the national minorities from Ukraine and by the kin-states. For this reason, Ukraine reported the situation to the Venice Commission. The analysis made by this body revealed that this provision is not clear. There is a mention about the official language - Ukrainian - about the languages of the national minorities but there are no details. For example, one or more study subjects can be offered in two or more languages: the official language, English, other EU official languages. Who is going to decide in concrete terms? Would students or their parents have a say in this matter? Is there an upper limit to the number of courses in the mother tongue? There is no answer to all these questions.

The Venice Commission conclusion was that “without specifications in the national legislation, the implementation of the Ukraine obligations regarding the use of minority languages in education will be hardly insured”².

Ukrainian authorities offered to the Venice Commission statistics showing that 55% of the students enrolled in Romanian schools and 62% students enrolled in Hungarian schools failed the test of Ukrainian language knowledge. The Venice Commission has shown that these statistics cannot be considered, because the methodology that underlies these data is unknown.

In order to offer an assessment related to the core of the issue at stake, the Venice Commission has made a comparison with the opinion it offered in 2010 on the Law on state language from Slovakia (dealing with a similar problem - Slovak language vs. Hungarian

¹ Venice Commission, *Opinion No. 651/2011 on draft law on principles of the state language policy of Ukraine*, CDL- AD (2011)047.

² Venice Commission, *Opinion No. 902/2017 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.

language). The Conclusion was that “the measures taken to achieve this legitimate goal (learning Hungarian language) must be coordinated and put in balance with the guarantees and measures for education in the language of national minorities”. Moreover, the Venice Commission expressed “serious doubts that Ukrainian authorities will [...] solve the important problem of the lack of qualified teachers that could teach Ukrainian language”. In other words, to the question if the 2017 Education Law does ensure a balance between promoting the Ukrainian language and the protection of the linguistic rights of the national minorities, in the absence of concrete data, the Venice Commission cannot give an answer. There is no evaluation about teaching the languages of national minorities, but certainly, the teaching of Ukrainian language in the education system cannot be expanded, because of the lack of teachers. No further modifications have occurred from 2017 up to the present time.

The Venice Commission has also analyzed the situation of the schools where mother tongues are used exclusively. The Romanian minority of Ukraine benefit from the existence of such schools. In doing this task, the Venice Commission invoked the ECHR decision in the case *Cyprus v. Turkey*³ where it was stated that the schools where Greek language is used cannot be closed, because it would affect the very substance of the right to education. Based on this argument, the Venice Commission stated that this kind of schools are part of the “historical heritage of Ukraine” and must work continuously. To notice that the 2017 Education Law does not refer to these schools that would cease to function, as an effect of applying this law.

The Venice Commission formulated many recommendations addressed to Ukraine. Among these: to ensure a “sufficient level of education in the EU official languages”, “to increase the quality of instruction in the state language”, to initiate “a dialogue with the national minorities representatives and with all interested parts”, to “exclude private schools” from the new provisions”, to “ensure that the law application will not endanger the preservation of the cultural heritage of minorities”.

None of these recommendations released by the Venice Commission in 2017 have been put into practice.

³ ECHR, Appl. No. 25781/94, *Cyprus v. Turkey*, Judgement of 10 May 2001.

All that has been done up to now was to postpone until September 2023 the application of the provisions according to which all the schools from Ukraine where Romanian language is taught will be obliged to study all the study objects in Ukrainian, apart from Romanian language and literature.

One may believe that until the start of the Russian Federation aggression on 24th of February 2022 Ukraine has not been asked to implement the Venice Commission recommendations. This assumption is not true.

Ukraine, as all other States part to Framework Convention for the protection of national minorities, is under the obligation to report periodically the implementation of this instrument. The latest Resolution of the Council of Ministers, ResCMN(2020)13, adopted on the 8th of December 2020 include many recommendations addressed to Ukraine, among others:

- To ensure the protection of the rights of the people belonging to the national minorities.
- To adopt, as a priority and in close consultation with the interested groups, a legal framework for the protection of national minorities.
- To develop, in consultation with all relevant groups, a clear and coherent legal framework regarding the use of languages, in order to offer solid legal guarantees for the protection and the use of all minority languages, including the least numerous;
- To implement the recommendations included in the 2017 Opinion of the Venice Commission.
- To facilitate and encourage the use of all minority languages in the relationship with administrative authorities.
- To adopt measures having as purpose the access of minorities to media in their mother tongue.

- To adopt measures for the representation of the minorities to the level of elected bodies, local or central⁴.

In other words, the Council of Europe considered in 2020 that Ukraine does not have a suitable legal framework for the protection of national minorities, does not have a suitable legal framework for learning the languages of these minorities and has not applied the recommendations of the Venice Commission related to the Education Law. Consequently, *in December 2020 Ukraine must start from nothing the building of this normative framework, in accordance with the European model for the national minorities' protection.*

On the date of 28th of February 2022, just 5 days after the start of the unjustified aggression of the Russian Federation, Ukraine submitted the application to become EU Member State. On 7th of March the EU Council requested the European Commission an opinion on this application. This document was delivered on the 17th of June and it was called the Opinion of the Commission on the application of Ukraine to become EU Member State, COM (2022) 407 final⁵. In order to start the accession negotiations to the EU, Ukraine must fulfil some requirements. Among them the following:

“The respect for the rights of persons belonging to the national minorities in the area of education, of language and in the area of their representation in the elected institutions to all the levels of public life must be ensured by the full implementation of the Venice Commission recommendations regarding the Education Law...taking into account the latest monitoring cycle of the Framework Convention...Ukraine made steps for the implementation of the Venice Commission recommendations but need to complete the reform of the normative framework for national minorities and to adopt efficient implementation mechanisms”.

⁴ Resolution CM/ResCMN(2020)13 on the implementation of the Framework Convention for the Protection of National Minorities by Ukraine. Adopted by the Committee of Ministers on 8 December 2020 at the 1391st meeting of the Ministers' Deputies.

⁵ Communication from the Commission to the European Parliament, the European Council and the Council, *Commission Opinion on Ukraine's application for membership of the European Union*, Brussels, 17.6.2022, COM(2022) 407 final.

In other words, the European Commission see the situation of the national minorities from Ukraine in an integrated way, by referencing the evaluations of the Committee of Ministers and of the Venice Commission in this matter. To note that the evaluation of the European Commission does not refer only to the 2017 Venice Commission opinion, but to all the opinions of this body that considered at a certain moment the situation of the national minorities from Ukraine.

Because it wants to start the EU accession negotiations as quick as possible, the Supreme Rada of Ukraine adopted in December 2022 a new law on national minorities. Article 11 of this law states that the education in the language of national minorities is regulated by the 2017 Education Law. A submission of this kind is not enough, as this law shall be modified by considering the content of the 2017 Venice Commission Opinion.

The new law on minorities also includes provisions on the right of persons belonging to the national minorities to elect and to be elected, the right to the media in their mother tongue, etc. A close look at the way these provisions are formulated proves that they bring nothing new about the existent normative framework, sometimes constitutional provisions being only resumed as such.

For the Russian minority, the new provisions will enter into force 6 months after the end of the war, but for other minorities exactly when the law enters into force.

Romania reacted at the adoption of this law, reminding Ukraine that it engaged itself to ask the opinion of the Venice Commission before the adoption of the law, but this did not happen. The official position of the Romanian Ministry of Foreign Affairs was that the new provisions did not bring anything new as compared to the existing normative framework, but Ukraine shall change it in order to fulfil the requirements of the European model on the protection of national minorities.

Indeed, Ukraine did not ask the opinion of the Venice Commission before adopting this new law and Ukrainian authorities did not give any reason for such an omission. Most probably, the Venice Commission would reiterate the 2017 recommendations that were not put into practice.

The minorities law was promulgated by President Zelensky on 30 of December 2022. He had the option to send the law to the Venice Commission before promulgation or to turn it back to the parliament with his remarks, but he decided not to act in any of these ways.

Even if Ukraine did not consider the reaction of Romania or the reaction of the Hungarians living in Transcarpathia, also criticizing this law, the European Commission will examine if Ukraine fulfilled its obligations that were communicated as an answer to its request of accession to the EU. In that moment Ukraine will have to restore not only this law, but all the internal instruments for the protection of national minorities. *The matter of national minorities protection in Ukraine concerns not only the relationship between Ukraine and Romania, as a kin-state, but the relationship of Ukraine with the European Union. Inside the European Union, Romania's perspective, as kin-state for the Romanian minority in Ukraine obviously matters more than the perspective of other EU Member States that do not have this quality.*

In order to better understand why Romania has, in regards with Ukraine, a special status, different from other EU Member States, the content of the Bolzano Recommendations must be reminded. Bolzano Recommendations on national minorities and inter-state relations were adopted under the aegis of OSCE and of the OSCE High Commissioner for National Minorities in June 2008⁶. This document is addressed to all of OSCE Member States, including Romania and Ukraine.

The document starts from the premise that no kin-state could exercise its jurisdiction on the territory of a state where national minorities lives, without the consent of that state, because the protection of national minorities is the responsibility of the state where that minority lives. However, OSCE Member States cannot prevent the right of the persons belonging to the national minorities to establish and maintain contacts with persons from other states that has the same ethnic, cultural, linguistic, and religious identity or a “common cultural heritage”.

⁶ OSCE High Commissioner on National Minorities, *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations*, 2 October 2008.

Kin-states may expand certain benefits to the persons from the states where kin minorities live, as in the area of education, work permits, a preferential visa regime. Kin-states may offer “assistance for the support of education abroad”, could offer help to the non-governmental organizations, cultural or religious, with the consent of the state where these minorities live. Access to media issued by a kin-state cannot be restricted by the state where these minorities live but only in the case of incitement to violence, racism, or discrimination. Kin-states and those where kin minorities live are encouraged to conclude bilateral treaties for the protection of national minorities. Otherwise, the Romanian Ministry of Foreign Affairs in his official perspective on the Ukrainian Law on minorities evoked this opinion that an agreement has not been reached with the Ukrainian authorities.

As a conclusion, Ukraine’s behavior with regard to the protection of national minorities is conditioned by: the Resolutions of the Committee of Ministers of the Council of Europe, adopted as an effect of Ukraine ratifying of the Framework - Convention for national minorities; Venice Commission Opinions in this matter, especially those from 2011 and 2017; the Opinion of the European Commission on the application of Ukraine to become EU Member State and the relationship of Ukraine with kin-states as Romania shall be in line with the Bolzano Recommendations of the OSCE.

So far, in the area of national minorities protection Romania acted in the relationship with Ukraine in full respect of the European model that is defined by the Council of Europe and OSCE. The European Union refers to this model in its relationship with Ukraine as well. To criticize the way Romania behaved up to now, means to criticize and to put under the sign of doubt this European model. One of the biggest challenges of Ukraine right now is to find the fairest report to all its citizens, in order to prove that it fulfils the same democratic standards as any EU Member State. Facing the war, the national minorities from Ukraine behaved as the majority - even the Russophone people opposed to the Russian Federation aggression. Right now, Ukraine is facing tough choices: continuing the resistance against an unjust aggression and applying simultaneously the European model in a lot of areas, loke the protection of national minorities. These choices are not mutually exclusive, but on the contrary. Proving the respect for this European model, Ukraine could prove, based on irrefutable facts, that it is in antithesis with

the Russian Federation that neglect it fully, as part of a refusal of a more developed model that refers in general to the respect of human rights.

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Radu Carp is Professor, Faculty of Political Science, University of Bucharest. MA in European studies and international relations, Institut Européen des Hautes Etudes Internationales, Nice (1996). SJD, Comparative Constitutional Law, Faculty of Law, Babeş - Bolyai University of Cluj (2002). Representative of the University of Bucharest team part of the European research network *Observatory on Local Autonomy*, coordinated by the *Université de Lille* (2015 -). Member of the Academic Curriculum Group (2017 - 2018; 2021 -); Executive Committee (2015 – 2020; 2022 - 2023) of the E.MA - European Master's Degree in Human Rights and Democratization of the Global Campus of Human Rights, Venice. Representative of the University of Bucharest in the project CIII-PL-0702-06-1718 - *Ethics and Politics in the European Context*, part of the CEEPUS III network, coordinated by The Catholic University John Paul II of Lublin.

Address for correspondence: Faculty of Political Science, str. Spiru Haret 8, Bucharest radu.carp@fspub.unibuc.ro.